Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GEORGE LUCAS & SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 82-CE-76-D 82-CE-103-D 82-CE-157-D 82-CE-182-D 82-CE-192-D 82-CE-195-D 11 ALRB No. 11

DECISION AND ORDER

On February 9, 1984, Administrative Law Judge (ALJ) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, Respondent and the United Farm Workers of America, AFL-CIO (UFW or Union), each timely filed exceptions and a supporting brief, and Respondent timely filed a responsive brief.

Pursuant to the provisions of 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 attached Decision in light of the exceptions and briefs, and has decided to affirm the ALJ ' s rulings, findings, and conclusions as modified herein and to issue the attached Order.

Discharge of Ernie and Yolanda Popoy

On the second day of the 1982 grape harvest, George Lucas & Sons (Lucas) terminated crew leaders Ernie and Yolando

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

Popoy. Charges were filed asserting that Lucas terminated the Popoys for their failure to issue a warning ticket to a union activist. Lucas asserted in its defense that the Popoys were actually dismissed for cause and, as statutory supervisors, are not entitled to the protections of the Agricultural Labor Relations Act (Act).

On August 12, 1982, Lucas supervisor Joe Becerra assigned certain grape vines to be harvested by the Popoy crew. He admonished the crew to be careful to only pick ripe grapes, a harder task early in the harvest season. The Popoy crew harvest was rejected that morning at 8:00 a.m. by a State inspector for insufficient sugar content (or ripeness) and the harvest was repacked. Becerra re-emphasized the need for care in the harvest and no further problems occurred that day with the Popoy crew.

On August 13th, the next morning, Lucas personnel manager Henry Mendez met with the Popoy crew and, among other things, stressed the need for care in maintaining the quality of the harvest. Becerra learned later that morning that the Popoy crew's harvest had again needed repacking. Becerra went to monitor the quality of the re-pack and concluded it was again of inferior quality. Becerra and Ernie Popoy began a table-by-table inspection of the crew's work and Popoy admonished the crew to be more careful. After checking seven boxes at the work site of Popoy crew member Lupe Amarillas and finding only a minor problem in the pack, Becerra ordered Ernie Popoy to issue a warning notice to Amarillas and Popoy refused. Amarillas and Popoy testified that Becerra ordered the warning because Amarillas was a "Chavista," or union supporter. Becerra denied telling Popoy to give Amarillas a warning notice.

The inspector again rejected the Popoy crew's harvest that afternoon and, after another repack, the harvest was again rejected. Becerra then sent the Popoy crew home. At 3:00 p. m., Mendez met with Ray Major, Lucas' ranch superintendent. Mendez explained that the Popoy crew had required one repack the day before and two repacks that day had been rejected. Mendez also stated to Major that Ernie Popoy was unable to adequately control or instruct his crew. Major thereafter ordered the Popoys' termination. Mendez instructed Rolando De Ramos, another Lucas supervisor, to terminate the Popoys. Becerra testified he discovered the termination the next morning.

De Ramos issued a termination slip to Ernie Popoy giving as a basis for the termination the problem with the repacks and another termination slip to Yolando Popoy justified by the following: "She is not helping the foreman [Ernie Popoy] to tell the people to not to pick green grapes and clean the grapes."

The ALJ found Becerra to be less credible than Ernie Popoy and Amarillas and, therefore, concluded that Lucas terminated the Popoys for their failure to issue a discriminatory warning notice to Amarillas in violation of section 1153(a) of the Act.

Generally, a supervisor within the meaning of the Act is not covered by the protections of the Act. However, an employer nonetheless violates section 1153(a) by discharging a supervisor for refusing to engage in activities prescribed by the Act, such as committing an unfair labor practice. (See Ruline Nursery Co. (1981) 7 ALRB No. 21, Parker-Robb Chevrolet, Inc. (1982) 262 NLRB No. 58 [110 LRRM 1289]. Here, the evidence established that supervisor Joe Becerra ordered foreman Ernie Popoy to issue an employee a written warning notice because of the employee's union support, that Ernie refused to do so, that Becerra shortly thereafter stopped Ernie from working, and that Ernie was fired that same day.

We reject Respondent's contention that no prima facie case was established because it was not shown that ranch superintendent Ray Major who made the decision to terminate Erni Popoy knew of Ernie's refusal to commit the unfair labor practice. In the context of cases where an employee engages in protected activity, the. National Labor Relations Board ALRB will generally impute to an employer a supervisor's knowledge of an employee's protected activity. However, an exception is made in cases where there is credited testimony in the record that the supervisor's knowledge of such protected activity was not passed on to higher management officials who in turn made the decision for disciplinary action. (Dr. Phillip Megdal, D.D.S., Inc. (1983) 267 NLRB Mo. 24 [113 LRRM 1133], Kimball Tire Co., Inc. (1979) 240 NLRB 343 [100 LRRM 1258].) In this case, neither Joe Becerra, the supervisor who knew of Ernie Popoy's refusal to commit the unfair labor practice, nor Ray Major, the superintendent who made the decision to terminate Ernie Popoy, testified that Becerra's knowledge of Ernie Popoy's refusal to commit the unfair labor practice was not passed on to other management officials, such as Major himself.

Further, the actual language of the justification for the terminations, specifically for Yolanda Popoy's discharge, strongly suggests that the Lucas management was aware of the Popoys' refusal to issue the discriminatory warning notice and that this reason was the motivating factor for the discharge.

Respondent, however, suggests that it met its burden of showing it would have terminated the Popoys even in the absence of his refusal to commit an unfair labor practice. We reject this argument.

The ALJ concluded that the justification proffered, the quality problems with the Popoy crew, was pretextual, that Lucas only offered the quality of the pick in the Popoys crew as an afterthought to justify an otherwise unlawful termination. Such a finding by itself satisfies the rest of causality without requiring further weighing of the employer's motives. (Matsui Nursery, Inc. (1985) 11 ALRB No. 10; see also, Frank Blade Mechanical Services. Inc. (1984) 271 NLRB No. 201 [117 LRRM 1183].)

> It is by now well established, however, that if the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise legal or even praiseworthy is not controlling. [Citation.]
>
> If the Board finds, as it did here, that the otherwise legitimate reason asserted by the employer for a discharge is a pretext, then the nature of the pretext is immaterial, even where the pretext involves a reliance on state or local laws. [Citation.]
>
> Indeed, as we noted in NLRB v. Erie Resistor Coro. 373 U.S. 221, 230, n. 8, 83 S.Ct. 1139, 1146 n. 8, 10 L.Ed.2d 303 (1963), even evidence of a "good-faith

> motive" for a discriminatory discharge "has not been deemed an absolute defense to an unfair labor practice charge."
> (Sure-Tan, Inc. v. NLRB (1984.) 461 U.S. 942
> [104 S.Ct. 2803, 2811 n. 6].)

As we have here concluded that the ALJ' s analysis was the correct one (that Lucas did not, in fact, rely on any purported quality problems in the Popoy crew harvesting pack), we find it unnecessary to balance the evidence of conflicting motives to determine if the General Counsel put on the preponderance supporting such a violation.[2/] We affirm the conclusion of the ALJ that Respondent had only a prohibited motive in discharging Popoy.

Yolanda Popoy, Ernie's wife, was fired along with him. Although both the General Counsel and Respondent stipulated that Yolanda was an agricultural employee, the evidence establishes that as second foreman to Ernie, Yolanda was considered by Respondent as part of his management tear, and that she in fact exercised supervisorial authority. However, we need not resolve whether in fact Yolanda was an agricultural employee or a supervisor within the meaning of the Act, since her case stands or falls with that of her husband. (See Anton Caratan & Sons (1982) 8 ALRB No. 83.) Since we find that Ernie Popoy's termination was due to his refusal to commit an unfair labor practice, we also find Yolanda Popoy's firing violative of the Act.

Discharge of Rogelio and Taide Terado

We find merit in the UFW's exception to the ALJ ' s

[2/] As our dissenting colleague points out, in such a balancing analysis. Respondent would have telling evidentiary arguments."

conclusion that Respondent's discharge of employees Rogelio and Taide Terado did not violate sections 1153(a) and (c). Contrary to the ALJ's finding, the evidence supports the conclusion that there was a causal connection between the Terados' union activity and their discharges. Both Rogelio and Taide engaged in union support shortly before they were fired. Rogelio began to wear a union button just one week prior to his discharge. He spoke to Taide and Francisco Pacheco about the union in the proximity of supervisor Rolando De Ramos. De Ramos did not deny knowing of Rogelio's union support. Similarly Taide began to wear union buttons at the end of August and placed union bumperstickers on her ice chest. Shortly before he discharged her, Taide asked De Ramos when the company was going to sign a contract with the Union, to which De Ramos replied angrily, "never." We thus find that the timing of their discharges followed shortly after their open expression of union support and that the General Counsel has established a prima facie case.[3/]

In addition to the timing of the discharges, evidence of disparate treatment of the Terados also supports the conclusion that they were unlawfully terminated.

The testimony of a disinterested witness, Elena Alvarado, who worked in the same crew as Taide and Rogelio, established that she likewise failed to mark boxes. When De Ramos

[3/] In this regard the UFW's exception to the ALJ's statement that the union support was "minimal" and not unique has merit. The Act provides protection to all manner of union support and an agricultural employee does not have to be a very active participant in order to enjoy such protection. (Cf. As-H-Tie Farms (1977) 3 ALRB Mo. 53.)

initially asked her and her group why they were not marking, they failed to respond. After De Ramos repeated his question, Alvarado told him that if the company wanted them to mark they should provide marking materials and she openly criticized his suggestion of using leaves, sticks or paper. After De Ramos left, she and her group continued to fail to mark their boxes until just before quitting time. In comparison to the conduct of Taide and Rogelio, both of whom denied they were insubordinate, Alvarado's conduct was plainly insubordinate. Alvarado openly refused to mark her boxes and, unlike Rogelio and Taide, Alvarado and her group continued not to mark their boxes after De Ramos spoke to them. Alvarado's testimony thus casts doubt on Respondent's alleged business justification, as well as the ALO's conclusion that the Terados were perceived as insubordinate and were, therefore, discharged for cause.[4/] Instead, Alvarado's testimony establishes that the alleged insubordination was pretextual, and further supports the conclusion that the discharges were in response to the Terados' recent union support.[5/] We thus conclude that Respondent violated sections 1153(a) and (c) by discharging Rogelio and Taide Terado

---

[4/] That two other workers in a different crew were allegedly discharged for failing to mark their boxes is also discredited by the testimony of Alvarado.

[5/] The ALJ speculated that Elena Alvarado was the "Elena" whom Rogelio Terado saw wearing *a* button. The record does not support this speculation. Even if this speculation were true, this would not preclude the finding that Rogelio or Taide were discriminated against because of their union support. The fact that not all union supporters are discriminated against does not disprove or preclude the finding of a violation. (See Tex-Cal Land Management Inc. (197?] 3 ALRE No. 14.)

because of their union support.

Remedy

Respondent excepts to the ALJ's recommendation that the Board's usual remedial provisions be ordered, including posting, mailing and reading on company time of a Notice to Employees. Citing the Fifth District Court of Appeals decision in M. B. Zaninovich, Inc. v. Agricultural Labor Relations Beard (1981) 114. Cal.App.3d 665,[6/] Respondent contends that in the absence of specific evidence establishing employee knowledge of the unfair labor practice or evidence of open, repetitive or egregious employer misconduct, from which it reasonably may be inferred that other workers acquired knowledge of the misconduct, the remedies must be restricted to the crew wherein the violations occurred. Respondent's reliance on the case is misplaced since in this case there is evidence from which to

---

[5/] In M. B. Zaninovich v. Agricultural Labor Relations Board. supra, 114 Cal.App.3d 665 the court of appeal annulled the Beard's Order relating to mailing copies of a Notice, reading it and answering employees' questions because it found such provisions to be punitive and not remedial. In the Board's Decision, the employer was found to have unlawfully refused to rehire three employees who had been provided reinstatement rights by virtue of a settlement of a prior unfair labor practice case. The Board found a violation of section 1153(a) even though the employer believed in good faith that the employees no longer were entitled to reinstatement because seven months had passed since execution of the settlement agreement. However, the three employees had not worked for the employer for over a year prior to asking for work and they made their application to a supervisor at his office. The court inferred from the evidence that aside from the supervisor, no employees ever learned of the three employees' application for work or the employer's unlawful refusal to rehire them. The Court rejected the Board's attempt to infer employee knowledge of these unfair labor practices based upon its cumulative experience derived from other cases, and stated that employee knowledge of specific unfair labor practices must be proved and could not be established by conjecture.

infer such knowledge.

In this case, Respondent did not except to the ALJ's findings or conclusion that the discharge of Francisco Pacheco because of his union support violated sections 1153(a) and (c). Pacheco was a well-known union supporter. In addition to wearing union buttons and a union cap, he distributed UFW buttons, bumperstickers and cards urging worker attendance at union meetings. The ALJ credited Pacheco's testimony that foreman Ernesto Estrala grabbed some of the bumperstickers Pacheco had given to a woman in the crew and threw them on the ground. In addition, in mid-May 1982 Pacheco told members in his crew to go to the shop and ask for a raise before starting work. Estrala told him to go home and stop bothering the workers. Pacheco was the spokesperson for 250 to 300 workers who stopped work, went to the shop and asked superintendent Ray Major for a wage raise. Lastly, Pacheco's firing occurred while he was at work. In light of visible response to union activities on the part of Respondent's supervisors, it cannot be seriously argued that other employees would not be aware that Pacheco was fired by Respondent.

We have also concluded that Respondent violated section Il53(a) by discharging Ernie Popoy and his wife Yolanda. Supervisor Joe Becerra's order, and Ernie's refusal, to issue employee Lupe Amarillas a warning ticket for her union support occurred in the presence of Amarillas. Thus, the unlawful firing of the Popoys later that day would have been abundantly evident to the workers in Ernie's crew.

Moreover, while both Rogelio and Taide Terado did not have the same prominent role as union supporters as did Francisco Pacheco, their discharge in retaliation for their union support likewise was known to fellow workers. Both Rogelio and Taide each worked in a group consisting of one packer and two *to* three pickers. Thus their firing would of course be known to their group and to their crew. As such, coupled with the discharge of Francisco Pacheco and the Popoys, these firings related to union activities or support would likely be communicated to other employees of Respondent. The Board's observation expressed in M. Caratan, Inc. (1980) 6 ALRB No. 14, that employees will likely communicate among themselves concerning the unlawful conduce, is appropriate and will justify the imposition of broad remedies.

An additional basis for imposing the mailing, reading, and question-and-answer remedies is the fact that the violations found herein are part of a pattern of violations engaged in by Respondent over a period of several years.[7/] Indeed, the M. B. Zaninovich court inferred that where the violations involved other sections of the Act, in addition to a section 1153(a) violation such as the one before it, the Board's broad remedies would be justified:

> Under the NLRA, orders to remedy section 8(a)(l) violations (identical to Lab. Code § 1153, subd. (a), violations) normally are limited to cease and desist orders with a 60-day notice and posting requirement that the employer will not in the future engage in

---

[7/]'See George A. Lucas & Sons (1984) 10 ALRB No. 53; George A. Lucas & Sons (1982)10 ALRB No. 14; George Lucas o Sons (1981) *7* ALRB No. 47; George A. Lucas & Sons (1979) 5 ALRB tic. 52; and George Lucas & Sons (1978) 4 ALRB No. 85 1975.

> the conduct found to be violative of the act (Morris, The Developing Labor Law (1971) p. 852). Blanket Orders similar to the one before us may issue in 8(a)(l) cases if the unlawful interference, restraint or coercion violates other sections of the act or is part of a broad pattern of unlawful conduct. [Footnote omitted.] (114 Cal.App.3d 665, 688-689.)

The repetitive acts of Respondent in continually disregarding the rights of its employees warrant the remedies recommended by the ALJ.

ORDER

By authority of Labor Code section 1160.3, the

1. Cease and desist from:

(a) Discouraging membership of employees in the UFW or any other labor organization by discharging any of its agricultural employees for participating in protected concerted or union activities, or by discharging any supervisors for refusing to commit an unfair labor practice.

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

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Agricultural Labor Relations Act (Act):

(a) Offer to Francisco Pacheco Sandovai, Ernie Popoy, Yolanda Popoy, Rogelio Terado and Taide Terado immediate and full reinstatement to his or her former job at Respondent without prejudice to his or her seniority or other rights and privileges.

(b) Make whole Francisco Pacheco Sandoval, Ernie Popoy, Yolanda Popoy, Rogelio Terado and Taide Terado for any losses he or she suffered as a result of his or her discharge plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms. Inc. (1982) 8 ALRB No. 55.

(c) Preserve, and upon request, make available to the Board or 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 amounts due to the aforementioned employees under the terms of this Order.

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

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

(f) Mail copies of the attached Notice, in a-11 appropriate languages, within 30 days of the date of issuance of this Order to all employees employed by Respondent in its harvest season in 1982.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions 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 non-hourly wage employees to compensate them for time lose at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, with: 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodical thereafter in writing of further actions taken to comply with this Order until full compliance is achieved.

Dated: April 22, 1985

JEROME R. WALDIE, Member[8/]

PATRICK W. HENNING, Member

[8/] The signatures of Board members in all Board Decisions appeal with the signature of the chairperson first (if participating, followed by the signatures of the participating Board members in order of their seniority.

MEMBER CARRILLO, concurring and dissenting:

I join the majority opinion insofar as it concludes that the discharges of Rogelio and Taide Terado were a violation of Labor Code section 1153(a) and (c), and as it generally explains the appropriateness of our remedial Order herein. I also agree with the majority opinion that the General Counsel established a prima facie case that foreman Ernie Popoy and his wife Yolanda were terminated for their refusal to commit an unfair labor practice, i.e., issuing a warning ticket to an employee because of her union support. However, I find merit in Respondent's exception to the ALJ's conclusion that Respondent did not meet its burden of showing it would have fired Ernie and Yolanda Popoy even in the absence of the refusal to commit an unfair labor practice.

The evidence in the record is uncontroverted that both before and after Ernie Popoy' s refusal to commit the unfair labor practice, Ernie's crew was having difficulty picking grapes of the proper sugar content and that Respondent wanted Ernie to exercise better control over the work of the crew. After the grapes were repacked on the first day of harvest, supervisor Joe Becerra asked Ernie to be more careful and issue warning notices to workers picking green grapes. At the start of work on the second day, both Becerra and personnel manager Henry Mendez separately told Ernie to be more careful. After the first repack was ordered on the second day, Becerra asked Ernie why he wasn't issuing any warning notices but instead was allowing workers to do as they wished. By the time of the incident wherein Ernie refused to commit the unfair labor practice, Respondent had expressed its dissatisfaction several times to Ernie over the work he and his crew were doing.

Ernie was not fired at the point in time when he refuse: to commit the unfair labor practice, i.e., after the first repack of grapes on the second day. Instead, it was not until the pickes grapes failed an inspection a second time, were repacked again, and failed yet a third inspection, that Becerra stopped Ernie and his crew from working. Thus, it appears that Respondent stopped Ernie from working only after repeated requests to him to do a better supervisorial job and his repeated failure to do so. As such, Ernie Popoy was fired for cause.

Further reinforcing the conclusion that Ernie was discharged for cause is the fact that the entire crew was stopped and sent home early on the second day of the harvest. This suggests that Respondent's problem with Ernie extended to the work of the entire crew. Since it is clear that repacking the grapes was costly to Respondent, Respondent's frustration at what it regarded as a serious failure by Ernie and the crew to do proper work appears entirely natural. The evidence therefore supports the conclusion that the decision to terminate Ernie came in response to his failure to get the crew to do a proper job. While it is clear that Becerra wanted Ernie to issue a warning notice to an employee for her union support, Respondent demonstrated that it fired Ernie nonetheless for the work-related problems. Therefore, I would reverse the ALJ's conclusion that Ernie's firing was due to his refusal to commit an unfair labor practice. I would not find a violation of section 1153(a), and I would dismiss the complaint in this regard.

I agree with the majority opinion that the case of Yolanda Popoy stands or falls with that of her husband. (See Anton Caratan o Sons (1932) 8 ALRB No. 83.) Since I would find that Ernie's termination was for cause and not because of his refusal to commit an unfair labor practice, I would similarly find Yolanda's firing not to be a violation of the Act.

Dated: April 22, 1985

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board (Board) found that we violated the Agricultural Labor Relations Act by discharging employees Francisco Pacheco Sandoval, Rogelio Terado and Taide Terado because of their union support. The Board also found that we violated the Act by discharging foreman Ernie Popoy and his wife Yolanda for refusing to issue a warning notice to an employee because of her union support. The Board has ordered 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 (Act) is a law that gives you and all other farm workers in California these rights:

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

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

WE WILL NOT discharge or otherwise discriminate against any employee because he or she has exercised any of these rights.

WE WILL offer Francisco Pacheco Sandoval, Rogelio Terado, Taide Terado, Ernie Popoy and Yolanda Popoy their old jobs back and will pay them any money they lost because we discharged them unlawfully.

Dated: GEORGE LUCAS & SONS

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 93215. The telephone number is (805) 725-5770:

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

DO MOT REMOVE OR MUTILATE.

CASE SUMMARY

GEORGE LUCAS & SONS

11 ALRB No. 11
Case No. 82-CE-76-D, et al

ALJ Decision

The Administrative Law Judge (ALJ) found that Respondent fired foreman Ernie Popoy and his wife Yolanda after Ernie refused to issue an employee a warning notice on account of her union support. The ALJ noted that although supervisors are not generally covered by the protections of the Act, an exception exists where a supervisor refuses to commit an unfair labor practice. He rejected as pretextual the Company's explanation that it fired the Popoys because the crew under their supervision was repeatedly picking grapes of insufficient sugar content. He also concluded that employee Francisco Pacheco was fired for his union activities.

The ALJ dismissed allegations that employees Gerardo Megrete, Rogelio Terado and Taide Terado were fired for their union activities, finding instead that there was no causal connection between their discharges and their union support. An allegation that an employee received a warning notice because of her union support was dismissed because the actual basis for issuance of the notice was her placement of union bumperstickers en company property, a matter the employer could legitimately prohibit. The ALJ also ruled that the company did not discriminatorily harass three employees in issuing them warning tickets for spending too much time drinking at the water can. Finally the ALJ found that there was insufficient evidence to establish that the Company unilaterally modified its disciplinary policy by increasing the number of warning notices given to its employees.

Board Decision

The Board affirmed the ALJ's findings and conclusions in all respects except as to the discharges of Rogelio and Taide Terado. As to them, the Board found that the General Counsel had established a prima facie case, relying on the timing of the discharges shortly after their expression of union support. Additionally, unrebutted evidence that other employees were not disciplined for the same alleged misconduct established that the asserted grounds for the discharges of the Terados was pretextual. The Board therefore found the discharges were in response to the Terados' union activities.

The Board explained its basis for rejecting the Company's argument that the Board's usual remedies were not appropriate in this case. Discussing the court's decision in M. B. Zaninovich (1931; 114 Cal.App.5d 665, the Beard held that there was ample evidence that the unlawful firings involved in this case were known to other employees and that the Beard's usual remedies were therefore appropriate.

Member Carrillo Dissent

Member Carrillo dissented from the finding that the discharges of the Popoys were a violation of the Act. He would find that the evidence established that the Popoys were fired because they were unable to properly control the work of their crew.

* * *

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

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: GEORGE LUCAS & SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party.	Case Nos. 82-CE-76-D 82-CE-103-D 82-CE-157-D 82-CF-182-D 82-CE-192-D 82-CE-195-D

Appearances:

For General Counsel:

Heberto A. Sala
627 Main Street
Delano, CA 93215

For Respondent:

Paul J. Coady
Seyfarth, Shaw, Fairweather & Geraldson
2029 Century Park East, Suite 3300
Los Angeles, CA 90067

For Intervenor:

Legal Department
United Farmworkers of America, AFL-CIO
P. 0. Box 30
Keene, CA 93531

Before: Robert LeProhn
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

ROBERT LE PROHN, Administrative Law Judge:

This case was heard before me in Delano, California, on May 10, 11, 12, 13, 16, 17 and 18, 1983.

Complaint issued February 4, 1983; a First Amended Consolidated Complaint issued May 5, 1983. Respondent filed its Answer to the Complaint on February 17, 1983. In addition to denying the allegations found therein, Respondent's Answer set out seventeen affirmative defenses. No answer was filed to the Arended Complaint. Pursuant to the provisions of 8 Admin. Code section 20230, Respondent is deemed to have denied the allegations of the Amended Complaint except so far as those allegations were admitted in its answer to the original complaint.

The United Farm Workers of America (UFW), Charginq Party, pursuant to the provisions of B Admin. Code section 2026P, moved to intervene in the proceedings. As required by section 20268, its motion was granted. Intervenor did not particinate in the hearing.

The parties were given full opportunity to participate in the hearing. General Counsel and Respondent filed post-hearing briefs. Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent George Lucas & Sons is an agricultural employer within the meaning of Labor Code section 1140.4(c) and is engaged in agriculture within the meaning of section 1140.4(a).[1] The Agricultural Labor Relations Board has asserted jurisdiction over Respondent on several prior occasions.[2]

The United Farm Workers of America, AFL-CIO, is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours and other conditions of employment on behalf of agricultural employees. The UFW is a labor organization within the meaning of section 1140.4(f).

II. BACKGROUND

The UFW filed a Petition for Certification on May 26, 1981; a representation election was conducted on June 2, 1981. Following timely filing of post-election objections by Respondent, the UFW was certified as bargaining representative for Respondent's agricultural employees on Septeber 10, 1932.[3] The record does not indicate whether the parties have engaged in bargaining or have consumated a collective bargaining agreement.

III. THE UNFAIR LAROR PRACTICES

The complaint alleges that Respondent discharged Taide Terado, Rogelio Terado and Francisco Pacheco Sandoval in violation

---

1. Unless otherwise indicated code section citations refer to the Labor Code.

2. George A. Lucas & Sons {1Q91) 7 ALRB No. 47; George A. Lucas & Sons (1982) 3 ALRB No. 61; George Lucas and Sons (19~9) 5 ALRB NO. 62.

3. George A. Lucas & Sons (1982)8 ALRE No. 61; these facts are admitted in Respondent's Answer.

of sections 1153(c) and (a) of the Act. A further violation of sections 1153(c) and (a) is alleged with regard to Respondent's failure to hire Gerardo Negrete. The termination of Ernie Popoy, a supervisor within the meaning of section 1140.4(j), and his wife Yolanda is alleged to violate section 1153(a).[4/]

Respondent is alleged to have committed independent violations of section 1153(a) by disciplining Heracitio Hernandez, Alonzo Ruiz, Francisco Tirade and Alma Fuentes.[5/]

Finally, the complaint alleges that Respondent violated sections 1153(a), (c) and (e) by unilaterally changinq its disciplinary system while having an obligation to bargain with the UFW.

Respondent admitted that Ray Major, Rolando de Ramos, Ernie Estrala, Jose Becerra, Abel Jinenez, Ernie Camacho and Ernie Mendez were at all times material supervisors within the meaning of section 1140.4(j) of the Act.

IV. THE EMPLOYER'S OPERATIONS

Respondent is engaged in raising and harvesting grapes in the Delano, California area. Two facets of its operations are of interest so far as this proceeding is concerned: its hiring practices and its disciplinary policies.

---

4. The parties stipulated that Ernie Popoy was at all times material a statutory supervisor. It was further stipulated that Yolanda Popoy was not a statutory supervisor.

5. At the close of its case in chief, General Counsel moved to delete allegations in Paragraph 6(c) regarding threats to discharge Alonzo Ruiz and Francisco Tirado. This motion was granted. A similar motion was granted with, respect to an allegation of threats to discharge Alma Fuentes found in Paragraph 6(e).

(1) Hiring Practices

Ray Major, ranch superintendent, determines the number of people required for particular jobs; he also determines when people are to be hired and laid off.[6/] Reporting directly to Major are supervisors Rolando de Ramos and Erneste Becerra. Crew foremen involved herein report directly to either de Ramos or Becerra.

Crew foremen and second foremen are responsible for direct supervision of their crew members. Included within this responsiblity are the following: teaching workers to do the jobs assigned and making sure assigned jobs are done correctly. If a worker is not performing properly, the foreman requests his termination.[7/]

Major determines the number of crews needed as well as the size of each crew. The number of crews and the size of particular crews depends upon the volume of work. Crew size may also vary depending upon a foreman's ability to handle workers; some harvet crews may be limited to forty workers while others may have sixty to sixty-five employees.

Respondent's seniority system is a crew system related to the length of time the foreman has worked for Lucas. The oldest crew is that of Abel Jimenez. It is first hired and last laid off. Major testified to a limited exception to this rule in that a lower seniority crew which has been specially trained for a specific job may be retained over a higher seniority crew to perform that

---

6. TR. V;37. The findings regarding Respondent's hiring; policy are based upon credited testimony of Ray Major.

TR. 7:33.

specific job.

Crew foremen are responsible for hiring individual workers in their crews; Major determines on an almost daily basis whether crew sizes are to be modified. He meets with his supervisors around 2:00 p.m. and advises of the need for additional personnel the following day.[8/] He never advises supervisors of personnel needs as much as a week in advance.[9/]

The first operation in Respondent's cultural cycle is pruning. Pruning begins about mid-December and continues until the end of February or the first part of March; two crews are used. The second operation is pre-harvest which begins about Castor and runs until early May. The next major operation is tipping and thinning which begins about the first of June and continues until the end of July. Harvesting begins around August 1 and ends in November.

Initial hiring for a pruning season is done from those on the last payroll for the preceding pruning season and from those on the last payroll for the preceding harvest. The reason for utilizing both payrolls is that it is difficult to get people to do pruning.[10/] When a worker is called to work, he has three days within which to report to be assured of a job in his former crew. If he fails to report within that time, he will be hired only if

8. TR. V:42.

9. TR. V:43.

10. Major testified Lucas has 20 to 30 people in pruning and 40 to 50 in the harvest, and it cannot get enough people for pruning from, the combined payrolls for the last week of each of those preceding seasons.

additional workers are needed.[11/] If a sufficient number of workers fail to respond to the call back, supervisors are instructed to hire anyone who has worked for Lucas during the previous year.[12/] If there is still need for additional workers to fill out the crew, anyone who has had pruning experience with growers other than Lucas may be hired. New hires are not unusual in the pruning season.

Once a workers has failed to respond to a call back, the burden of obtaining a job rests with him. He must check to see whether there are openings.[13/]

Only worker who finish the season have a three day recall right to work in that season the following year.[14/] The exception to this rule is an approved sick leave which prevented the individual from completing the season. However, if such an individual fails to report within three days, he also loses his right to placement in his former crew. A worker, having failed to meet *his* reporting obligation, who is placed in another crew has no right to transfer to his original crew in the event of a subsequent vacancy in that crew. Any such transfer would be made at the

---

11. TR. V:47, 50. If there is no vacancy in his ere'..', but another crew needs workers, the late comer will be offered a job with another foreman.

12. TR. V:49; de Ramos testified that preferential hiring is accorded only those who completed the prior season. Since Major is de Ramos' supervisor, and since his explanation of Respondent's policy is more logical, de Ramos is not credited on the point. Completion of the previous season relates to right of initial recall when the next season begins and is akin to a seniority right rather than a preferential hiring right.

13. TP. V:52.

14. Ibid.

convenience of Respondent.[15/]

Major testified the recall system described above was operative during. 1981 and 1932 and has not been changed.[16/]

Having failed to respond to recall, a worker wishing to return to his former crew is obliged to contact his foreman and notify him of his availability. The foreman lists the individual's name and forwards his list to Major who forwards the list to the office with the object of ascertaining whether the individual had in fact previously worked for Lucas. If the office verifies an individual has previously worked for Lucas, that individual would enjoy a hiring preference over one not previously employed by Lucas if he is "there when we are hiring."[17/] So long as a foreman's crew is not full, he will continue to take and forward names to Major.

Once a season starts, Major meets daily with his supervisors to determine the need for additional workers the following day. If workers are needed, he instructs his supervisor's regarding the number of workers to be hired into the particular crew. These instructions are relayed to the foreman who do the actual hiring. Major testified he had no knowledge of how individual foremen contract workers for hire.[18/]

---

15. TR. V:54.

16. TP. 7:64.

17. TR. 7:66, 67.

18. TR. 7:72.

(2) Disciplinary Policy

Respondent's policy with respect to effecting discharge is one of progressive discipline. An oral warning is issued. Upon subsequent occasions when discipline is required, a written warning is issued. Before an employee is to be terminated for repeated warnings, he must have received three written warnings during the same operation, e.g. the harvest. Coincidental with the third warning notice is discharge.[19/] There are also certain offenses, not relevant here, for which immediate discharge is effected.[20/] De Ramos testified that before he acts upon a recommendation from a foreman to discharge a worker, he will "... try to investigate all the facts . . . ."[21/] He tries to talk to the person who is to be fired. The foregoing procedures are not applicable to management employees.[22/] It is not clear from the record what criteria are used for terminating a foreman or other member of management.

V. DISCHARGES AND FAILUPE TO REHIRE

The Amended Complaint alleges a series of discharges and one failure to rehire as violative of sections 1153(c) and (a). Analysis of such allegations must be made against the back drop of N.L.R.B. v. Transportation Management Corp. (1983)________U.S.________,113

---

19. Testimony of foreman Paul Veloria, TP. VII: 27; Veloria's testimony in this regard was corroborated by de Ramos

20. See G.C. Ex. 5.

21. TR. VI: 107.

22 . TR . VI : 83.

LRRM 2857, 51 U.S.L.W. 4761; Wright Line (1980) *251* NLRB 10P3; Martori Brothers Distributors v. A.L.R.B. (1981) 29 Cal.3d 721 and Nishi Greenhouse (1981) 7 ALRB No. 18.

General Counsel has the burden of making a prima facie showing that an employer's union animus contributed to its decision, to discharge or otherwise discipline an employee, a burden which does not shift from the General Counsel. The employer, though failing to meet or neutralize the General Counsel's showing, can avoid *a* finding it violated the Agricultural Labor Relations Act (ALRA) by demonstrating by a preponderance of the evidence that the employee would have been discharged or otherwise disciplined even if he had not engaged in union or protected activities.[23/]

To prove a violation of section 1153(c), General Counsel must show by a preconderance of the evidence that the aliened discriminatee engaged in union activity, that Respondent was aware of this activity and that the activity was a motivating factor in effecting the discriminatee's discharge, i.e., establish the causal connection between the union activity and the disciplinary action Proving a violation of section 1153(c) establishes a derivative violation of section 1153(a). The same burden is placed upon the General Counsel in seeking to prove an independent violation of section 1153(a) with respect to discharges for protected concerted activity. We turn now to apply these principles to the discharges alleged in the complaint.

23. M.L.R.B. v. Transportation Management Corp., supra; Nishi Grenhouse, supra, p. 3.

(1) Gerardo Negrete

Paragraph 6(a) of the complaint alleges that since April 1982 Respondent has refused to rehire Gerardo Negrete because of his union and concerted activities.

(A) Summary of the Facts

During the 1931 harvest season, Negrete and his wife worked in the Abel Jimenez crew.[24/] The crew was laid off on October 22, 1981, because of inclement weather and was called back 5 or 6 days later. Megrete, having gone to Mexico, did not return, although recalled; his wife was recalled and did return, When Negrete returned to the Delano area on February 1, 1982, he contacted Jimenez for work. Jimenez told him his crew was full and suggested that Negrete contact Rolando de Ramos about work.[25/]

Negrete contacted de Ramos at the shop on February 8th and told him he was ready to go to work. When de Ramos told him to check with his foreman, Negrete said he had already done so and that the foreman told him they weren't hiring anybody. De Ramos suggested that Negrete check with Veloria.[26/] Negrete preceded to

---

24. Jimenez is admittedly *a* statutory supervisor.

25. There is no evidence Jimenez's statement regarding the unavailability of work in his crew was inaccurate. February 7th was near the end of the pruning season. Jimenez denied telling Negrete to contact de Ramos about work. However, a referral to de Ramos by Jimenez provides an explanation for Negrete's conduct the following day. While there appears to be no reason why Jimenez would have directed Negrete to de Ramos, subsequent events support Negrete's testimony that he was so referred. Jimenez's'denial that he din so is not credited.

26. The parties stipulated that Veioria is a foreman and a statutory supervisor.

the work site of Veloria's crew and told veloria that de Ramos had sent *him* to see whether Veloria was hiring. Veloria responded he was not; he asked Negrete whether he had ever worked for Lucas before, and Negrete said yes. Veloria asked Negrete for his name, social security number and telephone number, and said he would talk to de Ramos and if de Ramos hired Negrete, Veloria would call him.[27/]

Negrete apparently made no effort to obtain work between early February and the end of March when, according to his testimony, he contacted jimenez at the latter's home. No one else was present. When jimenez told Negrete that Lucas was not hiring, Negrete responded that he would wait until the suckering began.

Negrete again sought work from Jimenez during the first part of April.[28/] Jimenez told him the crew was full and sent him to see de Ramos; Negrete contacted de Ramos that day at his home.[29/] We asked de Ramos when he was going to be given a job; de Rarnos told him Lucas was going to hire some people about April 20th, and if

---

27. Veloria testified but was not examined regarding any February conversation with Negrete. He testified to conversations with Negrete in June following commencement of the girdling season. Negrete's unrebutted testimony regarding his February conversation with Veloria is credited.

28. Jimenez testified that Negrete was not recalled to his crew at the outset of pre-harvest in April 1982, because he had not completed the prior harvest season.

29. Jimenez and de Ramos corroborated the essentials of this portion of Negrete's testimony. De Ramos testified that Negrete contacted him at home about work, and that he told Negrete to check with his foreman because he (de Ramos) did not do any hiring. Jimenez denied having sent Negrete to see de Ramos; his denial is not credited. It seems unlikely Negrete would have so promptly contacted de Ramos absent a suggestion from Jimenez that he do so.

Negrete were to be hired, they would call him. Negrete telephoned Jimenez on the 18th and asked whether Lucas was going to hire; he also asked why he had not been called. Jimenez said that they were going to hire 5 or 6 people the following week.[30] Nothing else was said. Jimenez had no recollection of a telephone call from Negrete on April 18th.

The parties stipulated that Jimenez hired 15 people on April 19 and 20. He testified that of those hired only three had not finished the 1931 harvest: Two had been granted maternity leaves, and one person was hired in error and terminated two days later. This testimony was uncontradicted.[31] With the exception of April 19 and 20, there is no evidence that work was available on any date or immediately following any date upon which Negrete sought employment.

Because Negrete was aware Lucas was hiring, he called de Ramos around April 25 or 26th and asked what was happening. He told de Ramos he knew Lucas was hiring, but he had not been called. Negrete testified that de Ramos said he would be called if he were

---

30. At one point in his testimony Jimenez denied making such a statement.

31. General Counsel urges that Respondent's failure to produce records supporting de Ramos' testimony regarding the reason for terminating Fernandez, the person hired in error, warrants discrediting the testimony, citing Evidence Code section 412 which says that weaker evidence should be viewed with distrust when it was within the power of the proponent to produce stronger evidence. Thus, General Counsel urges the inference that Respondent's records would establish that Fernandez was terminated for reasons other than a misapplication of its hiring policy. Bearing in mind the admonition of section 412, the absence of any evidence which controverts de Ramos on this point and the absence of any effort or. General Counsel's part to rebut this testimony, leads me to credit de "Ramos testimony regarding the reason for Fernandez's termination.

to be hired. De Ramos denied making such a statement. His denial is not credited. While it would be contrary to the Lucas practice for Jimenez or de Ramos to make an advanced commitment regarding Negrete's hire, a statement that Negrete would be contacted if he were to be hired would not be contrary to that policy.

There is credible testimony that once a season has started, workers are hired on a daily, as needed, basis either from among those who are present at the field or those who have been contacted the night before by the foreman. Commitments to hire are generally made the evening a foreman learns from de Ramos that additional workers are needed the next day. There is nothing in the record to explain why special consideration would be given to Negrete.

On April 29th, Negrete again called Jimenez and was told Lucas was going to hire a few people the first part of May. He again told Negrete that if he were to be hired, Jimenez would either give him a call or send word to him.[32/] Negrete did not respond; he was not called to work by Jimenez.

Negrete testified he telephoned Jimenez on May 5th and asked about work; he told Jimenez he knew that Lucas was hiring. Jimenez said there were two ladies who had not yet started and that Negrete 'was going to start together with them.[33/] Negrete said nothing. He was never called by Jimenez.

32. Jimenez denies making these statements. Even if Negrete be credited, it can hardly be said that Jimenez gave Negrete a promise he would be hired. Negrete was told he would be called if he were to be hired. The situation did not develop.

33. Jimenez denied this conversation.

On May 8th Negrete testified he talked again to de Ramos about a job. He and his wife wanted to talk with Pay Major; but de Ramos said he could handle their problem. Negrete asked why he hadn't been given any work; de Ramos said the company was not hiring people and suggested they continue drawing unemployment benefits until they were called. De Ramos denied making such a statement.

During early June, Negrete went to Jimenez's home to ask about a job. Jimenez told him that he could go to work in the girdling with Popoy.[34/] After learning from Jimenez where Popoy lived, Negrete went to Popoy[1]s house and asked him for a job. Popoy said he was not going to have a girdling crew and suggested that regrete check with Veloria, that he might be hiring a couple of people. Negrete called Veloria when he returned home and asked for girdling work. Valoria asked whether he had worked for Lucas before; regrete said he had. Veloria said he would talk to de Ramos and told Negrete to call him the next day for an answer. Nearete called the next day; Veloria told him he wasn't hiring any more people.[35/] Girdling began on June 1st; Veloria hired on the 1st and 2nd of June; no one was hired into the girdling crew after June 2. Negrete's call to Valeria was the last attempt which he made to obtain work at Lucas. During the period when he was seeking work at

34. A foreman has control only over the workforce in his own crew. He has no authority to hire for any other foreman. Thus, it is hard to construe Jimenez's statement as something other than an alert to Negrete that Popoy's crew was hiring.

35. There are not significant differences in the testimony of Veloria and Negrete regarding their interaction. During the interval between their conversations, Veloria had been instructed by Major to cease adding workers to his crew.

Lucas, he was not employed at any other location.

(B) Negrete's Union Activity

During May 1981, there were three occasions on which Negrete distributed UFW bumper stickers. Jimenez was present on two occasions when Negrete distributed stickers during the lunch break. Two co-workers also distributed stickers on those occasions.

Negrete wore UFVI buttons to work once or twice a week in May 1981. His activity was part of the UFW campaign preceding the representation election held in June 1931. During late April and early May 1981, he also distributed and collected authorization cards from members of his crew. During this tine frame other members of the Jimenez crew engaged in like conduct.

In May 1981 Negrete, his wife and two co-workers had a conversation with de Ramos in which they sought a wage increase. The group was gathered getting a drink of water about 11:00 a.m. De Ramos arrived and asked what they were doing. When he told them to get to work, Negrete said that de Ramos should give them a raise, De Ramos responded he would see about a raise, but he didn't know when.

Negrete does not appear to have engaged in any union acitivity or protected concerted activity subsequent to the representation election held in June 1981.

Respondent makes no contention that Negrete was other that a competent worker, nor does Respondent contend that Negrete was unqualified to perform any work which he was seeking.

(C) Analysis and Conclusions

The requisites for establishing a prima facie case that Respondent violated section 1153(c) by failing to rehire Negrete are the following: that Negrete made proper application for employment at a time when work was available and was not rehired because of his union activity. In order to establish an independent violation of section 1153(a) General Counsel must prove employer knowledge of protected concerted activity by Negrete and a causal connection between that activity and Respondent's failure to rehire him.

General Counsel established Negrete's union and protected concerted activity, and Respondent's knowledge of such activity. However, I am not convinced a causal relationship between Negrete's activities in May 1981 and the failure to hire on or about April 1932 was proved.

Negrete, and others in his crew, engaged in pro-UFW campaign activities preceding the June 19S1 representation election. There is no contention that employees engaged in like conduct were subjected to discriminatory treatment by Respondent. While the absence of evidence of discriminatory action against Negrete's co-activists is not dispositive of whether there is a causal connection between Negrete's conduct and the failure to hire him in.

/

/

/

/

/

/

/

/

1982, it is an appropriate consideration.

The fact that Negrete was hired for the fall 1981 harvest season, a point in time substantially closer to his protected concerted and union activities, suggest that such activity was not a consideration leading to his failure to be re-hired in April 1982. But for his voluntary departure for Mexico during the October 1981 layoff and his subsequent unavailability when the crew was recalled, there is nothing to suggest that Negrete, as was his wife, would not have been recalled and upon completion of the harvest season been eligible for hire at the commencement of subsequent operations. Negrete's 1981 union activities do not insulate him for having to comply with Respondent's criteria for subsequent hiring.[36/]

In seeking to prove causation, General Counsel presents alternative arguments: Negrete was subjected to disparate treatment in that Respondent did not deal with him in a manner consistent with its rehire policy; or alternatively its rehire policy, as enunciated by de Ramos, is an after the fact construct.

The latter argument is directed toward de Ramos' testimony regarding preferential hiring during the course of a particular season being limited to those persons having completed the previous harvest. As noted, de Ramos' testimony in this regard is not credited. The rehire preference is afforded those with prior work experience with Lucas. Negrete had this preference and pursuant to Respondent's policy was eligible for rehire on April 19 and 20.

Turning to General Counsel's disparate treatment argument,

---

36. Martori Brother Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721.

which is made in the context of Jimenez having been directed by de Ramos to hire only persons who finished the prior harvest, such an order was inconsistent with Major's credited testimony regarding the hiring policy and would have the effect of disqualifying Negrete. Notwithstanding this inconsistency, Jimenez with one exception did as he was ordered.

Conceding the inconsistency of de Rarnos' order, I an not persuaded it was discriminatorily motivated. The record does not establish that de Ramos had personal knowledge that Negrete was a union activist. The only independent protected concerted activity in which Negrete engaged occurred approximately one year prior to de Ramos' instruction to Jimenez. While this time lapse does not totally dispel illicit motiviation for de Ramos' action, it provides no support for the proposition that the order was illicitly nctiviated.[37/] Taken together with Negrete's rehire for the 1981-82 harvest season, a time more proximate to both his union and protected concerted activities, the evidence does not persuade me that de Ramos' direction to Jimenez was motiviated by a desire to foreclose Negrete from employment for reasons violative of the Act. The best which can be said is that General Counsel created *a* hint or suspicion of such motivation; hints or suspicions do not suffice to prove this element of a statutory violation.[38/]

37. Lassen Canyon Nursery (1978) 4 ALRB No. 21; slip op. p. 9, conclusion of ALO adopted by the Board.

38. Monrovia Nursery Company (1983) 9 ARLB No. 5; Rod McLellan Company (1977) 3 ALRB Mo. 71.

Other than April 18th the record does not establish work availability on any other occasion on which Negrete sought work.

In short, I conclude General Counsel failed to made a prima facie case with regard to the allegations of paragraph 6(a) and accordingly recommend dismissal of said allegations.[39/]

(2) Francisco Pacheco Sandoval [40/]

Paragraph 6(g) of the complaint alleges that Respondent discharged Pacheco on October 13, 1932, because of his protected concerted and union activities.

(A) Summary of the Facts

Pacheco was initially employed by Respondent in 1977. The assigned cause for his discharge on October 18, 19R2, was receipt of three warning notices.

August 11, 1982

August 11th was the first day of the 1982 Lucas grape harvest. Pacheco began work in Ernie Estrala's crew. De Ramos was the supervisor.

At the outset of the day, de Ramos spoke to the Estrala crew and demonstrated the type of grapes which he wanted picked. He told the crew that packers were responsible for green grapes found in their boxes and that a picker was responsible for green grapes

39. Note has been taken in reaching this conclusion of testimony offered by Miguel Gallegos regarding his rehire in 19«3. Respondent's motion to strike the Gallegos testimony on the grounds it related to events subsequent to issuance to complaint was taken under submission. It is denied. However, the facts surrounding Gallegos' returned to work are distinguishable and do not establish disparate treatment.

40. Hereafter called Pacheco.

found in his box. Each picker picked a sample box for inspection by de Ramos. Pacheco's box was satisfactory.

Pacheco testified that most of the tine a picker has his own box, and only grapes picked by him are placed in that box; however, there are occasions on which pickers use a common box.[41/] Pacheco testified that on each occasion on which he received a warning ticket, the three pickers in his group were picking into a common box.[42/]

On the 11th, about 40 minutes after work started, Becerra, another supervisor, shouted to the Estrala's crew "watch the red grapes." Approximately 15 minutes later, Gregoria de Ramos, Estrala's second foreman, told Pacheco she was going to give him a ticket because the grapes were red (green), and he was given his first notice for not paying attention and picking green (red) grapes. The notice was signed both by Gregoria de Ramos and by Estrala. Prior to issuance of the written warning, Pacheco received no oral warning of his shortcomings from either Estrala or Rolando de Ramos. Estrala testified he personally observed Pacheco pick green and dirty grapes and, therefore, issued a warning notice. Pacheco denied he picked green and dirty.

No explanation is offered regarding the reason Estrala deviated from the established practice by failing to limit his

41. Pacheco's testimony on this point is generally consistent with that of de Ramos who testified that each picker is supposed to have his own box, but that there are rare occasions when two pickers will pick into the same box.

42. The term crew is used to refer to workers under the supervision of a particular foreman. A group is a portion of a crew consisting customarily of three pickers and a packer.

disciplinary action on the first day of the harvest season to an oral warning. Assuming, as he testified, Estrala did observe Pacheco picking green and dirty grapes, Respondent's policy called for an oral warning. Estrala's failure to so limit discipline coupled with his knowledge of Pacheco's union activity as discussed below, supports the inference that Respondent was setting Pacheco up for future discharge, utilizing the warning notices to provide colorable legitimacy for its action.

Estrala's claim that he personally observed Pacheco picking green and dirty grapes is suspect for another reason. Personal observation is the only way that Estrala could justify singling out Pacheco's boxes as the ones with green and dirty grapes. While each picker customarily picks into his own box, pickers in a particular group do not usually identify their own boxes. Marking or identification is required only after discovery by a foreman that grapes from that group are unacceptable. With such a discovery, the pickers are directed to mark their boxes. This is normally done by use of twigs or leaves being placed on top of the box; one picker places two leaves or twigs on his box, another places one and the third places none.[43/] In this way the packer and the foreman can identify the picker of a particular box. There is no evidence that Pacheco's group was marking its boxes on the morning of the 11th. There is testimony to the contrary.

---

43. Some groups, when required to mark, do so by writing the picker's name on discarded paper cups and placing those in the box.

August 14, 19«2

On August 14th, the day after he distributed bumper stickers during the lunch break to members of his crew, Pacheco received his second written warning. Estrala, who eats lunch with the crew, was present at the time. The stickers bore the legend "we want a contract" and had an eagle insignia. Pacheco also testified he was wearing a "we want a contract" button at the time. Pacheco testified that Estrala grabbed some of the bumper stickers which Pacheco had given to a woman in the crew and threw them on the ground.

Estrala denied the incident and further denied ever having seen Pacheco distribute union literature or wear a union button or union cap. Estrala went still further to deny ever having seer, any employee in his crew wear a union button curing all the years he had been a foreman at Lucas. Moreover, he testified he never heard anyone in his crew speak about the union; nor during 1982, did he ever see any bumper stickers on a worker's ice chest. This testimony is inherently incredible. It is inconceivable that having eaten lunch with his crew on a daily basis during the period when an organizing campaign was going on in 1981 and during the period of the election in 1931, that Estrala would have failed to observe workers in his crew wearing union buttons and other union insignia. His testimony in his regard is not credited; nor because of its obvious fabrication do I credit his denial of the events of August 13th as described by Pacheco in his testimony.

The correctness of his credibility resolution is supported by Respondent's argument with respect to the Pacheco discharge.

Respondent does not deny Estrala's knowledge of Pacheco's union activities, but rather rests its defense on the ground that such activities were not a motivating factor in effecting discharge, noting that on every instance prior to October 18, 19S2, when Pacheco wanted work with Lucas, he was hired. Thus, it is lack of causal connection between Pacheco's activities and his discharge rather than Respondent's lack of knowledge of those activities which is argued.

Pacheco's warning notice of August 14 was issued by Estrala, citing as the reason the presence of rotten grapes in the packer's box. When Pacheco inquired why he was getting a warning notice when the grapes were found in the packer s box, Estrala did not respond. prior to issuing the written warning of the 14th, neither Estrala nor de Ramos counseled Pacheco that he was picking improperly. Three other members of Estrala's crew received warning notices on the 14th for not properly cleaning grapes.

October 15, 1982

Sometime during early October, Pacheco was moved to another group in Estrala's crew. On October 16, Pacheco received a third written warning. It was given him by Estrala pursuant to an order from, de Ramos. The stated ground for the warning was picking "stained grapes." The notice given Pacheco appears to be the only one issued by Estrala on the 16th. There were two pickers in his group, and Pacheco places the blame for the stained (scarred) grapes on the other picker who did not receive a warning notice. Again there was no discussion with Pacheco prior to issuance of warning notice that his work that day was unacceptable.

October 18, 1982

De Ramos testified that Estrala asked him to check Pacheco's record to see whether he had sufficient warnings to warrant discharge. De Ramos telephoned Mendez (Respondent's personnel manager) requesting the information. Mendez reported back that Pacheco had sufficient warning notices to justify discharge.[44]

De Ramos testified that when his foremen want to fire someone he investigates the circumstances for which they are to be discharged. However, the record does not reveal that his investigation consists of more than ascertaining from the foremen, the alleged basis for the discharge. Thus, with respect to the Pacheco discharge, there is no reason for concluding that he would have done more than ascertain the number of warning notices on file as requested by Estrala.

On the 18th, Pacheco worked until about 3:0n p.m. when Mendez and Estrala called him from the field, and told him he was fired because he had received three warning notices. When Pacheco sought an explanation regarding the reasons for giving him warnings, he received none. Mendez merely responded that he was fired and told him to get his check. Nor was Mendez prepared to listen to Pacheco's explanation regarding why he received the tickets or his plea for another chance. He told Pacheco that if he gave him another chance, he would have to give everyone who received three

---

44. Although both Estrala and Mendez testified, neither was questioned regarding this portion of de Ramos's testimony. Notwithstanding the failure to corroborate, I credit de Ramos. The events he described are consistent with a normal practice for checking an employee's record.

warning notices another chance.

(B) Union Activity

Since the days of the 1981 election campaign, Pacheco has been a UFW activist at Respondent's. During both the harvest and the pre-harvest seasons of 1981 and 1982, Pacheco wore union buttons and a union cap to work. During his lunch break, he distributed UFW buttons, UFW bumper stickers and cards urging attendance at union meetings. De Ramos was present on some occasions when Pacheco engaged in these activities. Estrala was present and observed Pacheco engaged in his lunch time activities.[45/]

In May 1982, during the pre-harvest season, Pacheco testified there was an occasion on which he told the members of Estrala's crew to go to the shop and ask for a raise before starting work. He testified that Estrala told him to go home if he didn't 467 want the work and to stop bothering the people.[46/] Pacheco's version of his role in getting the Estrala crew to the shop was not corroborated, but since he was the most active UFW supporter in the crew, it is likely he would have been the "mover". His testimony that he directed the crew to the shop is credited. Pacheco testified that he was the spokesman for the workers at the shop

45. As noted above, Estrala's testimony regarding his lack of awareness of Pacheco's activities is not credited.

46. Estrala denies seeing Pacheco that morning. He testified that an unknown person came by in a car and told the workers to go to the shop.

meeting with Becerra, de Ramos, and Ray Major.[47/]

(C) Analysis and Conclusions

As is so often the case in determining whether an employer has violated section 1153(c), credibility is the important consideration. Here, there is no problem with respect to the question of employer knowledge of Union activity. As noted above, Estrala's testimony regarding never having seen Pacheco or any other member of his crew engage in Union activity is not credible. The difficulty here is determining whether Pacheco's discharge was motivated by union animus or whether it would have occurred irrespective of his union activities. The problem is compounded because the testimony of no witness is totally believable.

Pacheco testified that on each occasion on which he received a warning ticket, he and at least one other picker in his group were picking into a common box. The likelihood that such is the case is remote. Even Pacheco testified that it is unusual for pickers to share a common box. Obviously, Pacheco is concerned to establish that Estrala could not identify the grapes which he had picked. However, since it appears that on the occasions when Pacheco received warning notices the pickers in his group were net marking their boxes, there is no way his grapes could have been identified once his box was transported to the packer's table. Given these circumstances, it is difficult to understand why he

47. According to Pacheco the role of Alma Fuentes in the confrontation was limited to that of translating from English to Spanish and Spanish to English. There were approximately one hundred workers present. A wage increase was received a few days after the confrontation. Fuentes placed more importance on her role, characterizing herself as spokeswoman for the group.

would fabricate testimony regarding picking into a common box. Fortunately, resolution of the point at issue does not require a resolution of this conundrum.

Estrala testified that he observed Pacheco picking green grapes prior to the occasion of the first warning notice. He does not explain why he made no attempt immediately to correct the situation or to confront Pacheco. Moreover, there is no evidence that Estrala took any steps to prevent the bad grapes he purportedly saw Pacheco pick from getting packed. Having successfully packed a test box for de Ramos, it is hard to believe that Pacheco would have forgotten his instructions an hour after starting work.

Finally, there is the absence of any explanation regarding the reason why Respondent permited Estrala to deviate from its disciplinary policy: that is, why Pacheco did not receive an oral reprimand rather than a written warning. No argument is made that his alleged offense was so heinous as to warrant bypassing the first step up the disciplinary process. However, it appears that company policy notwithstanding, Estrala does not give an oral warning for the first offense. On August 11th, the first day of the harvest, he issued warning notices to 8 employees in addition to Pacheco for picking green grapes.[48/]

Given the apparent prevalence of green grape picking on the 11th and bearing in mind the Becerra admonition to the crew shortly after work started, it is reasonable to conclude that Pacheco did,

48. Estrala appears to have had a practice of giving written warnings for green grapes at the outset of a harvest. In 1981 he issued six such notices (none to Pacheco) on August "7th which was likely to have been the first day of the harvest.

in fact, pick green grapes on the 11th and that he was observed doing so by Estrala.

Pacheco received his second warning notice the day after being observed by Estrala engaged in union activity. Pacheco testified that Estrala said the warning notice was issued because of rotten grapes in the packer's box. The text of the notice is as follows: "Pacheco is not cleaning the grapes . . . ."[49/]

Estrala testified each tine he issued Pacheco a warning notice, he was standing next to him and saw him put dirty or rotten grapes into his box. In short, Estrala would have us believe that Pacheco committed each act of misconduct directly in front of him; that not once, bat three times, Pacheco was so arrogant or so negligent as to mispick grapes in the presence of his foreman.

This testimony is difficult to credit. There is no evidence Pacheco was an unsatisifactory worker during the 1981 harvest or during the 1982 pre-harvest; nor was Pacheco's demeanor while testifying such as to warrant the conclusion that he is of the temperament or disposition to taunt a foreman by deliberate work misconduct in the foreman's presence.

I credit Pacheco's version of the events surrounding the issuance of the second notice, particularly that he was told by Estrala that the bad grapes were found in the packer's box. Having done so, I conclude that issuance of the second notice was not consistent with de Ramos' statement to the crew at the outset of the harvest and, thus, not consistent with Respondent's disciplinary

---

49. Two illegible words follow the portion quoted. (C.C. Ex No. 3.)

policy.

The third notice and accompanying discharge were consistent with what Respondent contends its established disciplinary policy to be; i.e., discharge upon receipt of three warning notices.

To summarize: General Counsel has proved by a preponderance of the evidence that Pacheco engaged in union activity known to Respondent at points in time proximate enough to disciplinary action taken against him to warrant the conclusion that the disciplinary action was illicitly motivated and not for cause. Thus, General Counsel made a prima facie case.

Respondent replies by offering evidence that the same action would have been taken vis-a-vis Pacheco absent his union activity. This evidence is not sufficient to overcome General Counsel's prima facie case. The discharge was not consistent with the purportedly firm and established disciplinary policy, i.e., there was no initial oral reprimand, and the second notice was based upon facts which required the warning be given the packer rather than Pacheco. These breaches of policy are not explained and are coincidential with Pacheco's union activities. Therefore, I conclude that Respondent's termination of Pacheco violated sections 1153(c) and (a) of the Act.[50/]

---

50. In reaching this conclusion, consideration has beer, given to Respondent's argument that the validity of the discharge is supported by the fact that Pacheco lodged no protest to any of the warning notices, thereby indicating that each was properly issued. Stated otherwise, that Pacheco did in fact commit the sins alleged in the notices. This position is overstated. Pacheco did contend that notice number two was improper because the bad grapes were found in the packer's box. Moreover, a failure to file an unfair labor practice based upon receipt of the warning notices rather than waiting until he was terminated is understandable. From Pacheco's point of view he was not disadvantaged until he was terminated.

(3) Ernie and Yolanda Popoy

Paragraph 5(d) of the complaint alleges that Respondent discharged Ernie and Yolanda Popoy for refusing to commit an unfair labor practice.

(A) Summary of the Facts

Ernie Popoy has worked for Lucas every season since 1976 or 1977. He was a foreman at the time of his discharge and an admitted statutory supervisor. His wife Yolanda was a rank and file employee in his crew.[51/]

August 12, 1982[52/]

Prior to the start of work on the first day of the harvest, Becerra met with the Popoys; he took them, into the field and picked some grapes of the proper color and told them to pick from the brown canes where the grapes were riper. He assigned Popoy's crew the "top side," so-called because it is the area of a field which first receives water. Grapes are riper on the "top side" than on the "border side." Two other crews were assigned to the "border side."[53/]

Becerra also spoke to the entire Popoy crew showing them the type of grapes he wanted picked and told them to be careful because it was the first picking and all the grapes were not ready.

---

51. Yolanda was Ernie's second foreman.

52. Popoy's crew appears to have started on August 12 while Jimenez's crew began on the 11th. The variation in starting is consistent with de Ramos' testimony that seniority is by crew a that Jimenez's crew is the first called.

53. Major determined which of Becerra's crews would nick in what area.

After picking, grapes are inspected by an inspector from the Federal State Inspector Service, Department of Food and Agriculture, California. Inspection occurs in the field. The first day of picking the inspector arrived about 8:00 a.m. and began checking the sugar content of the grapes picked by Popoy's crew. When he finished, the grapes had to be re-packed because they failed to pass the test. Becerra learned of this sometime later when the inspector told him that he better talk to Popoy because his crew was picking too green and that already he had directed the crew to repack.

Becerra went immediately to Popoy's crew. It had repacked more than one hundred boxes by the time he arrived. Becerra told Popoy to be careful about the green grapes. Popoy said he had already spoken to the crew; Becerra said that if they don't obey you, you'll have given them something so they won't continue to pick green grapes.[54/] Following the re-pack that day there were no other problems.

August 13, 1982

Ernie Popoy arrived at work about 6:45 a.m. When the crew arrived, Mendez told Popoy to gather them together so that he could talk to them about the rules.[55/] Ernie assembled the

54. Yolanda testified that after the crew began working, Becerra called her husband and her aside and told them to issue warning notices for any little thing the workers did. Ernie Popoy did not so testify. It is unlikely that he would forget such a vivid statement; nor after the crew began work, does there appear to be a reason why Becerra would have made such a statement. Ernie's version of what Becerra said is generally consistent with Becerra's testimony. Yolanda's testimony is not credited on this point.

55. Both Mendez and Ernie Popoy testified regarding Mendez' visit on the 13th.

and Mendez spoke to then for approximately 10 minutes, saying he was aware of their problem of the previous day. When Mendez finished, Popoy sent the crew back to work. Mendez testified he told the Popoys he heard they were having problems with their people and were unable to control them. He asked whether they needed assistance and was told that they could handle the problem. Popoy did not testify regarding the substance of this conversation with Mendez; thus, the Mendez version being reasonable on its face and being uncontroverted is credited.

Sometime after 10:00 a.m. while visiting another of his crews, Becerra spoke with the inspector. The inspector told him that the Popoy crew again had to repack. Becerra immediately returned to Popoy's crew. Again there were over a hundred boxes which had to be repacked. When Becerra arrived, he began opening boxes which had been repacked and concluded that they would still not pass inspection. Becerra checked one or two boxes at the Lemus table and seeing one or two waterberrys "took that and put it on the ground." Becerra testified he showed Ernie the grapes and told him they were too green and were not going to pass. Once more, he told Popoy that if he did nothing about the problem, he wasn't doing his job properly. He told Popoy not to load out any boxes until the inspector rechecked them for sugar content.

When Becerra found one or two waterberrys at the first table, he put the bunches on the ground. Popoy told the people to clean the grapes before putting them in the boxes. Essentially the same thing happened at the second table. Popoy again told the packer to clean the grapes before putting them into the boxes.

Becerra checked one or two boxes and saw one or two waterberrys and again put the bunches on the ground.

Becerra went to the third table were Lupe Amarillas was the packer. He checked about seven boxes, and found one waterberry in the last box; he told Popoy to give Amarillas a ticket. Popoy said he was not going to issue a ticket for one waterberry.[56/] Becerra responded; "We'll see about that Ernie." Yolanda was present and told Becerra it wasn't fair to do so.

When Amarillas asked Becerra whether he was going to give her a ticket for one waterberry, he moved on to another table. She did not received a warning notice, nor was she otherwise disciplined. She testified that Becerra told popoy to give her a warning notice because she was a "Chavista"; that Popoy responded that one waterberry was no reason to give her a ticket and that Becerra wanted to give her a ticket because he knew she was a member of the UFW.[57/] Ernie Popoy substantially corroborated her testimony on this point.

Following the interaction with Amarillas, Becerra and Popoy preceded to check the remaining tables. There was one table where Becerra found waterberries but said nothing.

When the inspector completed his test following the first repack., he said the grapes wouldn't pass and would have to be

---

56. Popoy testified that he had never issued a warning ticket for having one waterberry in a box of grapes during the period he had been a foreman.

57. TR. III:91; Becerra denied telling the Popoy's to give Amarillas a warning ticket. His denial is not credited.

repacked for a second time.[58] popoy places the time of the second repack at about 1:00 p.m.; however, his later testimony that Becerra laid the crew off at abut 11:30 a.m. is inconsistent with a repack at 1:00 p.m. The inconsistency of this portion of Popoy's testimony is unexplained.

When the grapes failed to pass after the second repack and Becerra was told a third repack was necessary, he told Popoy not to repack again and to take his crew out and go home.[59]

Becerra concedes he was upset because the grapes didn't pass the sugar test, but contends he wasn't angry. He told the Popoys that all the grapes were going to be lost. Becerra's view is that Popoy wasn't doing his job because he didn't issue a single warning ticket although the crew wasn't doing what they were told.

About 3:00 p.m. on the afternoon of the 13th, Mendez and Major had a conversation regarding the Popoys. Mendez told Major the Popoy crew had had to repack on the first nay of the harvest and on the second day had to repack twice before being sent hone by Becerra. He also told Major that Popoy had a record of not being able to instruct or control his crew. Major responded that if they can't control and instruct their crew and if the company's losing money as a result, let's terminate them.

Mendez testified that Ernie Popoy had two prior warnings in his personnel file; one for not instructing his crew properly and *a* second for over hiring. Mendez testified that Yolanda popoy also

---

58. None of the other crews under Becerra's supervision had to repack either on the first or second day of the harvest.

55. Mendez was also present at this time.

had warnings prior to April 13th, one for failing to tell people not to pick green and dirty. He testified these warnings were discussed with Major prior to the termination of the Popoys.

Following his talk with Major, Mendez met with de Ramos and told him that Major wanted the Popoys terminated. De Ramos said he would get a hold of them and bring them in. Becerra denied any knowledge of the termination of Ernie Popoy until the 14th when de Ramos brought over a new foreman to take charge of the Popoy crew.

De Ramos testified to a conversation with Major on the 13th during the course of which Major told him the Popoys were fired. No mention was made of any prior warning notices issued to either Popoy. Major told de Ramos to discuss the matter with Mendez.[60/] De Ramos had learned from Mendez that the Popoys were to be discharged prior to his conversation with Major. Following his conversation with Major, he had a second conversation with Mendez during which Mendez showed him the prior warnings issued Ernie and Yolanda Popoy.[61/]

The assigned cause for Ernie's discharge was the following: "Not doing his job properly. Today Gary made him repack same grapes

---

60. Major testified but was asked no questions regarding his involvement in the Popoys' discharge.

61. The 19S1 warning to Yolanda was introduced. The only other notice issued Yolanda which is found in the record was issued the day of her discharge. The parties stipulated she is not a supervisor within the meaning of the Act. Thus, it appears Respondent failed to follow its disciplinary policy in effecting he: discharge.

The only notice issued Ernie Popoy which was offered into evidence was a 1981 warning issued for failing to follow his supervisor's orders with regard to the number of people to be hired, twice." The assigned case for Yolanda's termination was as follows: "She is not helping the foreman to tell the people to not to pick green grapes and clean the grapes." De Ramos prepared the termination slips and issued them at a meeting in his office with the Popoy's. .

August 14, 1982

Neither of the Popoy's returned to work on the 14th; the Popoy crew worked that day and no repacking was required. The crew worked in the same field as on April 12 and 13.

(B) Analysis and Conclusion

Ernie Popoy

As a statutory supervisor, Ernie Popoy is not covered by the protections of the Act. A supervisor serves at the will of the employer and generally may be discharged for any reason or no reason at all.[62/] However, as the Board noted in Ruline, the National Labor Relations Board (NLRB) has recognized four categories of exceptions to this general rule: (1) discharge for refusing to engage in activities proscribed by the Act; (2) discharge for engaging in conduct designed to protect employee rights; (3) discharge of *a* supervisor as the means for discriminating against the employer's employees; and (4) the supervisor's discharge is an integral part of an employer scheme to penalize employees for having engaged in concerted activity.[63/] General Counsel makes a prima

---

62. Ruline Nursery Co. (1981) 7 ALPS No. 21, slip op. pp. 8-9.

63. Id. at pp. 9-10.

facie case upon establishing by a preponderance of the evidence one of the cited exceptions as the cause for a supervisor's discharge. With the making of a prima facie case, the burden shifts to Respondent to establish the discharge would have occurred even in the absence of supervisor conduct falling within one of the exceptions.[64]

Here the exception urged by General Counsel is discharge for refusing to engage in activities proscribed by the Act. General Counsel's prima facie case rests upon favorable credibility resolution of controverted testimony. Ernie Popoy and Amarillas testified that Becerra directed Popoy to give Chavista Amarillas a ticket. Becerra denies having done so, testifying that he did not direct Popoy to issue anyone a ticket.

There is no question but that Respondent, and Becerra particularly, was aware of Amarilla's activities or behalf of the UFV". In 1931 she served as a UFW election observer and was also active in the union's pre-election campaign. During the 1982 pre-harvest she distributed UFW literature to crew members while Becerra was present and was wearing a UFW button at the time Becerra inspected her table. Thus, there was reason for Becerra to have made his remark. Amarallas, in testifying about Becerra's Chavista remark was testifying adversely to Respondent's interests. As a current employee, such testimony is entitled to added weight.[65]

64 . Martori Brothers Distributors v. Agricultural Labor Relations Board, supra.

65. Georgia Pug (1961) 131 NLRB 1304, fr.. 2; Gifford & Hill Co., Inc. (1971) 198 NLRB 337, 344.

Moreover it cannot be argued that she has an interest in the outcome of the Popoy charge. Finally, I found her to be a straightforward and believable witness. Therefore, I conclude that Becerra did tell Ernie Popoy to issue the "Chavista" Araarallas a warning notice. Since there is no evidence a warning notice was issued, it follows that Popoy refused to do so. Issuance of the notice for the cited reason would have violated Amarallas’ section 1152 rights. Thus, General Counsel has made a prima facie case that Ernie Popoys' discharge violated section 1153(a) under the refusal to commit an unfair labor practice exception set forth in Ruline. [66/]

We turn now to Respondent's business justification for Popoy's discharge. Certain facts are uncontroverted: Popoy's crew had to repack a substantial number of grapes both the first and second days of the 1982 harvest; the day following the Popoys discharge, a new foreman was placed over the crew and no repacking was required; repacking may result in downgrading of the grapes and an accompanying loss of revenue. However, these facts do not suffice to explain Becerra's failure to instruct Popoy to issue warning notices to packers other than Amarillas when he discovered during the course of his inspection that their boxes contained unsatisfactory grapes. His disparate reaction to their unsatisfactory work vis-a-vis his reaction to Amarallas' work supports the inference that he was motivated to make an example of

---

66. In reaching this conclusion primary reliance has been placed upon Amarillas' testimony. Respondent asserts the Popoys' interest in the outcome of the litigation is reason to view their testimony with suspicion. The observation is appropriate; however, Respondent's assertion that Becerra was a disinterested witness is unpalatable and not accepted.

her as a union activist and that he initiated Popoy's discharge for failing to go along. While it appears that Major rather than Becerra made the decision to terminate Popoy and may have made that determination without knowledge of the interaction between Becerra and Popoy, Respondent has not established by a preponderance of the evidence that the discharge would have occurred but for Popoy's refusal to do as Becerra directed. There is no evidence that prior to the Amarillas incident Popoy was on the brink of discharge or that his discharge was in the works. It followed hard upon that incident, and its timing suggests Respondent's business justification for the termination is pretextual.

For all of the above reasons, I conclude that Respondent's discharge o£ Ernie Popoy violated section ll53(a).

Yolanda Popoy

The parties stipulated that Yoland Popoy at the tine of her discharge was not a statutory supervisor. As a rank and file employee she would appear to be subject to the disciplinary policy described above. Her discharge was not consistent with that policy. She had not received the requisite number of warning notices during the 1982 harvest to warrant discharge. Recognizing this, Respondent argues that as *a* second foreman, Yoland had certain supervisory functions which permitted disciplinary action without reference to its policies.[67/] This argument is not persuasive.

The record does not contain sufficient evidence regarding the duties of second foremen to conclude that disciplinary policies

---

67. As noted by Respondent there is no credible evidence Yolanda engaged in union or protected concerted activity.

applicable to all employees are not appropriately applied to then. While there would be nothing inherently illicit in establishing different disciplinary standards to apply to second foremen, there is no evidence Respondent had done so.

As suggested by Respondent, Lucas considered Yolanda and Ernie Popoy a team and her discharge must stand or fall on the propriety of Ernie's discharge. Having found Ernie's discharge violative of the Act, I conclude that Yolanda was terminated because her husband refused to commit an unfair labor practice and that her termination violated section 1153(a).[68/]

(4) Rogelio Terado and Taide Terado

Paragraph 6(f) of the complaint alleges that Respondent discharged Rogelio Terado and Taide Terado on or about October 7, 1982, for their union and protected concerted activities.

(A) Summary of the Facts

October 7, 1982

About 11:00 a.m. de Ramos gathered Estrala's crew together and told the pickers that he wanted them to place identifying marks on their boxes. This was the first occasion such an instruction had been issued to Estrala's crew. Thereafter, Taide and her group marked their boxes by writing the picker's name on a discarded paper cup. The group picked five boxes which were not marked because the group was picking into a common box. Taide said she was undecided how the box should be marked.

After meeting with Estrala's crew, de Ramos made his

68. Anton Caratan & Sons (1982) 3 ALRB No. 83

customary rounds and revisited the crew sometime after lunch. He inspected grapes at various packers' tables. When he reached the Andrea Fernandez table, he found unidentified boxes.[69/] De Ramos called the group together and asked why the boxes weren't marked. When no one responded, de Ramos asked who was prepared to be responsible in the future for marking the boxes; Taide responded that she would do so.

About 3:00 p.m. the afternoon he was discharged, Rogelio Terado and the members of his group met with de Ramos at their packing table.[70/] De Ramos asked Terado and the other picker how they marked their boxes. Rogelio said he placed a leaf on his boxes. De Ramos did not respond. Rogelio returned to work and continued to use a leaf to mark his boxes.

/

/

/

/

/

/

/

/

69. Taide Terado and Rodolpho Terado were pickers in the Fernandez group.

70. Testimony of Rogelio Terado. (TR. IV:4-R.)

When De Ramos finished checking the tables, he told Estrala "that those people is (sic) to be terminated because they are not doing what they are supposed to do. They are supposed to be marking, and I don't want them to be working."[71] He asked Estrala what had happened at Andrea's table (the first table with unmarked boxes); Estrala responded, "They didn't say nothing, they didn't say nothing, so I said okay."[72] De Ramos told Estrala that Taide and Rogelio had to be stopped for not marking the boxes as they were directed. De Ramos testified he learned from Taide's husband, Rodolpho, that she was the member of her group responsible for marking the boxes and that this was his reason for singling out Taide rather than another member of her group for discipline.

The boxes at the Galindo and Fernandez tables were the only-unmarked boxes discovered by de Ramos in the Estrala crew. Taide and Rogelio were the only persons in Estrala's crew terminated for failure to mark. Two employees in Ernie Camacho's crew were also fired on October 7 for failing to mark their boxes; they were rehired a few days later.

Elena Alvarado, a picker in Estrala's crew testified to a conversation with de Ramos regarding the failure of her group to mark its boxes. When asked why her group had not marked its boxes, Alvarado responded that the company should supply marking materials if it wanted the boxes marked. When de Ramos told her to use a stick, leaf or piece of paper, she said this was not really marking.

---

71. TR. VI:52.

72. Ibid.

Later that afternoon when the packer received a pencil and some paper cups, the group marked its boxes.[73/] De Ramos had no recollection of having a conversation with Alvarado on the 7th. He later denied that Alvarado told him that she was not going to mark her boxes because the company provided no marking materials.[74/]

Rogelio and Taide were reinstated after being off two days. According to de Ramos, Mendez related to him that neither Rogelio nor Taide intended to disobey his orders, but rather had forgotten to mark the boxes which he discovered and that they had earlier been marking their boxes.

Both Terados reported for work the day following their discharge, but Estrala did not permit then to work. He told them to wait for Mendez. When Mendez arrived about 8:00 a.m., Mendez said he would talk to de Ramos. Rogelio and Taide met with Mendez later that day at his office; he told them he had convinced de Ramos to reinstate them.

(B) Union Activity

Rogelio testified he began wearing a UFW button to work about a week prior to his discharge. He and Margarita, his packer, were wearing buttons the day of his discharge. Other packers in Estrala's crew were also wearing buttons.[76/]

---

73. TR. 111:72-74.

74. TR. VI:53.

75. TR. VI:54.

76. Rogelio testified that a picker named Elena also wore a UFW button.

Taide testified that she's a member of the UFW and that she began wearing a UFW button to work about the end of August 1992. She wore the button a minimum of 3 times a week.

During the 1982 harvest, she had a "we want a contract" bumper sticker on the ice container she brought to work every day.
She also testified to a conversation with de Ramos sometime around the end of September during the course of which she asked when the contract was going to be signed now that the UFW had been certified. She testified that de Ramos responded "never."

(C) Analysis and Conclusions

The evidence establishes minimal union activity by Rogelio Terado commencing about a week before his discharge; his activity (wearing a UFW button to work) was not unique in Estrala's crew. Taide Terado also wore a UFW button to work and manifested her interest in the UFW on one occasion by asking de Ramos when Lucas was going to sign a contract.

The evidence also establishes that Respondent has a policy of terminating employees for insubordination even though the employee has no prior written warning notices.[77]

Here, the issue is whether General Counsel has established by a preponderance of the evidence the requisite causal connection between union activity and disciplinary action to find a violation of section 1153(c). General Counsel's argument regarding causation runs as follows: both Teradcs commenced openly manifested support of the UFW shortly before they were terminated; perceiving them as

77. G.C. Ex. No. 5.

potential disturbing influences, de Ramos ordered Estrala's crew to mark its boxes and utilized the Terados failure to follow his orders as an excuse to terminate them.

This argument is not persuasive. The Terados did not conform to de Ramo's directive and were perceived as insubordinate. They were accorded the same treatment as two members of Camacho's crew who failed to mark their boxes and with respect to whom there is no evidence of union activity. Moreover, it is likely that Elena Alvarado is the Elena whom Rogelio saw wearing a union button, and she was not disciplined for failing to mark her boxes. General Counsel has failed to prove by a preponderance of the evidence that animus toward the UFW contributed to its decision to terminate the Terados.[78/]

I recommend that the allegations of Paragraph 6(f) be dismissed.

VI. INDEPENDENT VIOLATIONS OF SECTION 1153(a)

(1) Harassment of Alma Fuentes

Paragraph 6(e) of the complaint was amended to allege that Respondent violated section 1153(a) by harassing Alma Fuentes because she testified against Respondent in an earlier proceeding and because she engaged in union and protected activities. Said conduct is alleged to have occurred on or about September 16,

78. In reaching this conclusion no weight has been given to the fact that the Terados' discharge was reduced to a disciplinary suspension without pay when Respondent purportedly learned their failure to mark was not deliberate. The modification of the discipline manifests only recognition that discharge was an inappropriate discipline for unintentional failure to follow orders. The issue may more properly be stated in terms of whether the two-day suspension imposed October 7th violated the Act.

1982.[79/]

(A) Summary of the Facts

Fuentes is *a* current employee of Respondent; she was not working at the time of the hearing. During the 1982 harvest season she was a packer in Ernesto Camacho's crew. De Ramos was her supervisor. She has been a union activist for some period of time. In an earlier case involving Respondent, Fuentes was reinstated with back pay when the Board found Lucas violated sections 1153(a) and (d) by refusing to recall her in 1979.[80/]

At the outset of the 1982 harvest, Fuentes and two other packers (Ramirez and Baez) adopted the practice of pasting UFW bumper stickers on discarded grape box lids and displaying those stickers from their packing tables. Fuentes foreman, Camacho, testified he saw the stickers on the opening day of the harvest. He did not suggest to the workers that the practice violated any company policy. Fuentes testified that both Mendez and de Ramos observed her bumper sticker well before September 16th. Her testimony on this point is not credible. With regard to Mendez, she testified he saw the sticker during the course of inspecting grapes at her table. This testimony is implausible. Mendez is Respondent's personnel manager; he does not go to the field and

79. At the close of General Counsel's case, counsel deleted from Paragraph 6(e) an allegation that Fuentes was threatened with discharge.

80. George A. Lucas & Sons (1981) 7 ALRB No. 47. Fuentes has testified in a total of four ALRB cases in which Lucas was respondent.

inspect the grapes.[81/] De Ramos denied seeing the stickers the opening day of the harvest. He testified he first saw them sometime in August or September. It is unclear that the first occasion he observed the stickers was September 11; however, the promptness with which he contacted Mendez after seeing them on the 11th leads me to conclude that the 11th was the first time he saw them.

During the course of work on September 10, Fuentes heard a radio announcement declaring the UFW had been certified as bargaining representative for Lucas employees. Fuentes commented to Camacho:

> [W]e had one (sic) and that now we were going to have the benefits that we were going to want and that he, too, was going to enjoy those benefits for which we had fought and for which he had not.[82/]

Around 11:00 the following day, Mendez, de Ramos and Camacho met with the Fuentes, Ramirez, and 3aez groups. Mendez reminded the employees of the company rules against destroying company property and told them there should be no labels placed on the table.[83/] Mendez told the workers he was having the stickers removed and that he was issuing an oral reprimand for this first offense. He said he had told us that Lucas policy prohibited

81. TR. I:72. Testimony of Henry Mendez. While Mendez was not generally an impressive witness, having a poor recollection of certain events and evasive with regard to some areas about which he was questioned, his testimony on this point is credited. Therefore, I conclude he hadn't seen the stickers before September 11.

82. TR. I:114.

83. Neither de Ramos nor Camacho said anything. The term labels refers to the "we want a contract" bumper stickers.

placing any posters or bumper stickers on company property, and if we continued to do so, he would give us a ticket. Mendez said it 847 was all right to put the stickers on their own property.[84/]

Mendez told Camacho to remove the labels; Fuentes told Camacho to wait; she told Mendez to remove the bumper stickers. Mendez reiterated his instruction to Camacho, Fuentes then proceeded to remove the offending box tops.—Camacho then burned the box lids.[86/]

On the days following this incident, Fuentes and others attached bumper stickers to their lunch pails and stereos. Fuentes testified that Camacho tore a bumper sticker from her stereo.[87/]

Four days later, Mendez gave Fuentes a warning notice for her continued use of bumper stickers.[88/] Fuentes denied she had stickers attached to box lids the second time Mendez confronted her.

---

84. Testimony of Baez. The testimony of foreman Camacho regarding this portion of the meeting is consistent with that of Baez.

35. Mendez testified that when he refused to remove the sticker as requested by Fuentes, she removed it herself. Mendez' testimony is corroborated by that of Camacho who also testified Fuentes removed the lid from her table, stating it was her property.

36. Baez corroborates Fuentes' testimony on this point. Camacho did not deny burning the box lids; however, he was unsure whether it was done before or after Mendez and de Ramos departed . The lids together with other trash are customarily burned at the err of the work day.

87. Fuentes testimony on this point was not corroborated. Camacho denied ever prohibiting any employee from putting any sort of sticker on his personal property. He also denied he had been instructed to prohibit employees from so doing.

88. This was the first occasion on which Fuentes had been disciplined by Respondent. The notice is dated September 20, 1982, and was issued to Alma, Petra, Ricardo Sr. and Ricardo Fuentes, Jr.

She testified they were on her lunch box, her radio and an ice box.[89/] Camacho denied the sticker was placed on a carton which Fuentes was using as a lunch box; he testified that the Fuentes table was the only one with stickers on box lids on this second occasion. Fuentes testified that the Baez and Ramirez tables also contained stickers but that no action was taken against either packer.[90/]

Fuentes testified that before Mendez arrived, Camachoalerted her that he was being pushed against his wishes to issue her a warning ticket over the use of bumper stickers.[91/] When she was given the ticket, Fuentes insisted it be signed by Mendez rather than by Camacho; however, Mendez declined to oblige. Fuentes admitted that damaged box lids are sometimes used to show which rows belong to a particular packing table and are sometimes used by a checker to keep his records.

(3) Union Activity

Sometime during October 19R2, following the afternoon break, while Fuentes was working at her packing table, she had a conversation with Mendez regarding her participation in UFW radio broadcasts. Fuentes denied such participation and then asked Mendez

---

89. TR I: 134-135.

90. Fuentes testimony on this point was not corroborated. Baez testified, but she was not questioned by General Counsel about her use of bumper stickers on box lids following the date of the oral reprimand. She was questioned about the events surrounding the oral reprimand. The failure to question her about her use of stickers following the 11th warrants the inference she ceased posting them on box lids. Thus, "Fuentes is not credited on this point, and Camacho is credited.

91. Camacho denied this conversation.

why he "was such a hypocrite." She told him she knew he was there to break the union, and when Mendez protested that he was a friend to all the workers, Fuentes responded, "That kind of friend we do not need."

During the 1982 harvest, Fuentes distributed UFW meeting notices as well as copies of the UFW newspaper. Such distribution occurred during the lunch break and sometimes before the commencement of work. Camacho was present at the lunch break distributions.

Fuentes also participated in a mid-May 1982 wage increase meeting at the Lucas shop. There were 250-300 workers present. Major, de Ramos, Becerra and Lucas Sr. were present. Fuentes testified that her co-workers told her to go into the office and tell Lucas and Major that the employees wished to sneak to them. She went into the office and relayed the message to Major; he said he would deal with the problem.[92/]

When Fuentes and Major emerged from the office, Major told the assembled employees that he wanted to speak only to one person and that any complaints should be submitted to him through that person. Fuentes characterized herself as spokesperson for the group.[93/] Fuentes testified she was selected by a majority of the employees present to act as the spokesperson.

---

92. De Ramos, Becerra and Elisio Herrera were also present. Fuentes testimony on cross-examination was inconsistent. She testified she did not go into the office and had no conversation with Major until he came out of his office to speak to the people.

93. Major does not speak Spanish. Fuentes is conversant in English and admitted to no difficulty in understanding what Major had to say. She has, on occasion, acted as an interpreter in. conversations between workers and management personnel.

During the course of the meeting, Major solicited information from the workers regarding who had given wage increases and the amount of the increases granted. About two days after the meeting, Lucas employees received *a* wage increase. No one was disciplined for participation in the meeting.

(C) Analysis and Conclusions

The Board in C. J. Maggio rejected the ALO's finding that placing union emblems, flags or banners on company vehicles or other company property was protected activity.[94/] This proposition was reaffirmed in Paul N. Rertuccio (1982) 8 ALRB No. 39.

A look at the facts of Maggio is instructive. A crew member placed a UFW flag upon the rear of the company's stitcher truck. When the supervisor arrived a few minutes later, he told the crew it could not work unless the flag was removed, a position subsequently reiterated by another supervisor and by the company's general manager. The flag was removed and returned to the crew; truck was returned to the yard; and the crew went home. About three weeks later the flag reappeared and was again affixed to the stitcher truck, When no on removed it, the supervisor ordered that the truck be returned to the yard, and the crew was laid off.

There was no evidence the company had previously permitted employees to use company property to display union or any other materials.

94. (1980) 6 ALRB No. 62.

> Respondent [Maggio] was under no duty to allow the flag to be attached to, or to remain on, the truck and did not act improperly by disciplining the crew ... or by terminating [an employee] for his second violation of a company rule. (Supra, slip op. p. 4.)

In Paul W. Bertuccio,[95/] the Board held the unauthorized placement or display of union flags in an employer's field to be unprotected activity and dismissed the allegation even in a context in which it found Bertuccio had committed other violations of the Act.

Against this backdrop, we turn to examine the instant case. While the company property on which Fuentes and others affixed union. materials consisted of box lids which were customarily discarded, the lids were none the less company property. The fact that they may have been unusable for their primary purpose does not mean they ceased to be Respondent's property. No argument is made to the contrary; rather the argument is that because Respondent had no further use for the tops, its motive for imposing discipline for their use was interference with section 1152 rights, i.e. a manifestation of Respondent's union animus.

Thus, we start with the proposition that the box lids were company property, that union materials were affixed to this property and that those lids were hanging from packers tables, also company property. Conceptually the factual situation here is indistinguishable from that in Maggio or Bertuccio. In each instance the employer resisted and imposed discipline for employee conduct beyond the scope of section 1152. To do so does not violate

---

95. (1982) 3 ALRB No. 39.

section 1153(a). Nor in the instant case can it be said that the written warning issued Fuentes on the 16th manifests an animus supportive of a finding that Respondent violated section 1153(d). Of those initially reprimanded for use of bumper stickers, only Fuentes persisted in their use. Have done so, she received the previously announced discipline. Respondent did not discriminate against Fuentes in issuing her a warning notice; she was not treated disparately; on September 16th she was the sole violator of the company rule.

I recommend the allegations of Paragraph 6(e) be dismissed.

(2) Harassment of Ruiz, Hernardez and Tirado

Paragraph 6(c) of the complaint alleges that Respondent, on June 24, 1982, harassed Heracilio Hernandez, Alonzo Ruiz and Francisco Tirado because of their union and concerted activities.

(A) Summary of the Facts

Ruiz testified as follows regarding events on the afternoon of June 24th. Hernandez, Tirade and he were at the water can when de Ramos arrived at 2:13. When they got to the water can, each obtained a drinking cup and proceeded to obtain water. Tirade's CUP was unglued at the botton so he threw it away and got another. "[T]hat instant Rolando stopped him and he came over and told Lalo [Cardenas] to give us a ticket."[96/] They had been at the water can two minutes when de Ramos gave them, a ticket. When they heard de Ramos tell Cardenas to ticket them, they went to talk to

96. TR II:23

him.[97/] When they asked why they were getting tickets, de Ramos departed to obtain some warning tickets.

During the period -de Ramos was gone, Ruiz testified he saw four workers sitting by the water can throwing grapes at each other and laughing. They continued this activity for eight minutes. Cardenas was sitting in his pickup the entire time.[98/] One of the four workers was Cardenas' son. General Counsel's witness Mario Moreno Romo (Moreno) corroborated this portion of Ruiz' testimony. Moreno currently works in the same crew with Ruiz. While he sees Ruiz on a daily basis, he denied having discussed Ruiz's testimony with him.[99/]

When de Ramos returned, Ruiz, Tirado and Hernandez came from the field and asked why they received warning notices. ^e Ramos said he had seen them playing and throwing cups. Ruiz denied this was true. De Ramos responded that he was giving them a ticket, and if they objected they should go to the ALRB. He got out of his

---

97. Ruiz offered no testimony regarding the content of this conversation; de Ramos denied any conversation with Ruiz, Tirado or Hernandez at this point in time. Neither Tirado nor Hernandez testified. Ruiz' testimony regarding a conversation with de Ramos at 2:20 p.m. is not credited; it is confused and inconsistent.

98. Cardenas denied seeing any workers other than Ruiz, Tirado and Hernandez sitting on the trailer drinking water. Cardenas was not a credible witness. His recollection of events was bad and his testimony was vague.

99. I do not credit this denial. It is unlikely that having daily contact with Ruiz during the course of the hearing, he would not have discussed the case and more particularly Ruiz's testimony.

pickup and began to swear at them.[100/]

De Ramos' testimony regarding the events of June 24, 1982, was as follows. As part of his regular rounds, he arrived at the site of the Cardenas crew sometime after lunch.[101/] he stopped about twenty feet from Cardenas' pick-up and remained sitting in his pickup watching three men at the water can. Two were facing each other and the third was leaning on a gondola attached as a trailer to Cardenas' pickup. After observing the men for approximately five minutes, de Ramos honked his horn to summon Cardenas. When Cardenas arrived, de Ramos got out of his pickup and told him the three men were fooling around at the water can. Cardenas agreed.[102/] De Ramos said they should be given a ticket; he prepared the ticket because Cardenas does not write English. While Cardenas and de Ramos were talking, Ruiz, Hernandez and Tirado returned to work. When de Ramos finished writing the tickets, he departed. He denies having any conversation with the three workers at this point in time. He concedes this was the first occasion on which he issued a warning notice for "fooling around" at the can. However, he has issued warnings to other employees for not working.

De Ramos returned to the Cardenas crew forty-five minutes to an hour later. The three workers came from the field and asked

---

100. Ruiz's testimony was not corroborated by Tirade or Hernandez. De Ramos denied making such a statement and denied swearing at them. He testified one of the three said something about going to the ALRB.

101. The crew was planting on the de Georgio Ranch.

102. Cardenas testified he saw the three men in the vicinity of the water can for 8 to 10 minutes, and they were "vacillating."

why they had received a ticket. De Ramos responded that they were fooling around. One of them said they would go to the ALRB.

(3) Union Activity

Beginning in May 1982, Ruiz wore UFW buttons to work; he also distributed UFW meeting notices and the UFW newspaper during the lunch break, but he did not recall seeing either Cardenas or de Ramos on those occasions[103/] Cardenas takes lunch daily along with the crew. Cardenas admitted seeing Ruiz wearing *a* UFW button but denied seeing him distribute the union newspaper. He also admitted seeing Tirado wearing a UFW button during 1932.

One or two days before Ruiz received his warning notice, he confronted de Ramos regarding the failure of the company to supply ice for the drinking water. Ruiz testified the conversation occurred in the presence of Tirado, Hernandez and Alfonso Alvarado, none of whom testified. De Ramos had no recollection of the conversation. At some point later, de Ramos told Ruiz he had asked a stupid question.

Ruiz testified he was continually asking any foreman or supervisor with whom he had contact when the workers were going to get a raise. He recalled one specific conversation in which he asked de Ramos about a raise. He placed the conversation about two weeks before receiving the warning notice. De Ramos had no recollection of this conversation.

---

103. Ruiz testified that Tirado and Hernandez, as well as a lot of other workers, wore UFW buttons to work during this period. Other workers also distributed the newspapers and leaflets.

(C) Analysis and Conclusions

General Counsel contends that Respondent discriminatorily interfered with the recognized right of its workers to take a break for the prupose of getting a drink of water; that its conduct violated section 1153(c) in that it constituted discrimination with regard to a condition of employment and that its conduct also violated section 1153(a) in that it interfered with, restrained or coerced employees in the exercise of their section 1152 rights. To find the violation alleged it is necessary to credit almost in its entirety the uncorrborated testimony of General Counsel's witness Alonzo Ruiz; only if that testimony be credited will it be necessary to determine whether any vioaltion of the Act was established.

Of the three persons issued warning notices the afternoon of June 24, 19S2, only Ruiz testified. No explanation was offered by General Counsel for the failure of Tirado and Hernandez to testify. The absence of explanation permits drawing the inference their testimony would not have corroborated that of Ruiz.[104/] Although corroboration is not essential to establish a violation of the Act, when the testimony of General Counsel's witness has beer, contradicted in respects crucial to establishing discriminatory motivation, the failure to explain why corroboration was not offered permits an inference that Ruiz[1] testimony regarding his conduct on the 24th would not have been corroborated and is not credible. This conclusion is buttressed by Ruiz's demeanor while testifying; he did

---

104. America Chain Link Fence Co. (19S1) 255 NLRB 692; Castle Instant Maintenance/Maid (1981) 256 NLRB 130.

not impress me as a candid and truthful witness.

General Counsel's evidence is that Ruiz and friends were at the water can for two minutes and, for that conduct, were issued warning notices. De Ramos rebutted his evidence, testifying he observed the men at the water can for at least five minutes before calling Cardenas from the field and stating that warning notices should be issued. Faced with this direct conflict in testimony, in the absence of corroborating evidence to support Ruiz' version, it is appropriate to credit de Ramos and to find that Ruiz and friends spent at least five minutes at the water can.[105]

Adoption of the foregoing finding suggests the notices were issued for cause and that the allegation should be dismissed. However, General Counsel argues the stated reason for Respondent's action was pretextual and was in fact illicitly motivated. De Ramos' admission that he had never previously issued a warning notice for fooling around at a water can is cited as a basis for inferring discriminatory motive. General Counsel's reliance is misplaced; there is no evidence de Ramos ever previously had occasion to observe such conduct. Moreover, de Ramos testified credibly that he had on prior occasions issued notices to employees for not working, the same offense for which Ruiz, Hernandez and Tirado were disciplined.

General Counsel also urges the timing of the discipline vis-a-vis Ruiz' questioning de Ramos regarding furnishing ice water

105. S. Kuramura (1977) 3 ALRB No. 49, slip op. p. 16; Desert Harvest Company (1979) 5 ALRB No. 25, slip op. p. 2; Arakelian Farms (1983) 9 ALRB No. 25, slip op. p. 9; Broadmoor Lumber Co. (1977) 227 NLRB 1123.

as evidence of discriminatory motive. Assuming, as Ruiz testified, there was an interchange between him and de Ramos a day or two before June 14th, and assuming Ruiz' question was protected concerted activity, he was not thereby insulated from disciplinary action.[106/] There is no evidence de Ramos was on other than his regular rounds when he spotted Ruiz and friends goofing off, while one might suspect he seized upon this opportunity to effect minor disciplinary action, suspicion does not suffice to establish a violation of the Act.[107/]

Finally, General Counsel argues disparate treatment of Ruiz et al . as manifesting illicit motivation. While Ruiz and Moreno are credited regarding the conduct at the water can of the four members of their crew, conduct as egregious as that of Ruiz and friends, there is no evidence de Ramos observed the other four workers goofing off; thus, his failure to issue warning notice to them cannot be characterized as disparate treatment.

For all the foregoing reasons, I conclude General Counsel failed to prove the allegations of Paragraph 6(c) and, therefore, recommend that said allegations be dismissed.

VII : UNILATERAL CHANGE IN WORKING CONDITION

Paragraph 6(b) alleges that since June 1982, Respondent has unilaterally changed its disciplinary system without notice to, or bargaining with, the UFW. At the close of General Counsel's case, Respondent moved to dismiss Paragrpah 6(b). The motion was granted

---

106. Martori Brothers Distributors, supra.

107. Rod McLellan Company (1977) 3 ALRB No. 71.

on the erroneous ground that as of June 1932 Respondent had no duty to bargain with the union.[108/] That ruling is hereby reversed. In their briefs both parties either overlooked the action taken or recognized its patent error and argued the allegation fully. Thus, no prejudice was incurred.

General Counsel contends Respondent unlawfully modified its disciplinary policies in two respects: (1) increasing the number of warning notices issued and (2) eliminating an oral warning as the initial step in its progressive disciplinary policy.

In support of its first contention General Counsel cites testimony of Ernie and Yolanda Popoy. Mr. Popoy testified he had a conversation with Mendez on August 12, 1982, during the course of which Mendez told him to issue more tickets if the worker did something wrong. Later that same day, Mendez gave him instructions with regard to how the notices should be prepared. Ernie Popoy further testified that his supervisor -- Becerra -- told him "to give more tickets to the people what (sic) they do wrong."[109/]
Following his discharge Popoy and Camacho had a conversation daring which Camacho purportedly told Popoy he was getting too much

108. The representation election was held June 2, 19R1; certification issued September 10, 19P2. Sundstrund Heat Transfer, Inc. v. N.L.R.B. (7th Cir. 1976) 538 F.2d 1257; and Highland Ranch v. A.L.R.B. (1981) 29 Cal.3d 348, make clear the proposition that an employer is not free to make unilateral changes in working conditions with impunity during the pendency of election objections. Such changes are at the employer's peril and if there is a subsequent certification, the employer can be held to have committed an unfair labor practice.

109. TR. III:18. Yolanda Popoy was also present. She testified Recerra said he wanted them to issue tickets for "any little thing" the workers did.

pressure to issue more tickets.[110/] Camacho denied making such a statement.[111/]

In actual numbers more disciplinary notices were issued from June through November 1982 than during the comparable period in 1981, 106 as opposed to 85. However, Respondent points out that the average number of employees per month during 1982 was 497 as opposed to 360 for the comparable period in 1981. Respondent states the work force was 28% larger on the average during 1982 (my calculations show the percentage increase to be 38%). The percentage increase in warning notices from 1981 to 1982 was approximately 25%. Thus, it would appear that, considering the increase in work force size, Respondent did not increase the number of warning notices issued. It is a comparison of the number of warning notices issued relative to work force size which is significant rather than the absolute numbers. General Counsel has failed to prove that Respondent, relatively speaking, modified its disciplinary policy by issuing no re notices.

General Counsel's second argument regarding disciplinary policy modification is that issuance of an oral warning as the first step of the process was abandoned in 1982. Certainly, this was the case with respect to the notices issued Ruiz, Tirado and Rodriguez. Nor does it appear that Pacheco received an oral warning before receiving his initial written warning ticket. Given the fact there were 105 written warnings issued during the 1982 harvest season and

---

110. TR. III:20.

111. TR. VII:13.

the absence of evidence from which to conclude that the recipients of those notices, other than those noted here, did not initially receive oral reprimands, the limited departure from Respondent's policy evidenced in the record suggest aberrations rather than modification of Respondent's disciplinary policy. Those aberrations have been considered in determining whether Respondent committed other alleged violations of the Act.

In sum, I find that General Counsel has failed to prove the allegations of Paragraph 6(b) and recommend that those allegations be dismissed.

VIII. The Remedy

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Sections 1153(a) and (c) of the. Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Ernie Popoy, Yolanda Popoy and Francisco Pacheco Sandoval, I recommend that Respondent be ordered to offer them immediate and full reinstatement to their former jobs if it has not already done so, without prejudice to seniority, or other rights and privileges. I further recommend that Respondent make Ernie Popoy, Yolanda Popoy and each of them whole for any losses suffered as a result of its unlawful discriminatory action by payment to each of a sum of money equal to the wages and other benefits which would have been, earned by each from August 13, 19.82, to the date on which they are reinstated, or offered reinstatement; that Respondent make Francisco

Pacheco Sandoval whole for any losses suffered as a result of its unlawful discriminatory action by payment to him of a sum of money equal to the wages and other benefits he would have earned from October 18, 1982, to the date on which he is offered reinstatement or reinstated. Such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB Mo. 55.

In order to further effectuate the purposes of the Act and to insure to the employees the enjoyment of the rights guaranteed to them in section 1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act, and it has been ordered not to engage in future violations of the Act.

Upon, the basis of the entire record, the findings of fact and conclusions of law, and pursuant to section 116n.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, George Lucas and Sons, its officers, agents and representatives shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the UFW or any other labor organization by discharging any of its agricultural employees for participating in protected concerted or union activities.

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

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

(a) Make whole each of the agricultural employees discriminatorily discharged, for any losses he or she suffered as a result of his or her discharge by payment to each of them a sum of money equal to the wages lost, less their respective net interim earnings, together with interest thereon at a rate consistent with the Board's Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

(c) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Post copies of the attached Notice in conspicuous places on its property for a 90-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(e) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of this decision.

(f) Mail copies of the attached Notice in all appropriate languages within 30 days of the date of issuance of the

Order to all employees employed by Respondent in the Delano area in 1982.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity outside the presence of supervisors and management, to answer any questions 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 non-hourly wage employees to compensate them for time lost at this reading and 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 which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing or further actions taken to comply with this Order.

(i) Offer to Ernie Popoy, Yolanda Popoy and Francisco Pacheco Sandoval immediate and full reinstatement to his or her former job at Respondent's Delano operations without prejudice to his or her seniority or other rights and privileges.

It is further recommended that the remaining allegations in the complaint as amended be dismissed.

DATED: February 9, 1984

ROBERT LE PROHN
Administrative Law Judge

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join, or help any union;
3. To bargain as a group and to choose anyone they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect each other; and
5. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT discharge or otherwise discriminate against any employee because he or she has exercised any of these rights.

WE WILL offer Ernie Popoy, Yolanda Popoy and Francisco Pacheco Sandoval their old jobs back if they want them, and will pay them any money they lost because we discharged them unlawfully.

DATED: GEORGE LUCAS & SONS

By: ______________________________
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.