Arroyo Grande, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CLASSEN MUSHROOMS, INC., Respondent, and INTERNATIONAL UNION OF AGRICULTURAL WORKERS, Charging Party.	)	Case No. 84-CE-12-OX 12 ALRB No. 13

DECISION AND ORDER

On April 29, 1985, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision in this matter. Thereafter, General Counsel timely filed exceptions to the ALJ's Decision with a supporting brief.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.[2/]

The Board has considered the record and the attached decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the ALJ as modified herein.[3/] General Counsel excepts to the ALJ's finding that

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

[2/] The signatures of Board Members in all Board Decisions appear with the signature of the chairperson first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

[3/] As our Order indicates, we affirm all the other findings of the ALJ which have not been excepted to by any party.

Respondent did not terminate Jorge Iriarte in violation of Labor Code section 1153(c). We conclude the exception has merit. Jorge Iriarte worked for Respondent from the beginning of March until May 9, 1984, when he was terminated, ostensibly for insubordination. Iriarte worked first as a picker, then as a box carrier and resumed picking shortly before his discharge. During his final picking stint, Iriarte became concerned that Respondent was not adequately compensating the workers for the number of boxes they picked. When he discussed the question of "the missing boxes" with other employees, their talk turned to bringing in a union to prevent the company from "robbing" them. As a result, a petition "to call" the Union was circulated. Iriarte signed the petition at the request of Victoria Benitez, one of Respondent's supervisors, the day before he was terminated.

Later that day, Iriarte worked with Benitez and, while working, they discussed the Union. Iriarte recalled commenting that he hoped "whoever had signed [the petition] would not back out;" "that the union was good . . . we had to call them;" and "that [the union would provide] better benefits." As they were speaking, supervisor Tony Gomez was within five to ten feet of them. Iriarte testified without objection that Gomez overheard them; he also testified without contradiction that, when he reported to work the next morning, Gomez told him "if [he] wanted to continue working there please not to mention the union."

It is undisputed that Iriarte was forced to work alone that morning because the company had previously terminated Benitez. According to Iriarte, sometime between 10 and 11 a.m., when he was

picking mushrooms in the bottom bins, Gomez told him to pick the top. Iriarte told him that as soon as he finished the bottom he would start on the top.[4/] When Gomez returned shortly afterwards and Iriarte was still picking the bottom, Gomez told him "he didn't have a job anymore because [he] didn't understand orders."

Although commenting specifically on Gomez' general lack of credibility, the ALJ also refused to credit Iriarte on the grounds that he had presented *a* "sanitized" version of the incident with Gomez because he failed to admit, as Gomez would later testify, that he had challenged Gomez to fight. For the reasons stated below, even assuming Iriarte challenged Gomez to a fight, we find Iriarte's discharge to be unlawful.

Gomez testimony is highly confusing. When he first testified, he said that he fired Iriarte because he would not do the work as he was told to do it. He did not initially mention what it was Iriarte had failed or refused to do,[5/] and it is not clear exactly when he fired Iriarte. Although on cross-examination he would testify that he asked Iriarte to go to the office to fix things up, when pressed by General Counsel he emphatically testified that he fired Iriarte on the spot--"right then at the moment when he was picking I terminated him. I told him, 'If you don't do the

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[4/] General Counsel elicited testimony from Iriarte that in order to pick the top beds, Iriarte would have to move a heavy scaffold by himself.

[5/] In cross-examination, Gomez admitted he never had trouble with Iriarte's following instructions before, but he testified that on the day he fired him, Iriarte had to be told six or seven times he was doing the work wrong, leaving a lot of mushrooms falling on the beds.

work like I tell you, you can't work here.'" Thus, it appears that Iriarte only challenged Gomez to fight after he was fired for not doing as he was told. Another employee, Teresa Ortiz, corroborated Gomez' account that, after the men left the picking room, Iriarte challenged him to fight.

Under Wright Line (1980) 251 NLRB 1082 [105 LRRM 1169], the General Counsel has the initial burden of presenting evidence supporting the inference that protected conduct was a motivating factor in Respondent's decision to discharge Iriarte. General Counsel met this burden. In this connection, we have in mind not only the other findings of unfair labor practices made in this case (and not excepted to by Respondent), but also the timing of the discharge in relation to Iriarte's union activity, the lack of any previous problems with Iriarte's work and Gomez' statement to Iriarte to keep quiet about the Union if he wanted to continue working. Although the ALJ credited Iriarte's testimony that Gomez made such a statement--and even found a section 1153(a) violation in its utterance--he declined to treat it as a significant factor in determining Gomez' motive during the incident in question. Given the timing of the statement, however, we find it sufficient to support General Counsel's prima facie case.

The burden then shifted to Respondent to prove that it would have discharged Iriarte even in the absence of his union activities. It is not clear from the ALJ's analysis what it was that he regarded as insubordination: what, according to Iriarte, was merely his delay in picking the top, but in Gomez' account was a refusal to do as he was told; or the challenge to fight, or both.

In view of our uncertainty regarding the ALJ's findings and Respondent's claim that it discharged Iriarte for "fail[ing] to follow directions given to him by his supervisor . . . and [making] a physical threat on [Gomez'] life," we shall weigh Respondent's evidence regarding both of these possible grounds.

Preliminarily, we note that no testimony supports the assertion in the dismissal notice that Iriarte threatened Gomez' life. Indeed, Gomez himself denied that Iriarte made any such threat. We can certainly take into account the apparent falsity of one of Respondent's given reasons in considering the overall credibility of its defense, for as the court said in Shattuck Denn Mining Corp. v. NLRB (9th Cir. 1966) 362 F.2d 466, 470 [62 LRRM 2401]:

> If [a trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that he can infer that the motive is one that the employer desires to conceal--an unlawful motive--at least where, as in this case, the surrounding facts tend to reinforce that inference.

By force of similar reasoning, we find Respondent's admittedly false justification to be a pretext to mask its real, unlawful motive. The ALJ's conclusion that Iriarte presented *a* "sanitized" version of his encounter with Gomez does not dispel our doubts as to Respondent's defense. As we have noted, the challenges to fight were not made until after Iriarte was discharged. Accordingly, since the initial justification for Iriarte's discharge was pretextual, we cannot condone his discharge on the ground of the challenge to fight as did the ALJ. Such an approach would permit an employer to retaliate unfairly against an employee and

then to exploit the natural human response the retaliation has provoked as another justification for discharge.[6/] (Steakmate, Inc. (1983) 9 ALRB No. 11, ALJD, p. 82.)

Moreover, because of the doubts we have already expressed about Gomez' testimony, once the challenges to fight are disregarded as a motivating consideration for the discharge, it becomes clear from the ALJ's refusal to credit Gomez' version of the circumstances surrounding Iriarte's actual discharge, that Respondent has not met its burden of proof that it would have discharged Iriarte in the absence of his union activities and we shall afford him the usual remedies.

ORDER

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

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment

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[6/]We do not mean to imply that every employee response in a pretextual discharge situation must be overlooked; only that where, as here, the response, although hostile, merely involves "fighting words," it cannot independently justify a discharge. Nor can it be used to deny an employee reinstatement. There is nothing in the record to suggest that Iriarte really intended, much less that he actually attempted, to engage in any violence. (Asplundh Tree Expert Company (1975) 220 NLRB 352 [90 LRRM 1425].) Under the circumstances of his discharge for union activities, Iriarte's alleged belligerence would not warrant denial of the reinstatement remedy. (See also NLRB v. Morrison Cafeteria of Little Rock, Inc. (8th Cir. 1963) 311 F.2d 534, 538, enforcing 135 NLRB No. 136 [52 LRRM 2150].)

section 1152 of the Agricultural Labor Relations Act (Act).

(b) Interrogating employees about their union or other protected, concerted activities.

(c) Engaging in surveillance of employee discussion about or participation in union or other protected concerted activities.

(d) Threatening employees with plant closure in the event that they decide to be represented by a union for purposes of collective bargaining.

(e) Threatening employees with discharge in the event they support a union.

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

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

(a) Offer to Juana Marisol Andrade, Haul Rodriguez, Cosme Loya and Jorge Iriarte reinstatement to their former or substantially equivalent positions and make them whole for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise all payroll records, social security payment records,

otherwise all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay periods arid the amounts of backpay and interest due under the terms of this Order.

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

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from January I, 1984, to January 1, 1985.

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

(f) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or the reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order

to compensate them for time lost at this reading and during the question-and-answer period.

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

Dated: June 26, 1986

JOHN. P. McCARTHY, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Santa Maria Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Claassen Mushrooms, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discriminating against Juana Marisol Andrade, Haul Rodriguez and Jorge Iriarte because they protested working conditions and found that we unlawfully discharged Cosme Loya because he was associated with Raul Rodriguez. The Board also found that we violated the law by interrogating employees about their union activities, engaged in surveillance of or gave the impression of engaging in surveillance of employees discussing the union and working conditions, threatened to discharge workers for talking about the union and threatened to close the company if the workers decided to bring a union in to represent them. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

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

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

WE WILL NOT threaten to or actually discharge or lay off any employees for engaging in protests over wages or their working conditions, or for discussing these matters.

WE WILL NOT question employees about their support or preference for a union.

WE WILL NOT engage in surveillance of employees who are discussing working conditions or bringing a union in.

WE WILL NOT threaten to close the company if employees decide to be represented by a union.

WE WILL reimburse Juana Marisol Andrade, Raul Rodriguez, Cosme Loya and Jorge Iriarte for all losses of pay and other economic losses they have suffered as a result of our discriminating against them, plus interest and in addition offer them immediate and full reinstatement to their former or substantially equivalent positions.

Dated CLAASSEN MUSHROOMS, INC.

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 528 South "A" Street, Oxnard, California 93030. The telephone number is (805) 486-4475.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

CLAASSEN MUSHROOMS, INC. (IUAW)

12 ALRB No. **13**
Case No. 84-CE-12-OX

ALJ DECISION

Employer allegedly discharged four employees for union and concerted activities and allegedly interferred with protected activities in a variety of ways including interrogation, giving the impression of surveillance, threatening plant closure and threatening discharge. The ALJ found that the four alleged discriminatees engaged in protected activity, that Respondent had knowledge of their activities and that three of the employees would not have been discharged in the absence of their union activities. The ALJ found that Respondent met its burden of proving that the fourth employee would have been discharged in the absence of his union activities. He also found that Respondent interrogated, engaged in surveillance of and threatened its employees as alleged in the complaint.

BOARD DECISION

The Board affirmed the ALJ's findings and conclusions regarding the violations he found and adopted his recommended Order. It overruled his finding that Respondent would have fired the fourth employee on the grounds that Respondent failed to meet its burden of proof under Wright Line (1980) 251 NLRB 1082 [105 LRRM 1169]. The Board held that Respondent's inconsistent reasons for terminating the employee did not overcome General Counsel's prima facie case.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of:	)	Case No. 84-CE-12-OX
	)	
CLASSEN MUSHROOM, INC.,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
INTERNATIONAL UNION OF AGRICULTURAL WORKERS,	)	
	)	
Charging Party.	)	

Appearances:

Juan Ramirez
for the General Counsel

David Claasen, Louise Claasen,
for Respondent in propria persona

Tim Rabara
for the Charging Party

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE

On May 16, 1984,[1/] in case number 84-CE-12-OX(SM), the International Union of Agricultural Workers (hereafter referred to as the "Union") filed a charge and served same on Claasen Mushrooms, Inc. (hereafter referred to as "respondent" or the "company"). The charge alleged that respondent had engaged in various violations of sections 1153(a) and (c) of the Act. Based on this charge, on August 3, 1984, the General Counsel for the Agricultural Labor Relations Board caused to be filed a complaint incorporating these allegations.

Commencing October 10, a hearing was held before me in Santa Maria, California. The General Counsel and Charging Party appeared through their respective representatives; respondent was represented by its principals. All parties were afforded the opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to submit argument and post-hearing briefs. Based upon the entire record in this case, including my observations of the demeanor of each witness as he/she testified, and having read and considered the briefs filed after the hearing closed, I make the following:

II. FINDINGS OF FACT

A. Jurisdiction

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

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1. All dates refer to 1984 unless otherwise noted.

2. The Union is and was, at all times material, a labor organization within the meaning of the Act.[2/]

B. The Unfair Labor Practices Alleged

1. Introduction

General Counsel alleged that respondent, a mushroom grower, discharged employees Juana Marisol Andrade, Cosme Loya and Paul Rodriguez in violation of section 1153(a) of the Act, and discharged employee Jorge Iriarte in violation of section 1153(a) and (c) of the Act. Also alleged were three separate independent violations of section 1153(a), involving interrogation of employees about, and giving the impression of surveillance of, union activities; threatening business closure in the event of unionization; and threatening employee Jorge Iriarte with discharge for having engaged in union activity.

The evidence amply establishes that employees Andrade, Loya and Rodriguez were discharged for having engaged in protected, concerted activities. This conclusion is based on the totality of inferences drawn from the timing of their discharges which followed closely on the heels of participation in protected, concerted activities, the pretextual nature of respondent's preferred reasons for the terminations, and respondent's ill-concealed animus towards unionization. Additional direct evidence of unlawful motivation for

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2. Respondent admitted its agricultural employer status in its answer. It denied the Union's labor organization status based on lack of information and belief. Administrative notice is hereby taken of numerous cases, including Jordan Brothers Ranch (1983) 9 ALRB No. 41, Bettaravia Farms (1983) 9 ALRB No. 46, and Point Sal Growers (1983) 9 ALRB No. 57, wherein such status was established.

these discharges was established by the admissions of supervisors that the terminations were effectuated for anti-union reasons.

General Counsel also established toy a preponderance of the evidence that respondent engaged in the threatening and coercive conduct violative of section 1153(a) of the Act in the particulars noted above. Insofar as the discharge of Iriarte is concerned, however, respondent was able to counter the assertion that his termination was unlawful by evidence that he was discharged for legitimate business reasons.

2. The Discharge of Juana Marisol Andrade and the Surveillance, Interrogation, and Threats to Close Allegations

Juana Marisol Andrade began working for respondent in September 1983. For two months, in November and December of 1983, she occupied the position of forewoman. She resumed her duties thereafter in the beginning of January as *a* rank-and-file picker, or agricultural employee in the language of the statute.

Sometime in mid-January respondent replaced forewoman Victoria Benitez[3/] for one working day with an individual named Tony Hill. The workers were displeased with the company's selection of the new foreman, who, Andrade claimed, was basically unfamiliar with the job and "couldn't make up his mind on what he wanted us to do."[4/] During the morning break on the day the change was made,

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3. The parties stipulated that Victoria Benitez was a supervisor within the meaning of the Act. However, for that one day in January, Victoria Benitez was an agricultural employee.

4. Worker Marlene Benitez testified similarly that Hill "didn't know how to do his job."

Andrade led a discussion among co-workers Ralph Andrade, Lupe Aguilar, Marlene Benitez and her sister, Victoria Benitez. In addition to problems with the newly appointed foreman, Andrade told her co-workers that "we needed a Union so . . . they won't be treating us like that."

When asked to elaborate on the company's "treatment," Andrade noted other areas of dissatisfaction with working conditions at the company, matters which she likewise discussed with fellow employees during the morning break that day. These areas included problems with breaks, which she claimed were not regularly given to employees who worked past the normal quitting time.[5/] Andrade stated that the workers wanted an additional half-hour meal break when they were requested to work past five p.m.[6/]

Another matter discussed by these workers[7/] was the problem they were experiencing regarding the company's "bonus" policy. When initially explained by Louise Claasen in the beginning of January, workers were told that they would be earning an incentive or premium of $1.50 for each box in excess of three that they harvested in one hour. However, in actual practice, production would not be measured

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5. Payroll records showed that Andrade, at least prior to the week of January 24, 1984, regularly worked an excess of forty hours per week.

6. In an attempt to discredit Andrade's testimony, respondent adduced evidence that the company had given its late-working employees meal breaks, and had even supplied them with dinner. However, respondent made no attempt to show that these benefits antedated Andrade's complaints. To the contrary, Marlene Benitez testified that they were instituted "long after" Andrade was terminated.

7. As noted, Victoria Benitez was technically a "worker" on that day. She resumed her forewoman's duties the day following.

in terms of individual isolated work hours; rather, output would be averaged over the total number of hours worked. Workers would receive the bonus only if the average output per work week exceeded three boxes per hour.[8/] Since the amount and size of mushrooms available for harvest varied greatly from bed to bed and room to room, it would not be possible to harvest three boxes per hour consistently. Output for many workers regularly fell below that level.

In addition, work hours were often devoted to non-picking tasks, such as cleaning the beds or helping with the packing. These hours with zero output would also be averaged with picking hours, thus further lowering hourly production levels.

Following the workers' discussion on these matters, as they were returning to their picking rooms, Andrade, Marlene, and Victoria Benitez stopped at the packing table located in the hallway separating the rooms. There they made small "signs" saying "Union" and/or "huelga" ("strike") on five by six or six by six pieces of paper. Present in the packing area at that time were packer Cheryl Shaw and another woman identified by Ms. Andrade as "Louise's [Ms. Claasen's] sister-in-law." As they left the area, Andrade, Marlene Benitez and Victoria Benitez waved the signs around, and together with Ralph Andrade, said "we got to get a Union" and "strike." When Marisol Andrade entered her particular picking room, two workers asked her what was happening, to which she responded that "we wanted a union."

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8. Ms. Claasen did not refute these assertions.

Cheryl Shaw testified that about five minutes after Andrade and the others had made their signs, David Claasen approached her in the packing area. Claasen asked her "What was going on?" "Why were they doing that?" Shaw replied that she "thought they were just joking around." Claasen thereupon stated that "he would close the doors before he'd go union." Claasen also mentioned that at another plant he had, "one of his boys were (sic) killed." On cross-examination, Shaw added that Claasen mentioned closing the plant "before union, but the reason why he said that, he was angry. And the reason why he said, because he didn't want anybody to get hurt."[9/]

About 10:30 that morning, Andrade was summoned to Louise Claasen's office by supervisor Tony Gomez.[10/] Gomez also asked Andrade to tell Victoria and Marlene Benitez, Lupe Aguilar and Ralph Andrade to join her at the office. After these workers were assembled there, Ms. Claasen stated "Okay, what's this I heard about the union?" Andrade asked her "Who told you?" Ms. Claasen did not respond. Instead, "she told us she wasn't going to permit it there . . . . She told us what happened on the other farm they had in Watsonville. That a little boy got killed because of the union, and a lot of their equipment got ruined, and that a lot of workers got

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9. David Claasen did not deny, in substance, any of the foregoing.

10. Respondent denied that Gomez was a supervisor within the meaning of the Act. The evidence demonstrated that he had the responsibility of directing employees in their work and had the authority to fire them, as shown in the case of Jorge Iriarte, discussed below. I therefore find that Tony Gomez was, at all times material, a supervisor within the meaning of section 1140.4(j) of the statute.

hurt, because of the union. And that David had spent a lot of time in court because of that, and that they weren't going to permit it. That they weren't going to go through it again, and that they would rather close the doors on that plant . . . . That we would rather close the doors at this plant before getting the Union."[11/]

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11. The foregoing recitation was taken from Marisol Andrade's direct examination. It, as well as the testimony she gave regarding the workers' earlier discussion that day, were corroborated in pertinent part by the testimony of Marlene Benitez. In contrast, Louise Claasen's testimony, which touched on some of these matters, was evasive overall, and internally inconsistent in several particulars. For example, after initially stating on direct examination that the first time anyone brought to her attention that they wanted a union was when a representation petition was filed in May of 1984, Classen admitted on cross that she had discussed the union in January with the workers named above. When questioned by General Counsel, she proved exceedingly uncooperative. In short, I find her overall demeanor indicative that her testimony, colored by self-interest, was unreliable, and wholly unworthy of credence. Where the following account of her statements, which she provided under examination by the General Counsel, conflicts with that of Andrade, it is Andrade's version which I credit. It is set forth for the purposes of delineating the admissions she made therein:

> The date of that meeting, it was primarily to talk about Victoria. But they also were, I was told that Marisol and Marlene were fooling around. So I asked them . . . after we had discussed Victoria's replacement . . . . `What were you girls doing, what was all this yelling and playing around? Was it something about a union?' And they said to me, 'Oh, no, we were just kidding, we were just playing around.' Which they often did . . . . They asked me 'Have you ever had any occasion to have first hand knowledge of having a union and what happens if things don't go right?' And I said, 'Yes, I can tell you.' We had a plant in Monterey County that the workers -- . . . had petitioned a union. A strike took place and they said, 'Well, what happened did they all quit?' And I said no, some did continue working. And those that continued working, we have (sic) a woman that was raped, we had a young boy that was threatened and killed that afternoon. Because he continued working.

(Footnote continued----)

Andrade responded to Ms. Claasen's comments by stating that if the company did not want the union, they should treat its workers better. Ms. Claasen asked for specifics, and Andrade proceeded to describe the problems she had earlier discussed with coworkers, i.e., the difficulties with newly-appointed foreman Tony Hill, and the dissatisfaction with the bonus program.[12/]

(Footnote 11 continued----)

> We had children followed on their school bus, and told, with a knife, that if their father went to work the following day that they would be followed again and . . . something would happen to them, that's what was said. We had phone calls made to our homes, we had threats to our employees that continued working. And what I said was, I said, 'You know.' I said 'If it was up to me if I had anything to say, I said, 'I wished we would have never opened the doors to that plant.'

Ms. Claasen's account, based wholly on subjective characterizations and hearsay (she admitted that she "was not present" at that plant when these acts took place, and that the workers "came to me and told me what was happening . . . ."), indicates a decidedly negative attitude towards unionization. It further bespeaks an intent to equate unionization with violence and to characterize it to workers in those terms.

12. Respondent introduced a statement under penalty of perjury by Lupe Aguilar. Aguilar, at the time of the hearing, was hospitalized and unable to testify. The statement was admitted pursuant to stipulation.

The statement contains the following: "I deny that Louise Claasen threatened us with the closing of the plant if we brought in the union. There were no threats of any kind." While this statement seems to refute Andrade's assertion, Aguilar did not provide its context or give as extensive an account as Andrade. Her statements generally, were not subject to cross-examination, nor was her demeanor observed. They are therefore of little probative value. As for the second sentence quoted, the subjective, conclusionary language used by Ms. Aguilar does not suffice to refute any of Andrade's testimony regarding the content of Ms. Claasen's statements to workers, which, as the Supreme Court recently re-emphasized, are to be viewed according to an objective standard as to whether they would "reasonably tend to restrain or interfere with the employee's rights." (Karahadian Ranches, Inc. (1985) ___ Gal.3d __ , slip. op. p. 7; Jack Brothers and McBurney, Inc. (1978) 4 ALRB No. 18; Harry Carian v. A.L.R.B. (1984) 36 Cal.3d 654, 669.)

Following their meeting with Ms. Claasen, Victoria Benitez was reinstalled as forewoman. Shortly thereafter, Benitez approached Andrade and told her that the picking was not being done properly, that sizes were getting mixed in the box, and that the boxes were not being filled correctly. Andrade responded that "the boxes were full," and that " . . . one of these days, I'm going to call the union" or "go to the Labor Commissioner" because of the problems workers were having with their breaks after 5:00 p.m. Andrade testified that she subsequently also mentioned the break problem to Louise Claasen.

Andrade regularly discussed unionization with her co-workers. She stated that she did so roughly two or three times per week. On one such occasion, as the workers were in the company parking lot preparing to go home, Andrade told them "we don't need to complain, what we need is a union." Forewoman Victoria Benitez was present at that time. Benitez was also present on an occasion after work at Andrade's house when Andrade told her that the workers would be better off with a union since it protected them. Respondent's knowledge of Andrade's interest in unionization was therefore amply established.

On the last day of her employment with respondent, February 16, Andrade, by her own admission, became involved in an argument with Louise Claasen. During the lunch hour, Claasen saw Andrade throw what the worker described as a "mouse" out from the trunk of her brother's car, where Andrade had gone to retrieve her lunch. Claasen ordered her to pick it up, and also to pick up all the papers in the parking lot. Andrade replied that she was not the

only one to throw papers around, to which Claasen responded: "I don't care. You either do it or you're fired." Andrade initially refused to comply, but subsequently she and Victoria and Marlene Benitez did in fact clean up the parking lot.

At the end of the day, Andrade was told by Victoria Benitez not to report the next day, who informed her that "it was going to be very slow[,] [a]nd that she need[ed] just three employees." The following Sunday, after her brother returned home from work at the company, he told Andrade that "Vickie had told him to tell me not to go to work there any more, because Louise didn't want me to work there any more."

The following Wednesday, Andrade went back to the company to pick up her check and to talk to Louise Claasen to find out why she had been fired. In testimony which was unrefuted, Andrade stated that she was then told by Louise Claasen that the reasons she had been fired were her "attitude towards work and my friends, that I won't be (wasn't?) the same any more, [sic] that maybe I had personal problems or things like that. And then she goes, 'those threats about the union, we're not going to take it.' "

The following reasons for Andrade's termination are set forth on the dismissal notice she received:

1. Threatened her supervisor on several occasions.
2. Deliberate slowdown and influenced other workers to do the same.
3. Misconduct in relation to attitude and quality of work.
4. Lack of effort for no apparent reason.

Andrade denied that she had ever been told or warned by supervisors, even at her termination interview, about slowing her

production down or telling other workers to do so.[13/] She further denied actually slowing her production, or that she ever received any warnings regarding the quality of her work.

Respondent cited Andrade's low productivity as evidence of her attempts to deliberately slow performance, and as a further reason for her dismissal. However, records demonstrated that Andrade's output was generally above average. On numerous occasions she put in extended hours. While it might be said that Andrade's productivity declined during the week of her termination, her output was second highest in the work force the week prior. Additionally, despite her working only two days in her last week, she picked as many boxes that week as two other workers who worked three full days in the period.

Production as a whole tapered off in February as a result of contamination. David Claasen testified that his operation lost 2/3 of its crop that month. As previously noted, worker output might also vary due *to* the beds they are assigned to pick: some beds simply contain more harvestable mushrooms. Without direct evidence from witnesses that Andrade was intentionally limiting production, it might be as easily inferred that her lowered output was due to the contamination or bed assignment factors, rather than to reasons more problematic. In sum, respondent was unable to substantiate, either by testimonial or documentary evidence, its assertion that Andrade deliberately curtailed her production.

About a week after Andrade's termination, Marlene Benitez

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13. Marlene Benitez also testified that Andrade never told her to slow down her production.

had occasion to discuss the discharge with Louise Claasen. Benitez testified that Claasen had called her in to the office, and told her that "she had noticed a change" in her, that she was "being rude" to her sister, forewoman Victoria Benitez. Claasen asked Marlene whether the reason for her "attitude" was because Andrade had been fired, to which the worker responded "kind of." Claasen then stated, regarding Andrade, "that she had to take her out, because she was like a contaminated mushroom, that if she didn't take that mushroom out, it would contaminate all the other ones." Also during the course of this conversation, Claasen asked Marlene whether Andrade was the one who "brought up the thing about the Union." The worker responded that "yes' she did. But we all talked about it." The interview ended with Claasen saying "she hoped that I would, you know, get better. That I wouldn't be rude or -- that she hoped that I could better my character or personality or whatever."[14/]

a. Discussion and Conclusion re Andrade's Discharge

The elements for establishing a violation of section 1153(a) involving an employee discharge are: (1) protected, concerted activity by that employee; (2) employer knowledge of that activity; (3) and a discharge which would not have been effectuated "but for" the employee's participation in protected, concerted activity. (See, generally, Lawrence Scarrone (1981) 7 ALRB No. 13; Nishi Greenhouse (1981) 7 ALRB No. 18; M. Caratan, Inc. (1982)

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14. Louise Claasen, though called as a witness, did not refute any of Marlene Benitez[1] statements about this conversation. It must therefore be accepted as accurate. Parenthetically, Marlene Benitez' testimony was internally consistent and was corroborated by other witnesses in several aspects. Her account was, on the whole, a credible one.

8 ALRB No. 41.) Andrade's protests to supervisors Claasen and Victoria Benitez about working conditions (specifically, regarding the bonus plan and the meal breaks after 5 p.m.), and the open expression of her preference for unionization, clearly constitute protected, concerted activities.[15/] (See e.g., Royal Packing Co. (1982) 8 ALRB No. 16.) This evidence also establishes respondent's knowledge of such activities.

Given the inconsistent, unsubstantiated and hence pretextual reasons for Andrade's discharge, and the company's union animus, an unlawful motive for her discharge can be readily inferred. (See Bruce Church (1982) 8 ALRB No. 51.) No evidence was proferred regarding Andrade's purported slowdown of work or her purported attempts to convince fellow employees to do likewise. Nor was there any convincing proof of her "misconduct." Arguably, Andrade's initial refusal to pick up the trash on the day of her discharge as per Ms. Claasen's order might be so interpreted. However, Andrade eventually did as she was told.[16/]

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15. Even if one were to credit Louise Claasen's assertion that when she asked workers about the union they stated that they "were just playing around," the statement may be viewed as an attempt to mollify superiors who displayed a blatant animosity towards unionization. It paraphrases the remark of Cheryl Shaw to David Claasen, whom, she stated, was "angry" when he asked her about employee talk and activity regarding a union. Such comments would not militate against a finding that a worker had engaged in protected, concerted activities. A worker's sincerity or depth of conviction is not an issue regarding unionization in determining whether a discharge has been effectuated for reasons contrary to the Act.

16. Respondent's brief makes repeated reference to the trash incident as a justifiable basis for Andrade's termination. Nonetheless, "insubordination" was not one of the reasons given for

(Footnote continued----)

Proof of her "lack of effort" was similarly absent: her production was superior or roughly equivalent to that of fellow employees. Furthermore, notwithstanding any inferences arising from the evidence, Louise Claasen made unmistakeable admissions to both the discriminatee and Marlene Benitez that the discharge of Marisol Andrade was unlawfully motivated.[17/]

A causal connection between Andrade's termination and her participation in protected, concerted activities was thus established by a preponderance of the evidence. Therefore, it is concluded that in discharging Marisol Andrade, respondent violated section 1153(a) of the Act.

b. Interrogation and Surveillance of, and Threats to Employees

Under ALRA section 1155, employers are free to communicate any opinions on the merits of or drawbacks to unionization as long as those opinions do not contain a "threat of reprisal or force, or promise of benefit." As interpreted by the U.S. Supreme Court in N.L.R.B. v. Gissel Packing Co. (1969) 395 U.S. 575, this phraseology[18/] subsumes the qualified right of an employer to "make

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(Footnote 16 continued----)

the discharge. The mere use of the term "misconduct" cannot be utilized to support a lawful termination herein, particularly as it went unexplained or related to specific instances. Furthermore, Andrade's termination notice refers to misconduct "in relation to attitude and quality of work," not in relation to the parking lot incident.

17. By way of recapitulation, reference is made to Ms. Claasen's remark to the discriminatee that they weren't "going to take" "those threats about the union," and to Claasen's comment to Benitez that Andrade was like a "contaminated mushroom."

18. ALRA section 1153 is the direct counterpart to N.L.R.A. section 8(c), discussed in that case by the Court.

a prediction as to the precise effects he believes unionization will have on the company." However, "the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization . . . . If there is any implication that the employer may or may not take action solely on his own initiative for reasons unrelated to economic necessity and known only to him, the statement is no longer a prediction but a threat of retaliation based on misrepresentation and coercion . . . " (395 U.S. 618, 619); see also Mission Packing Co. (1982) 8 ALRB No. 14; Akitomo Nursery (1977) 3 ALRB No. 73; Abatti Farms (1979) 5 ALRB No. 34, aff'd in part (1980) 107 C.A.3d 317; Steak-Mate, Inc. (1983) 9 ALRB No. 11.)

Remarks by Louise and David Claasen that they would "close the doors" before the company's workers would be unionized are unmistakeably coercive under the above standard, and hence violative of section 1153(a). They are not predictions based on "objective fact" underlying this employer's belief as to "demonstrably probable consequences beyond" the employer's control. Rather, they are indications of a deeply rooted conviction that this respondent would not continue operating should its workers become organized.

"Interrogating" employees about their union activities is not considered per se violative of the Act. The circumstances surrounding the questioning must be examined to ascertain whether they had a tendency to restrain, coerce or interfere with employee section 1152 rights. (Maggio-Tostado, Inc. (1977) 3 ALRB No. 33;

Abatti Farms, supra; Harry Boersma Dairy (1982) 8 ALRB No. 34; McCarthy Farming Co., Inc. (1983) 9 ALRB No. 34; see also Rossmorr House (1984) 267 NLRB No. 198.) The entire atmosphere of the meeting Ms. Claasen held with certain employees, and the tenor of her remarks to them, was coercive and intimidating and hence gave rise to violations of section 1153(a) as alleged in the complaint.

Among the circumstances to be considered in assessing the potentially unlawful aspects of an employee interrogation are: the general background and attitude of the employer toward its employees and/or unionization; the type and/or nature of the information sought; the position occupied by the company questioner; the place and method of the interrogation; the truthfulness of the employees' responses; whether the employer had a valid purpose in conducting the interview and communicated this to employees; and whether the employees were assured against reprisals. (McCarthy Farming, supra, ALOD p. 114 and cases cited therein.)

Nearly all the aforementioned factors highlight the objectionable nature of Ms. Claasen[1]s meeting with and questioning of employees. The company's attitude, as manifested by the statements of Louise and David Claasen, and, parenthetically, by the discharges which I have found to be discriminatory, was decidedly anti-union. While ostensibly basing their beliefs on prior experiences in Watsonville, the Claasens equated unions with violence, physical injury and disruptive influences. Ms. Claasen clearly sought to convey the message to employees that unions were nothing but trouble, or worse, and that employees and the company would be best off without them.

Insofar as the "type of information sought" and the "purpose in conducting the interview," although the meeting was superficially called to determine what problems on the job employees were currently experiencing, it also followed virtually within minutes employee demonstrations and speech favoring unionization.

Immediately after expressing pro-union sentiments, employees responsible were summoned into the boss's office.[19/] Not simply an inquiry into employee problems, the overall purpose of the meeting appeared to be to determine what was behind their sudden interest in a union, who was behind it, and to nip any union talk in the bud with a firm expression of management's opposition to it. Although there may have been a superficially legitimate purpose in asking employees about difficulties on the job, the timing of the meeting and the fact that a select group of employees who demonstrated pro-union sentiments were asked to participate, as opposed to all, indicate that the meting was more than an innocuous worker-management dialogue.

Lastly, the discussions between Ms. Classen and the group of workers were devoid of any management assurances against reprisals. To the contrary, Ms. Claasen conveyed the clear warning that should this union talk persist, the company would "close its doors." Subsequent events, i.e., the discharge of Marisol Andrade,

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19. This Board has found a violation of section 1153(a) where a pro-union employee was called to task by high-level management officials for her union activities. (McCarthy Farming, supra.)

further communciated the seriousness of management's threats.[20/]

Concerning the allegation that respondent "gave the impression of surveillance" of employee union activities, generally speaking, illegal surveillance must be based on a showing that where discussions of union matters were taking place, supervisorial personnel intentionally interposed themselves in the situation for the purposes of either determining the content of or participants in such discussions, or for the purpose of conveying the impression to employees that their union activities were being monitored. (Tomooka Brothers (1976) 2 ALRB No. 52; Sam Andrews' Sons (1983) 9 ALRB No. 24; Ukegawa Brothers (1983) 9 ALRB No. 26.) Insofar as worker activity in the packing area on the morning of their meeting with Ms. Claasen, no such showing has been made. The workers involved therein openly engaged in union discussions, and the "demonstration" by three of them took place in such a fashion as to be easily detected or discovered by persons within respondent's facility. As noted by the California Supreme Court in Karahadian Ranches v. A.L.R.B. (1985) ____ Cal.3d ___, slip op. p. 7, "only surveillance which 'interferes with restrains or coerces union activities' is prohibited. [Citations]." Here, knowledge of activities which took place in open view could hardly be the result of surreptitious spying or intentionally injected supervisorial presence. Consequently, no finding of unlawful surveillance, based on these facts viewed in isolation, can be made.

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20. The exchange Marlene Benitez had with Louise Claasen several days after Andrade's discharge may provide an additional basis for finding a violation grounded upon an unlawful interrogation.

Notwithstanding the foregoing, however, all of the workers who participated in the lunch room, morning break discussion involving work problems were called into Louise Claasen's office shortly thereafter. Not only were Andrade, Marlene and Victoria Benitez, the ones who engaged in the pro-union demonstration in the packing area, asked to be present, but Ralph Andrade and Lupe Aguilar were also summoned. Respondent could not have known the identity of the participants in the lunchroom gathering, nor the content of their discussion, which later became the focus of the meeting with Ms. Claasen, without somehow obtaining the information from an individual who saw and overheard the discussion taking place. While General Counsel did not establish that an individual was manifestly spying on the workers' discussion, the California Supreme Court has noted that the argument that "undetected surreptitious surveillance can have no coercive effect on employees" has been rejected: "[I]t should be a surprising result if the law were such that an employer could engage in any devious spying technique it desired so long as the program was not detected by employees." (Karahadian Ranches v. A.L.R.B., supra, slip op. p. 7, fn. 5, citing N.L.R.B. v. Southwire Company (C.A. 5 1970) 429 F.2d 1050, 1054.)

Respondent conveyed the notion that it was monitoring employee activities by demonstrating knowledge of the content of and the identities of the participants in employee conversations regarding unionization and working conditions. It is therefore concluded that respondent violated the Act by giving the employees the impression that their discussions were under surveillance,

albeit by persons unknown.

3. The Discharges of Raul Rodriguez and Cosme Loya

a. General Counsel's Evidence

Raul Rodriguez and Cosme Loya were hired in late February by respondent to work as pickers. The two applied for work together, and were hired at the same time. When they were hired, they lived together as roomates, rode to work in the same car, and were assigned to work together as picking partners.

After approximately one month on the job, Rodriguez and Loya were terminated on March 23. The terminations were just a few short days after Rodriguez, in a meeting with Louise Claasen, had spoken up about worker dissatisfaction with the company's bonus plan. Rodriguez' complaints about the bonus were nearly identical to those expressed by Andrade, discussed supra: although told by Victoria Benitez when initially hired that he would be receiving a $1.50 per box bonus for each box in excess of three he picked per hour, he soon found out after working for the company that his output was being averaged over the total number of hours worked. Consequently, the bonus was rarely, if ever, paid.

This problem with the bonus again became a source of discussion among the workers. On or about March 19, Rodriguez suggested at lunch time that the workers should gather in the lunchroom and meet there with Louise Claasen. Before the group thus assembled,[21/] Rodriguez told Claasen that no one was

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21. Twelve to fifteen employees were in the lunchroom itself. Due to the small size of the room, other employees, including Loya, were outside the room looking in through its windows.

receiving their bonuses because the boxes were being averaged, and that was not the way the plan had been explained to him when he began working for the company. She replied that she "thought I had a very short time working with them, and in case we don't like the way they were paying they could pay by contract [piece rate]."[22/] Ms. Claasen then asked the other workers individually how they felt about the situation. Some workers expressed no opinion; others who agreed with Rodriguez' position on the bonus were told by Ms. Claasen that they were not good workers, that their output was deficient.[23/] Quite clearly, Ms. Claasen made it known to the workers that she was displeased with the outspokenness of some of their number.

His next day at work,[24/] supervisor Victoria Benitez told Rodriguez that "Mr. Claasen was very upset with me, and he didn't like to see me in there no more." On the day that Rodriguez and Loya were actually terminated, Benitez called Rodriguez from his work station to come out to the hallway. She there informed him that she was having a disagreement with David Claasen, Tony Gomez, and Arturo di Stefano. Gomez and di Stefano had told Claasen in her presence that Rodriguez was sitting on the mushroom bed. Benitez informed the worker that she mentioned to Claasen at that time that

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22. What this piece rate would be was never expressed.

23. When called as a witness, Ms. Claasen did not refute any of Rodriguez's testimony regarding statements she made at this meeting. This testimony must therefore be accepted as factually accurate.

24. Records demonstrate that Rodriguez did not work on March 20.

"she understood that was a lie." David Claasen then ordered Benitez to fire Rodriguez or risk losing her own job in the event she would not carry out his order.[25/] Benitez, after Rodriguez told her that "she knows it was a lie" about their sitting on the beds, remarked to Rodriguez that he made a "mistake with that meeting."

After Benitez told Rodriguez he was fired, she asked him to call Loya, his partner, out into the hallway in order that he likewise be informed of his discharge. Rodriguez testified that after Loya was told of his termination, Loya met Gomez in the hallway. Loya asked the supervisor when he had seen him sitting on the bed. Gomez responded, "I never saw you."[26/] Rodriguez also confronted di Stefano and asked him when and where he was seen sitting on the bed. When di Stefano gave him this information, Rodriguez told di Stefano he was "crazy."

Rodriguez stated that when Benitez informed him of his discharge, the only reasons given were his sitting on the mushroom bed, and coincidentally, her comment about his behavior during the meeting with Ms. Claasen. His "dismissal notice" on the other hand, states: "Continues problems with the following:

1. Constant talking and work slow down;

2. Refusal to clean up equipment as required by others;

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25. Claasen did not refute these assertions. Di Stefano denied that he met with Gomez and Claasen on the day of the discharges to discuss them with fellow supervisors. Gomez testified that he met with di Stefano and Mr. and Ms. Claasen to discuss Rodriguez' termination. He added that the workers' sitting on the beds was "the only reason" for terminating them despite the termination notices quoted below, which cited other reasons as well.

26. Loya corroborated this aspect of Rodriguez' testimony.

3. Sitting on mushroom beds causing damage and contamination;

4. Unable to meet minimum performance standards.

Loya's termination slip also notes reasons "3." and "4." above, as well as stating "very poor attitude and arguing with the foreman."

Rodriguez, upon receiving his notice, told Mr. Claasen that what the paper stated was not true, except that he had been talking, but that everyone did, and it did not cause him to slow down his production. At the hearing, Rodriguez denied that he had sat on the beds, refused to clean his equipment, or received any verbal or written reprimands for failing to meet production stardards, or for any other conduct of which he had been accused.

Similarly, Loya denied that he had argued with his supervisors, sat on the mushroom beds, or received any reprimands for work attitude or failing to meet production standards.

b. Respondent's Evidence

The main reason given by respondent for the terminations of Rodriguez and Loya were that they were seen "sitting" on the mushroom beds as they worked. Sitting on the beds not only destroys the mushrooms which are sat upon but also may be a means by which the beds contaminate one another, as organisms carried on the worker's garments may be so transferred from bed to bed. David Claasen stated that he was "very concerned" with the spread of infection at the time Loya and Rodriguez were terminated, due to the fact that a good deal of production had been lost the previous month due to contamination. Yet Claasen also testified that despite the

fact that he actually saw these employes sitting on the beds on various occasions prior to their discharges,[27] he "didn't tell them anything" either because, he maintained, "they have direct supervision" which he prefers to work through, or because they would jump up immediately after having been seen, and "it wasn't required to say anything to them."

Arturo di Stefano worked as an assistant to owner David Claasen and foreman Tony Gomez during the tenure of the two discriminatees. He testified that "every time I came in there [the growing room] and saw [Raul Rodriguez] picking lower level,[28] I had to get his hip out of the bed"; that he saw Rodriguez doing this "usually every morning"; that Tony Gomez or forewoman Victoria Benitez would also call di Stefano's attention to Rodriguez' actions. At night after the workers left, di Stefano stated, he and Gomez would frequently smooth the imprints left in the beds by Rodriguez. He further averred that he and Gomez brought the situation to Rodriguez' attention many times, and that the worker was warned about the consequences of his actions.[29]

Di Stefano also attempted to explain the rationale for the apparent tolerance accorded Rodriguez during the course of the

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27. On cross-examination, Claasen stated that he saw these workers sitting on the beds on two or three occasions.

28. The lowest of four beds stacked vertically.

29. Apart from the exaggerated claims de Stefano made regarding Rodriguez' damaging conduct and low productivity (discussed infra), di Stefano's overall demeanor, like that of the great bulk of respondent's witnesses, indicated a lack of candor. During his cross-examination, di Stefano proved to be an exceedingly evasive witness, and had to be reminded repeatedly to respond directly to counsel's questions.

worker's employment with respondent. As a new employee, Rodriguez was in a "training" period of sorts, especially during his first two weeks, "but if it was borderline you'd be lenient and just give them another two. But usually after thirty days, if they couldn't cut it they had to be dismissed."[30/]

Significantly, di Stefano testified that he never saw Cosme Loya sitting on the mushroom beds. Tony Gomez also initially stated that he saw only Rodriguez engaging in this conduct. However, the supervisor later testified that on the day Rodriguez and Loya were terminated, he summoned di Stefano to witness both workers sitting on the mushroom beds, and he and di Stefano saw both of them doing this. Interestingly, despite respondent's ostensible concern with contamination, when Gomez noticed Rodriguez sitting on the bed, rather than instructing him to get down, the supervisor ran off to get a witness.

Respondent also cited low productivity as a rationale for the terminations of Loya and Rodriguez. The output of these two workers, it could be said, was at the lower end of the productivity scale, but the pair did not by any means demonstrate the lowest productivity in the work force. To the contrary, several of the workers in their group consistently picked fewer boxes than the two discriminatees. David Claasen denied that he never fired any other workers for low productivity. However, he was extremely evasive when asked to give specific examples and could not even estimate the

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30. Di Stefano added that he was talking mosting in terms of productivity, "because 99 percent of our employees try to comply with all the work habits."

number of workers terminated for this reason. Respondent produced no records to buttress Claasen's assertion.

David Claasen's characterization of the work performance of these two discriminatees, not substantiated by respondent's production records, indicated a predisposition to view them in an unfavorable light, and evinced as well the pretextual nature of this criticism. He repeatedly referred to "minimum" performance standards in assessing the productivity of these workers without explicitly stating what those standards were.[31/]

Classen initially testified that there was only one time that Loya and Rodriguez "even came close to making the minimum . . . and it went progressively downhill the last two weeks."

Claasen had previously, in his direct examination, noted that new workers were given "two weeks to get up to minimum standard. If they couldn't make it to a minimum standard within that period . . .," he would "ask [Victoria Benitez] to discontinue their employment." On cross, however, Classen modified his testimony somewhat, saying that new workers "could be terminated

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31. Respondent attempted to introduce into evidence a document which purported to set forth productivity requirements. As the document was not properly authenticated, its admission was denied. Parenthetically, the document was dated March 26, 1984, several days after the Loya and Rodriguez discharges.

Respondent did elicit testimony from Marlene Benitez that when workers began their employment with respondent, they were told they had to pick thirty pounds of mushrooms per hour. Benitez also stated that workers were fired for not picking this amount. (No competence objection was raised to this testimony.) However, respondent's records show that numerous workers consistently picked below the level of this alleged "minimum" production standard.

during the two-week period, if they would not follow directions. We tried to give them a minimum of two weeks. If we saw gradual improvement throughout that time, it would be extended . . . . Those particular people [Loya and Rodriguez] never hit minimum standard until they were at the end of their second week. The beginning of their third week, they gradually went downhill. And in their fourth week, they went clear to the bottom."[32/]

Interpreting the production records submitted by respondent[33/] presented some difficulties. While "hours" and "boxes" are noted on the form, pickers customarily devoted their work hours to tasks other than picking, such as "trashing" and cleaning. Only on those days when no boxes were noted, yet hours recorded, could it be determined with certainty that employees worked at tasks other than picking. On certain other days (for example 3/2 and 3/3), the entire picking group had low boxes per hours worked ratios.[34/]

However, comparisons on an absolute basis can be made. The following chart displays the total output of the discriminatees as

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32. As can be seen from the production records themselves (summarized below), the discriminatee's total output was highest during their third week on the job. Their last week, in which they worked three days and two hours, showed output roughly average to that of the three previous weeks. On the day prior to their discharge, Loya and Rodriguez worked for eleven hours and picked more mushrooms than all other workers save two of the seventeen employed that day.

33. By contrast, General Counsel submitted records for the last week worked by Loya and Rodriguez. These did indicate the number of boxes they picked per hour.

34. In his brief, General Counsel set forth certain calculations of average number of boxes picked per hour. Reliance on such figures is somewhat misplaced.

compared with the output of the other pickers:

Period	Total Boxes: Rodriguez	Loya	Total Number of Pickers	Number of Pickers Near or Below Discriminatees' Total
2/29-3/03	76.5	79.5	21	12
3/5-3/10	78	66	14	8
3/12-3/18	115.75	115.75	19	8
3/19-3/23 35/	71	71	22	9 36/

Finally, testimony on respondent's behalf was devoid of any specific references to Rodriguez' "constant talking" or "refusal to clean equipment" asserted as additional reasons for his discharge. There was a similar absence of evidence regarding Loya's "attitude" or "arguing with the foreman."

c. Analysis and Conclusions

Respondent's assertions regarding the two employees' sitting on the mushroom beds appeared to be greatly exaggerated. It is highly illogical that respondent, as seriously concerned with contamination as it maintained, would tolerate this conduct on as extensive a basis as it claimed Rodriguez, at least,[37/] was guilty

35. The discriminatees worked for only three full days that week, and picked for one hour on the last day employed. They were off work on March 20.

36. The same hour worked by the discriminatees was compared with that of the rest of the workers.

37. As noted, despite the fact that Loya was also accused of sitting on the beds, di Stefano testified that he saw only Rodriguez engaging in this behavior. Gomez did not assert that the two sat on the beds to the extent claimed by di Stefano. David Claasen stated that he had seen both men sitting on the beds "on several occasions." However, he was present throughout di Stefano's testimony.

of. Even assuming, arguendo, that the two had sat on the beds to a certain extent, respondent appeared to have tolerated their behavior in this regard until Rodriguez became outspoken on the bonus issue.

As previously noted, respondent's claims of inferior production were simply not borne out by its records. Furthermore, as David Claasen testified, in the first two weeks after a worker was hired, respondent's practice was to tolerate lower productivity, ostensibly in order to allow the worker to build up picking speed. However, he also stated that workers could be terminated after two weeks if their productivity was not up to standard. If some improvement appeared, the two week "probationary" period could be extended. Since Loya and Rodriguez were retained beyond this two week period, it can be inferred that their productivity was not as serious a problem as respondent maintained. Insofar as the remaining reasons given for the discharges of these two workers , no evidence in support of them was preferred.

All of these factors, coupled with the timing of the discharges, (see Rigi Agricultural Services, Inc. (1983) 9 ALRB No. 12), Benitez's admission to Rodriguez, and respondent's overall attitude toward openly expressed employee dissatisfacton with working conditions, point to the conclusion that the rationales advanced for the discharges of Loya and Rodriguez were pretextual, and that they were in fact terminated for reasons violative of the Act.

While Loya did not directly participate in any protected, concerted activities, he was closely associated with Rodriguez. He was Rodriguez' roommate and work partner who rode to work with him.

Further, the pair applied for work together and were hired at the same time .

This Board has recognized that the Act ' s protections extend to those who, although not directly involved in Union or other protected concerted activities, are closely associated with individuals whose participation in such activities is evident. (High and Mighty Farms (1980) 6 ALRB No. 54.) Commonly, these situations arise in the context of familial relationships, where discrimination directed against an activist family member effects the employment status of a non-activist relative. (Cf . A. Caratan (1982) 8 ARLB No. 83.) Additionally, unlawful discrimination has been established where a discharge of a non-activist has been effectuated for pretextual reasons in order to attempt to lend legitimacy to the similarly pretextual discharge of an activist. (Abatti Farms, Inc. (1981) 7 ALRB No. 36.) Stated in another fashion, a violation occurs where the discharge of the non-activist (s) was a "cover-up" designed to further conceal the unlawful motivation behind the activist's discharge . (Id.)

In the instant case, the reasons preferred for Loya's discharge were patently transparent. The vague, inconsistent and evasive accounts of respondent's own witnesses could not serve to definitively establish that Loya had committed the offense, sitting on the mushroom beds, utilized as the primary rationale for his termination. Other reasons given, such as "attitude" and "arguing with the foreman," were unsupported by any record evidence. Finally, as pickers customarily worked in pairs, an individual's production would perforce be roughly equivalent to that of his/her

picking partner. Should one be accused of deficient productivity, the other should likewise display similar deficiencies. The discharge of Rodriguez for failing to "meet minimum performance standards" could only be arguably supported if his picking partner, Who demonstrated an equivalent output, was discharged for ostensibly the same reasons. Similarly the legitimacy of discharging Rodriguez for sitting on the mushroom bed might be sustained if a co-worker was accused of, and discharged for, a like offense.

Accordingly, it is determined that respondent violated section 1153(a) of the Act by discharging Cosme Loya and Raul Rodriguez.

4. The Discharge of Jorge Iriarte Munoz

a. General Counsel's Version

Jorge Iriarte began working for respondent in early March. He was terminated on May 9. Initially hired as a picker, Iriarte worked in that capacity for about three days, then commenced working carrying boxes, which he did for one month and a half. He resumed picking eight or ten days before his discharge, and continued doing so until his termination.

After his return to picking, Iriarte claimed that the boxes he picked were "missing" from his paycheck:[38/] i . e . , the amount of boxes which he calculated to have picked was greater than the amount

38. In March, approximately, respondent instituted a payment system whereby workers would earn a piece rate wage of $1.75 per box, with an earning guarantee equivalent to the minimum wage multiplied by the number of hours worked.

recorded on his paycheck.[39/] Iriarte further claimed that supervisor Tony Gomez was requiring the pickers to fill the boxes with more than the standard ten pounds of mushrooms, and that if they failed to do so, he would not count the box in their total, but instead take mushrooms from certain boxes and augment the contents of other boxes with them.

Iriarte testified that the problems with the box counts and weights led to discussions among the workers. About three or four days before his termination, Iriarte told co-workers that the company was "robbing" them, and that perhaps a union might be able to protect them. He also stated that he tried to ascertain who among them would wish to participate.[40/]

On the day prior to his discharge, in the company parking lot before going in to work, Victoria Benitez asked Iriarte to sign a petition indicating whether he was in favor of calling the union in. Later that morning, while working with Victoria, he had further discussions about the union. He testified that he then told Benitez that "hopefully that whoever had signed would not back out," "that the union was good, [W]e had to call them," "that it had better benefits for the ones that were there," and additionally that the union should be called "because the majority of the workers had

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39. Respondent's payroll records indicate that certain workers did in fact pick more boxes them they were paid for. Iriarte picked 18.5 boxes on April 27, but was paid only for 13. Records for three other workers contained similar discrepancies. These were not explained by respondent.

40. Absent from Iriarte's account of the workers' meeting was any reference to the presence of any supervisors. Thus, respondent could not have acquired knowledge of his participation in protected activities as a result of that meeting.

signed." While these discussions were taking place, supervisor Tony Gomez was working about five or ten feet away from the pair.

When Iriarte reported to work the next day, he was met by Tony Gomez at the entrance to the facility, who told him "if I wanted to continue working there, please not to mention the union.[41/]

Iriarte picked without a partner that morning. He had heard that his picking partner from the previous day, Victoria Benitez, had been discharged. Between ten and eleven that morning, Iriarte was picking the mushrooms in the bottom sections when Tony Gomez entered the growing room and told him that he wanted the worker to pick the top section by himself. The worker replied that he would start doing so as soon as he had finished the bottom sections. Gomez left, only to return several minutes later and ask the worker whether he had started picking the top sections yet. According to Iriarte, the worker reiterated that he would begin picking on the top once he had completed the bottom. Gomez thereupon told him that he no longer had a job there because he did not understand orders. Iriarte replied "at least let me go bring the board."[42/] Gomez stated, "No, you don't have a board anymore."

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41. Gomez was not asked to refute these remarks. They therefore must be accepted as true.

42. The "board" is approximately six or seven feet long and weighs, Iriarte estimated, between forty to forty-five pounds. It is placed on scaffolding and used as a platform on which workers stand in order to pick the top beds.

Iriarte then went out of the picking room. He denied that he had, at that point, threatened his supervisor, testifying that the last words Gomez had for him were that "they'll give you your check right now." Iriarte subsequently went to the office to speak with Louise Claasen0, asking her to speak to Gomez to find out why the worker had been terminated. Ms. Claasen left the office, then returned several minutes later to inform Iriarte that Gomez "was busy at the moment."

Iriarte maintained that while picking without a partner, he only had to pick the bottom beds. The "board" used to pick the top bed, given its size, was usually handled by two workers who could easily maneuver it into position on the scaffolding. Iriarte stated that he never handled the "board" by himself.

Iriarte denied that he had ever been given a written or verbal warning for not following a supervisor's orders, or that he ever in fact failed to do so. His dismissal notice states as the reason for his termination that he "failed to follow directions given to him by his supervisor. He had been warned of this each time it occurred.[43/] On this particular day he failed to follow instructions given to him by his supervisor, Antonio Gomez, and also made a physical threat on Mr. Gomez's life."

b. The Company's Version

Tony Gomez has worked as a supervisor for respondent since

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43. Significantly, Gomez stated during his cross-examination that the day of Iriarte's discharge was the first time he had failed to follow the supervisor's orders.

it began operations in the summer of 1983.[44/] He testified that he discharged Jorge Iriarte because "he didn't obey what I commanded and because he didn't do the work he was supposed to." Gomez maintained that on the day of Iriarte's termination he had the following dialogue with the worker:

Gomez: ". . . you are going to do the work like the other ones are doing it." 45/

Iriarte: "If I don't want to, what?"

Gomez: "If you don't want to do it, you won't work with this company."

Iriarte: "Why?"

Gomez: "Because you don't want to obey."

Iriarte: "You can't stop me."

Gomez: "Yes, I can. If you don't obey like I command you, then you don't pick another mushroom."

Iriarte: "Take me out if you can."

Gomez: "I can, sir. Don't pick another mushroom. Come to the office. We're going to talk."

Gomez testified that he then walked out of the growing room, with Iriarte following close behind "inciting [him] to fight.' Iriarte continued to challenge the supervisor to fight. The supervisor responded, "If you want to fight, we'll wait outside. Later. Right now I'm working." Iriarte persisted in wanting to fight with Gomez. Finally, Gomez told the worker to go to the

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44. Gomez had worked with David Claasen previously for a total of fourteen or fifteen years.

45. On cross-examination, Gomez clarified this statement by testifying that Iriarte was "dong the work wrong . . . ., leaving a lot of mushrooms falling on the beds." He added that he gave instructions "to pick like the other workers' about six or seven times."

office to pick up his check. When asked if Iriarte threatened his life, Gomez stated that "he wanted to fight. I don't know what he wanted to do. He just wanted to fight."[46/]

On cross-examination, Gomez displayed a combative attitude towards the General Counsel, often providing evasive responses to counsel's questions. Gomez stated that he initially went to the office "to fix [Iriarte] up so he could keep on working, not to terminate him. But when a man wants to fight on the job, that's what you do." However, he immediately thereafter admitted that he terminated Iriarte inside the growing room, not later in the corridor outside.

As previously noted, in order to go from the growing rooms to the office, one has to pass through the packing area. On the day of Iriarte's termination Teresa Ortiz was working as a packer in this area.[47/] She testified that on that day she witnesed Iriarte go out of one of the growing rooms telling Gomez that he wanted to fight with him.

c. Analysis and Conclusions of Law

Despite the nearly overwhelming evidence of respondent' s antipathy towards the union and those associated with it, I am unable to conclude that "but for" Iriarte's participation in union and other protected, concerted activities, he would not have been discharged. One may speculate that Gomez's threat that morning that

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46. During his cross-examination, Gomez denied that Iriarte had threatened his life.

47. Gomez also testified that Ortiz was in the packing area where a portion of his exchange with Iriarte took place.

Iriarte should keep quiet about the union if "he wanted to continue working there" might indicated that the supervisor was looking for any excuse to fire him. However, speculation is no substitute for credible evidence. Iriarte's sanitized account of what transpired on the day of his termination, given his self-interest, requires some substantiation from disinterested witnesses. Despite the presence of other workers in the vicinity when the matters giving rise to this allegation took place, none was called to corroborate Iriarte's version of the facts.48/

By contrast, notwithstanding reservations about Gomez' overall credibility, Teresa Ortiz, an apparently neutral witness, was able to corroborate Gomez's assertions regarding the challenges leveled at him by Iriarte. Respondent was thus able to successfully rebut General Counsel's prima facie evidence that respondent had unlawfully discharged Iriarte by carrying its burden of proof that the worker was in fact terminated for legitimate, business reasons, i.e., insubordination.

Accordingly, it is recommended that this particular allegation be dismissed.

However, regarding the threat of discharge conveyed to Iriarte by Gomez, the evidence presented by General Counsel on this allegation was unrebutted. It is found that such remarks, clearly intend to chill unionism, are violative of the Act. (See, e.g., McAnally Enterprises, Inc. (1977) 3 ALRB No. 82; M. Caratan, Inc. (1979) 5 ALRB No. 16.)

48. I am not unmindful of respondent's often voiced anti-union attitude which might deter workers from volunteering to be witnesses.

RECOMMENDED ORDER

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

1. Cease and desist from:

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

(b) Interrogating employees about their union or other protected, concerted activities.

(c) Engaging in surveillance of employee discussions about or participation in union or other protected concerted activities;

(d) Threatening employees with plant closure in the event that they decide to be represented by a union for purposes of collective bargaining.

(e) Threatening employees with discharge in the event they support a union.

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

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

(a) Offer to Juana Marisol Ardrade, Raul Rodrizuez, and Cosme Loya reinstatement to their former or substantially equivalent positions and make them whole for all losses of pay and

other economic losses they have suffered as a result of the discrimination against them, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55

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

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

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from January 1, 1984 to June 1, 1984.

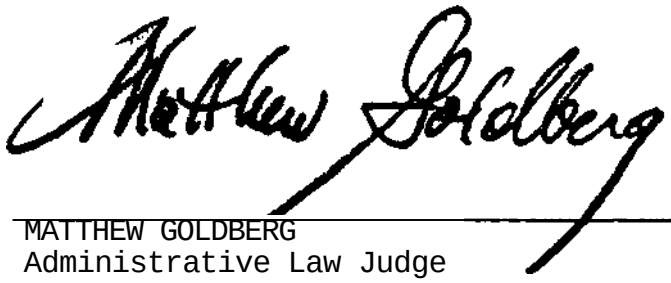
(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced covered or removed.

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

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

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

DATED:April 29, 1985



MATTHEW GOLDBERG
Administrative Law Judge