Shafter, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARMSTRONG NURSERIES, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 83-CE-108-D 83-CE-109-D 83-CE-110-D 83-CE-123-D 12 ALRB No. 15

DECISION AND ORDER

On February 22, 1985, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached decision in this matter. General Counsel filed exceptions to the ALJ's Decision together with a supporting brief, and Respondent filed a reply 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 ALJ's Decision in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings and conclusions only to the extent consistent herewith and to issue the attached order.

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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. Chairperson James-Massengale did not participate in this matter.

In this Decision we are called upon to determine whether certain activities engaged in by five of Respondent's employees were "concerted" within the meaning of section 1152[3] of the Agricultural Labor Relations Act (Act) and, if they were, whether they were entitled to the Act's protections. Because the ALJ concluded that the employees were engaged in neither "concerted" nor "protected" activities when they left their jobs on May 26, 1983, he held that Respondent did not violate the Act when it discharged them, at least in part, because they left work early. General Counsel has excepted to this conclusion, as well as to the ALJ's further conclusion that, even if the actions of the employees on May 26th were not within the ambit of section 1152, the events of that day were but a pretext to cover up Respondent's antiunion motivation. Because we overrule the ALJ's conclusions concerning the nature of the employees' activities, we do not reach the pretext issue.[4]

Respondent operates a nursery. In springtime, its employees perform two different grafting operations, known as "budding" and "rebudding." Budding, which normally takes place in

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[3]Labor Code section 1152 provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

[4]Inasmuch as Respondent cited the noon "walkout" as a ground for discharging each of the alleged discriminatees, the formal elements of a Wright Line (1980) 251 NLRB 1083, [105 LRRM 1169] approach are satisfied if the employees' actions are within the ambit of section 1152. As the national board stated in Wright

two phases between March and July, entails the insertion of buds into root stock for the purpose of producing certain varieties; rebudding, as the name implies, is required when the initial graft did not take. Although the techniques required for budding and rebudding are the same, a rebudding team cannot work as quickly as a budding team because the team must first inspect the stock to determine whether rebudding is necessary.

Employees work piecerate in budding, while in rebudding they receive an hourly wage with a premium for quantity. The length of the work day varies according to whether the employees are budding or rebudding. The employees uniformly testified that, when budding, they could leave after working six hours. Although Respondent put on evidence to show that employees often worked full or nearly full days even in piecerate, Bud Norris, Respondent's production manager, admitted that so long as the employees filled their quota, they could leave at twelve noon, after only six hours of work. Accordingly, when the crew switched from budding to rebudding on May 26th, the employees were affected in a number of different ways: they engaged in more

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Line: "[We] note that . . . when after all the evidence has been submitted . . . we will not seek to quantify the effect of the unlawful cause once it has been found. It is enough that the employees protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or the bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act." (251 NLRB at 1089, n. 14.) Accordingly, there is no need for us to consider the substantiality of the other alleged grounds of discharge.

tedious work and they lost the freedom to determine how long they wanted to work.[5]

Ordinarily, when the crew was going to switch from budding to rebudding, the employees would be notified of the change the day before it was to take place. Although Bob Phillips, one of Respondent's supervisors, testified that on May 25 he told every budder that the teams would start rebudding the following day, the five discriminatees uniformly testified that they were not advised of the change until the morning of May 26.[6] The ALJ credited the employees; Respondent did not except to his conclusion and, after our own review of the record, we affirm it.[7]

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[5]In this connection, we also consider the implication of the two "choices" later given by Respondent. Mauser reacted to the employees' complaints about their not being notified of the change to the hourly rate by giving them the choice of leaving at 2:15 (with a lunch break) or leaving early (without a lunch break). Since lunch was only half an hour, leaving early, according to Respondent's reckoning, meant leaving at 1:45. If we compare the length of the proposed early workday with the length of the 23 work days represented in Respondent's Exhibit 4, we find that on five days the discriminatees got to leave at least one hour earlier than the earliest they could have left under Respondent's choices; on three other days the employees got to leave 45 minutes earlier than the earliest they could have left under Respondent's choices; and on 10 other days the discriminatees got to leave at least 15 minutes earlier than the earliest they could have left under Respondent's choices.

[6]Respondent has argued that, as experienced budders and tiers, the five discriminatees should have known that they would be rebudding the next day because they were near the end of a block. A review of the employees' time cards, however, indicates that the crews worked on such a variety of stock that, in the absence of additional evidence on the matter, we cannot conclude anyone would have known he would be rebudding merely because he finished budding a block of *a* particular kind.

[7]The ALJ credited the employees on the grounds that (1) enough employees apparently failed to bring lunch to cast doubts on

Rafael and Hortencia Gonzales both testified they first learned of the switch to rebudding around 7 a.m., when they obtained more budwood from Patricia Lucio. Maria Maddock, Antonio Gonzales and Eduardo Villegas put their discovery of the change shortly before nine. Rafael, Hortencia and Eduardo testified that they had so much counted on leaving early that they immediately sought and received permission to leave at noon from Patricia Lucio, whom they regarded as their crew leader. Lucio testified that only Hortencia sought permission to leave and she denied granting that single request. According to Lucio, when Hortencia asked if she could leave at noon, she replied that she would have to talk to Ken Mauser.[8] Because Mauser admitted hearing from Lucio that some workers did not have lunches and wanted to leave

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Phillips' testimony and (2) Respondent's willingness to accomodate the employees by sending out for lunch is consistent with consciousness of its own failure to notify everybody that they ought to bring lunch. Despite reaching this conclusion, the ALJ expressed reservations about whether Maria Maddock and Antonio Gonzales were among the employees who had not been notified of the change to the hourly rate because, as he put it, "they appeared to have brought lunch with them . . . . " (ALJD, at 15.) Although Patricia Lucio testified that Maddock told her she had brought lunch, Maddock herself testified she only brought "breakfast;" and while Antonio Gonzales did testify that he brought "lunch," he testified that he brought the "kind of lunch" that he generally brought on days he worked piecerate (in this case two tacos, which he shared with Maria Maddock on their nine o'clock break). Since the employees usually had a morning snack, we cannot conclude that Gonzales[1] reference to having brought his usual "lunch" indicates knowledge of the switch to rebudding.

[8]The ALJ not only concluded that Lucio could not give permission to leave but also that, based upon their subsequent behavior, the employees did not really believe they had received permission to leave. We affirm his conclusion in this regard.

at noon, we do not credit Lucio's testimony that only Hortencia asked permission to leave. Exactly when Mauser heard from Lucio that the employees wanted to leave is not clear from the record.

What is clear is that sometime after the employees spoke to Lucio the crew took a break during which they discussed the change to rebudding. Employee accounts of this meeting vary. Rafael Gonzales emphasized a discussion concerning the wage paid for rebudding. Hortencia Gonzales testified that the workers generally discussed the lack of notification and "not being prepared." Maria Maddock testified that the workers discussed both the "change and not being notified." According to her, "everybody was really angry, so they were all saying they were going to leave at twelve." Although no one asked Eduardo Villegas whether he took part in the discussion, he testified that a number of workers had decided to go out at noon, because they did not have lunch.[9]

It is also clear that after the meeting a call was placed to the office and Ken Mauser came to the fields in response to the call. Everyone agrees that the employees initially spoke to Mauser about getting a higher rate for rebudding.[10] Rafael

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[9]Contrary to the ALJ's conclusion (at n. 36), Villegas' testimony about a planned walkout at noon corroborates that of Maria Maddock. The ALJ also erroneously concluded (at n. 35) that Villegas was not present during the crew discussion. Villegas did testify that he was "a ways off from" any discussion between the workers and management, also that he was' "a ways off" from the "noontime" discussion between the workers and Ken Mauser. He did not testify that he was a "ways off from" the crew discussion.

[10]Hortancia, Rafael and Maria testified that Mauser spoke to Rafael about the group's demands; Mauser testified he spoke to Guillen. The ALJ credited the employee witnesses.

testified that Mauser replied he would have to go to the office to inquire; Norris and Mauser testified that Mauser simply walked to the edge of the field to discuss the rate. Wherever Mauser went, it is further agreed that he returned quickly with an offer for the crew to rebud at the budding piecerate.[11] At this point, accounts begin to diverge again.

Maria and Rafael testified that, after the previous piecerate offer was rejected, Rafael asked Mauser whether, because of the Company's failure to notify the crew of the change, the Company would pay "us" for the extra two hours since "we" were going to leave at noon. According to Rafael, Mauser replied that he would go to the office to find out about the two hours. Rafael asked him to find out quickly because he was leaving at noon. According to the employees, Mauser then asked who else was leaving and Maria, Antonio and Hortencia indicated they were. Mauser denied having any conversation with Rafael or any other employees about leaving at noon.

Like the ALJ, we credit the employees' account. For one thing, Mauser testified that he spoke to Bud Norris about the employees' "demands" and, since Norris testified he knew some employees wanted to go home, we conclude that Mauser must have told him. Although Norris' sense of the timing of the conversation does not jibe completely with that of the employees,

[11]In view of the employees' uncontradicted testimony that they discussed a noon walkout during their break, it may be that Mauser responded so precipitously to the employees' wage request that there was no opportunity to discuss any other concern with him. It may also be that the employees were determined to walk out only

his testimony corroborates the substance of their account.[12] So do Mauser's actions. As a result of his conversation with Rafael about Rafael's not having lunch, Mauser agreed to return to the office to, in his words, "try to get the lunch or send somebody for lunch." According to Mauser, he and Norris discussed the "lunch" problem around 9:30-10:00 a.m., after which they decided to

> [offer] several possibilities. The one that we finally ended up with was if they were budding straight rate, straight piecerate that they normally don't take a lunch anyway. And that if they wanted to work straight through their lunch hour or their lunch period that they could go home early.
>
> If they wanted to take their lunch that they work until normal quitting time that day which would have been 2:15. On the ones that hadn't brought lunch we decided that--Bob Phillips had volunteered to go into town to pick up lunch if they wanted it but, of course, the

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after they were disappointed by Mauser's offer. In either event, so long as the concern which stimulated the employees' activity was sufficiently related to their interest as employees, Eastex Inc. v. National Labor Relations Board (1978) 437 U.S. 556, 557-558 [98 LRRM 2709, 2717], the walkout cannot be considered "unprotected" merely because it was of secondary importance to the employees.

[12]The text of his testimony follows:

[By General Counsel]:

When the workers were asking for money on rebudding, do you remember how much they were asking for?
A. Only one guy asked for it, Steve Guillen, and we explained to him that the rates had already been set for that year, and it was agreed upon, and it would stay that way.
Q. Do you remember what he was asking, though? How much?
A. He didn't have no figure in mind.
Q. No figure?
A. No, he didn't mention a figure.
Q. And none of the workers expressed a figure?
A. No, he didn't mention a figure.
Q. And none of the workers expressed a figure?
A. No.

employee would have to pay for it.[13]

If, as Mauser testified, he was under the impression that only one employee did not have lunch, why did he and Norris devise two options to be presented to the entire crew which directly relate to when employees could leave? The logic of Mauser's response points to the credibility of the employees' account.

There is no question that Mauser returned to the field around noon to convey his two options to the workers. Mauser initially testified that, after he delivered his two "options" to the "whole budding crew," Rafael remarked that he had not been

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Q. They just said they wanted more money?
A. He was the only one that said anything about it. The rest of them just wanted to go home at noon.
Q. Who did he say this to?
A. To Ken Mauser.
Q. Were any of the other workers talking to Ken Mauser at that time?
A. No.
Q. It was just Steve who went up to Ken?
A. Just Steve.
Q. No other workers spoke to anyone in the company about getting more money?
A. No.
Q. But the other workers were angry about something. Is that right?
A. Yes. They just wanted to go home at noon.
Q. Why did they want to go home at noon?
A. I really don't know.
(R.T.V.I pp. 95-96.)

[13]To the extent that Mauser's testimony may be read to imply that he arranged for Phillips to get lunch at this time, it simply does not square with that of Lucio and Phillips. Lucio testified she had already collected money for lunch at around 7 or 8 a.m. which was well before breaktime. And Lucio's testimony is corroborated by that of Bob Phillips who testified that Lucio asked him to get lunches sometime after 6 a.m.

informed about the change, to which Mauser replied that he had. In response, Rafael called Mauser a "lying son-of-a-bitch," and said "I did not bring lunch and *I* am leaving." Mauser repeated the choices; Rafael slammed his budwood on the trailer, raised his hands in the air, saying, "You guys can do with me whatever you want, I'm leaving," and he and the others left. When called by his own counsel, Mauser testified that when he returned to the field at noon, Rafael questioned him about his "decision about lunch." Claiming not to know what Rafael was talking about, Mauser nevertheless delivered the two options. Rafael replied that he had not been informed and that he was going home. When Mauser said that Phillips had informed him, Rafael called him a "lying son-of-a-bitch . . . nobody told me I was going to working by the hour . . . I'm going home." Maria Maddock then said, "you people are denying us our lunch hour" to which Mauser replied that she had a choice.[14] At this point, Rafael slammed his budwood down, repeated that he had not been notified, and left, followed by Antonio who also slammed down his budwood. Norris substantially corroborated this account.

The employees testified differently. In their telling, the incident began with Rafael asking Mauser if he had an answer to the question whether the Company would pay for the two hours because it was the Company's fault for not notifying them.

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[14]Mauser's retort is one more indication that his "options" were a reaction to the employees' intention to leave at noon.

According to Rafael, Mauser then called them a bunch of liars to which Rafael responded, "Bullshit, [you're] lying." Rafael testified that Maria then said, "We tried to reach an agreement with you on a new rebudding rate and on getting paid for the two hours and you gave us permission to leave." Hortencia repeated the same basic story, but had Maria saying, instead, that they "unsuccessfully had tried to reach an agreement with the Company and [they] had to leave." According to Maria, after Rafael said "bullshit," he continued: "it's your fault/ you guys didn't tell us so . . .I think you guys should pay us." She corroborated Hortencia's testimony that she said "we tried to get the two hours and the company doesn't give us no response so we are leaving."[15] All the employees testified that neither Rafael nor Antonio slammed the budwood down. The next day the employees were fired.

We find, as did the ALJ, that the employees' version of what transpired at the noon meeting is more credible than the company's version. The employees' account comports with our other findings in that the employees demanded two hours' pay and voiced their intention to leave because of the company's failure to notify them. Also, Mauser's testimony that he had no idea what Rafael was talking about strikes us as a fabrication in view of the fact that his two options were apparently crafted to deal with

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[15]Although the employees' testimony is not entirely uniform, it is clear a demand for two hour's pay was made.

the question of when the employees could leave. Our distrust of the main lines of Mauser's testimony causes us to further credit the employees' accounts that it was Mauser who first started the name-calling. We thus find that the employees were angry about the change to rebudding, about not being notified and about not being able to leave "early;" that they discussed it among themselves; that they decided to leave at noon; that Mauser knew the group was prepared to leave at noon; knew that Rafael had demanded two hour's pay and that, as a result, he consulted with Norris about how to respond to what he took as group demands.

Putting aside for the moment the question of the importance of each of the employee's individual motives with respect to the concerted nature of their walkout, we wish to emphasize how our conclusions differ from those of the ALJ. First, in light of our findings, we reject the ALJ's conclusion regarding the "individual" nature of Maria Maddock's and Antonio Gonzales' concerns. Even if, as the ALJ concluded, Maddock and Gonzales were only expressing solidarity with the other employees, section 1152 of the Act specifically protects such demonstrations of "mutual aid and support." As we recently expressed in V. B. Zaninovich (1986) 12 ALRB No. 5: "[W]hat [may] begin as a personal concern . . . [becomes] a group concern based upon the tacit understanding that the mutual aid to the aggrieved worker might also be extended to any other member of the group who had a job-related problem in the future." (12 ALRB No. 5; NLRB v. Peter

Cailler Kohler Swiss Choc. Co. (2d Cir. 1942) 130 F.2d 503 [10 LRRM 852].)

Second, it was error for him to conclude that Villegas had no other motive for leaving than to obtain a ride with Gonzales, since, as Villegas testified, he thought he was taking part in a group walkout; thus, to this extent, he too, must be seen as rendering "mutual aid." Finally, it was error for the ALJ to have concluded that Maddock's demand for two hour's pay was individual because no other employee "manifested complicity [sic] with it," when it is clear that Rafael, as spokesperson for the group, made the same demand. We next consider whether, assuming that Rafael and Hortencia were primarily motivated to leave at noon because they had to pick up their child, that Villegas was partly motivated to leave in order to get a ride home, and that Maria and Antonio left in part because they had no lunch, that their common act of walking out must be seen as a "bundle" of "individual" actions.

Prior to Meyers Industries (1984) 268 NLRB 493 [115 LRRM 1025], we had rejected such a contention, Pappas & Company (1979) 5 ALRB No. 52, as had the NLRB. See, e.g., McGaw Laboratories (1973) 206 NLRB 602, 603 [84 LRRM 1416, 1417] where the national board adopted the ALJ's reasoning:

> Employees who act in concert do not necessarily do so for the same reason. Some may be seeking higher wages. Others may want shorter hours or greater fringe benefits. Still others may make common cause in the hope of reciprocal support at a later time.

Ignoring such authorities, the ALJ relied upon an application of the standard for "constructive" concerted

activities announced in Meyers Industries (1984) 268 NLRB 493 [115 LRRM 1025]. Under the Meyers standard

> to find an employee's action to be 'concerted,' [the Board shall require that it be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(l) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected activity. (268 NLRB 493, 497 [115 LRRM 1028)]; emphasis added.)[16]

As we have emphasized by our underlining, Meyers addressed the question of when the activities of a single employee might be considered "concerted." Gourmet Farms (1985) 10 ALRB No. 41, in which we adopted Meyers, involved a similar question: whether, in speaking out during a group meeting, & single employee could be considered to be engaged in group activity. Whether we may construe the acts of a lone employee as being undertaken in "concert" with his fellows is a far different question from whether the policy of the ALRA will be furthered by uncoupling the demonstrably united efforts of a group of employees by analyzing the motives of each of the employees for joining together in the first place.

[16]Meyers, of course, has been remanded by the Court of Appeal Prill v. NLRB (D.C. Cir. 1985) 755 F.2d 941, [120 LRRM 3392] for reconsideration in light of NLRB v. City Disposal (1984) 104 U.S 1505 [115 LRRM 3193]. While the NLRB was not precluded from announcing the same test, the validity of Meyers has been undercut by the court's opinion. For the purposes of this opinion, we intimate no opinion about the continued authority of Meyers.

In order to determine whether Meyers should be read to require the approach utilized by the ALJ, it will be useful to detail the purpose of the "concerted" activity requirement. The requirement of "concert" as insulating certain actions taken by employees is not original to the NLRA; it first appears in 1914 in the Clayton Act which exempted certain types of peaceful union activities from the reach of antitrust laws. (See 15 U.S.C. § 17; 29 U.S.C. § 52; Gregory, Labor and the Law, 1946, pp. 158 et seq.) In 1932, Congressional protection was again afforded to united actions in the Norris-La Guardia Act which specifically declared that "the individual . . . worker shall be free from the interference, restraint or coercion, of employees . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 102.) It is this familiar formulation which found its way into the Wagner Act upon which our own statute is modeled and under it concert of "action" is protected, not concert of "thought."

Congress' peculiar emphasis on concert is rooted in history:

> That history begins in the early days . . . when employers invoked the doctrines of criminal conspiracy and restraint of trade to thwart workers' attempts to unionize. [Citations.] [Yet] a single employee at that time 'was helpless in dealing with an employer; . . . he was dependent ordinarily on his daily wage for the maintenance of himself and his family; . . . if the employer refused to pay him the wages that he thought fair he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; . . . union was essential to give laborers opportunity to deal on an equality with their employer.' (NLRB v. City Disposal Systems (1984) 104 U.S. 1505,

1512, [115 LRRM 3193, 3198-99]; emphasis added.)

In the sequence of legislation which we have briefly summarized, Congress sought "to equalize the bargaining power of management and labor" by protecting concert of action. (Ibid, at 3199.) We think it ill-comports with this history to factor out individual motives in demonstrably group actions in order to see if some underlying unanimity of sentiment informs them. Men and women engaged in a common effort often act from a variety of motives, yet we do not ordinarily treat such actions as "individual" based upon an analysis of the differences between the actors. Indeed, we regularly speak of the will of the majority emerging from the common effort of casting ballots even if everyone who voted on the same side did so for a different reason.[17]

Having rejected the ALJ's approach to this case, it remains to point out that even after Meyers the NLRB has not taken such an approach. Thus, in Advance Cleaning Service (1985) 274 NLRB No. 41, ALJD, p. 4 [118 LRRM 1491], in an opinion adopted by the NLRB, the ALJ noted:

> To the extent that every individual's thoughts are private and probably never completely known to another each of his or her decisions is an individual decision, but when two or more employees, having each made an individual decision, join together in group action toward a commonly desired objective that action is concerted activity, not concerted thought. Any

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[17]This result is not at odds with Nash de Camp v. Agricultural Labor Relations Board (1984) 146 Cal.App.3d 92 [193 Cal.Rptr. 910]. The court in that case explicitly recognized that employees' actions intended "to induce or prepare for group action" is concerted. (146 Cal.App.3d 108.) So, in this case, no matter what the employees' individual reasons for walking out, the form of their protest was "concerted."

> contention that a failure of all participants in a group activity to entertain identical reasons for engaging in that activity renders the activity individual rather than concerted is plainly without merit. So too is Respondent's argument that here employees did not act concertedly because they decided individually not to work overtime. Whatever reasons they might have entertained for not wanting to work overtime the alleged discriminatees and Corn acted as a group in refusing to stay past 4 p.m. This action was concerted because it was a shared activity, Meyers Industries, Inc. 268 NLRB No. 73 (1984), and protected because it concerned hours of work. Respondent knew the activity was concerted, knew it concerned a refusal to work overtime, and threatened to discharge and did discharge employees for engaging in this protected concerted activity.

To the same effect is Daniel Int'l Corp. (1985) 277 NLRB No. 81 [120 LRRM 1289] in which the Board treats the Meyers test as satisfied by a showing that employees acted in a "concerted manner" by, inter alia, discussing their concerns together, speaking out together and walking off the job together. (See also J. P. Hamer Lumber Company (1979) 241 NLRB 613 [100 LRRM 1629].)

Having concluded that the employees' actions were concerted, we must determine whether they were "protected." Like the concept of "concerted" activity, that of "protected" activity has also eluded definitive formulation.[18] We have no need to attempt a definitive test. Since we have found Respondent

[18]Some courts have attempted such a definitive formulation. Thus, in Shelly & Anderson Co. v. NLRB (9th Cir. 1974) 497 F.2d 1200 [86 LRRM 2619], the Court announced a four factor test which has been relied upon as authoritative, see e.g., German, Labor Law 296-302. The rigidity of the four-factor test, however, has been disapproved by the Supreme Court, Eastex, Inc. v. NLRB, supra, at n. 17, which has emphasized a more flexible "relationship to employees' interest" test.

initiated the abusive language, we do not find Gonzales' response in kind to be unprotected, (see Giannini & Del Charro (1980) 6 ALRB No. 38; Webster Clothes, Inc. (1976) 222 NLRB 1262 [91 LRRM 1432] so that the only remaining question is whether, in walking off the job at noon, the employees were engaged in a legitimate form of protest. The ALJ concluded that the noontime walkout was an unprotected attempt by the employees to dictate their own terms and conditions of employment. In support of this conclusion, he relied upon a number of cases considering "partial strikes" or "intermittent work stoppages." Although it is clear that "a concerted stoppage or strike . . . which is 'partial' 'intermittent' or 'recurrent' is . . . unprotected activity" (First National Bank of Omaha (1968) 171 NLRB 1145, 1149, [69 LRRM 1103] enforced (8th Cir. 1969) 413 F.2d 921 [71 LRRM 3019]), because different rules apply to each class of conduct, it is necessary to distinguish between them.

A "partial strike" is a refusal by employees to work "on certain assigned tasks while accepting pay or while remaining on the employer's premises," Audubon Health Care Center (1983) 268 NLRB 135, 136, [114 LRRM 1242]; while "a recurrent" or "intermittent" strike is a "repeated refusal" to perform certain work.[19] It is clear that the employees' walkout in this case was

[19]According to Morris, Developing Labor Law, 2d Ed. p. 1017: "A partial strike is a concerted attempt by employees, while remaining at work, to bring economic pressure to force their employer to accede to their demands. Another form of partial strike is a slowdown, i.e., a concerted slowing down of production by employees. A further example of a partial strike deemed unprotected is the intermittent work stoppage."

not a "partial strike" because the employees walked off the job completely. This distinguishes the matter at hand from Bird Engineering (1984) 270 NLRB 1415 [116 LRRM 1302] one of the cases relied upon by the ALJ in finding the walkout unprotected, for in that case the disgruntled employees remained at work and ignored the new rule they were protesting.[20] Similarly, in Audubon Health Care Center, supra, the activity found unprotected was the refusal of nurses to cover a section left open because of short-staffing, while performing all their other duties.

When employees walk off the job, however, they are said to be engaged in a work stoppage, to which different considerations apply. Thus, in Quality C.A.T.V., Inc. (1986) 278 NLRB No. 156 (slip opn., [121 LRRM 1297], the Board held that two linemen who walked off the job for the day because they were being asked to climb poles in wet weather, were engaged in protected activity

> Boyle and Reners acted in concert in refusing to work--they had discussed the matter earlier and refused at the same time. Their concerted refusal to work was to protest that they climb poles when wet, an employment condition. Protest over this employment condition was protected whether Boyle and Reners acted because they were concerned about their safety, their personal comfort or their supervisor's attitude. In carrying out their protest Boyle and Reners did not exceed the permissible bounds of protected activity--they were not violent, and they did not appropriate the Respondent's

[20]That the NLRB focused on this distinction is clear from note 3 where it states: "If the employees had chosen to demonstrate their opposition to the lunchbreak rule by participating in a work stoppage or similar forms of conduct then the protections of the Act might have applied." (270 NLRB at 1415 [116 LRRM 13001; emphasis added.

> property or prevent it from operating with other employees. They simply refused to continue the work they were performing, and there is no evidence that they intended to do some but not all the work or to stop their work intermittently. (Slip opn., p. 4.)

And in E. B. Malone Corporation, Basset Bedding Division (1984) 273 NLRB No. 16, [117 LRRM 1492] the NLRB adopted its Administrative Law Judge's decision that the discharge of three employees for refusing to work overtime in order to protest a newly adopted policy concerning telephone use was unlawful. The law judge's holding in E. B. Malone was based upon NLRB v. Washington Aluminum (1962) 370 U.S. 9 [50 LRRM 2235] in which the Supreme Court held that a one time walkout by employees to protest their working conditions was protected activity. Following Washington Aluminum, supra, the NLRB has created

> . . . a presumption that a single work stoppage is a protected strike activity; and that such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer. (Polytech, Inc. (1972) 195 NLRB 695, 696 [79 LRRM 1474].)

In the instant case the ALJ treated the final clause as establishing a category of conduct which is unprotected in the first instance rather than, as Polytech clearly holds, only when shown to be part of a "plan or pattern" for future conduct. In Polytech, the national board has made it clear that one-time stoppages are presumptively protected when "unaccompanied by any

affirmative indication as to what the employees intended to do in the future if the employer continued to maintain existing . . . policies." (Id. 195 at 696.) In this case, since there is no showing that the walkout was anything but a one-time response to a one-time situation, the employees' activity was protected.[21] See also NLRB v. GAIU Local 13-15 (1982) 682 F.2d 304 [110 LRRM 2987]; Excavation Construction v. NLRB (1981) 660 F.2d 1015 [108 LRRM 2561].) Accordingly, we shall require Respondent to reinstate them and to compensate them for their losses.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Armstrong Nurseries, Inc., 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 in violation of section 1152 of the Agricultural Labor Relations Act (Act).

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

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[21]The fact that some of the alleged discriminatees had engaged in previous work stoppages does not change our analysis. In the first place, we don't know anything about the circumstances of the previous stoppages which Respondent stipulated were both protected and concerted and in the second place, whether a work stoppage is "recurrent" is determined by reference to the particular objective of the protest.

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

(a) Offer to Rafael Gonzales, Hortencia Gonzales, Antonio Gonzales, Maria Maddock, and Eduardo Villegas 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 amounts 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, 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 May 26, 1983, to May 26, 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 a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(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: September 9, 1986

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

GREGORY L. GONOT, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Armstrong Nurseries, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board has found that we violated the Agricultural Labor Relations Act (Act) by discriminating against Rafael Gonzales, Hortencia Gonzales, Antonio Gonzales, Maria Maddock and Eduardo Villegas. 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 REIMBURSE Rafael Gonzales, Hortencia Gonzales, Antonio Gonzales, Maria Maddock, and Eduardo Villegas 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: ARMSTRONG NURSERIES, 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 Agricutlural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 588-3161.

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

Armstrong Nurseries, Inc., (UFW)

Case Nos. 83-CE-108-D
83-CE-109-D
83-CE-110-D
83-CE-123-D

12 ALRB No. 12

ALJ DECISION

On May 26, 1985, five employees walked off their job at noon, angry over a change in work assignment. The change about which they would ordinarily have been notified, was to a harder and more tedious operation. Before the walkout the employees sought a higher rate of pay for the new operation. After this was denied, the employees decided to leave the job. The ALJ found that the employees decided to walk out for different reasons and that, following Meyers Industries, such a walkout was not concerted activity. He also found that the actions of some of the employees were not protected because they were attempting to dictate their own terms and conditions of employment.

BOARD DECISION

The Board found that the action was concerted even if the employees had different reasons for walking off the job. Analyzing Meyers Industries, the Board held that it did not apply to demonstrably group actions. The Board further held that the walkout was a one-time work stoppage which was presumptively protected.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 83-CE-108-D
	)	83-CE-109-D
ARMSTRONG NURSERIES, INC,	)	83-CE-110-D
	)	83-CE-123-D
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

Appearances:

Miles Locker, Esq.
for the General Counsel

Ned Dunphy
for the United Farm Workers
of America, AFL-CIO

Ken Youmans, Esq.
of Seyfarth, Shaw, Fairweather & Geraldson
for Respondent

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE

Beginning May 27, 1983,[1/] the United Farm Workers of America, AFL-CIO, hereafter referred to as the Union, filed a series of unfair labor practice charges alleging that Armstrong Nurseries,Inc. (hereafter referred to as respondent or the company) violated sections 1153 (a) (c) and (d) of the Act. Based on these charges, on April 26, 1984, the General Counsel for the Agricultural Labor Relations Board caused to be issued a complaint alleging violations of the aforementioned sections of the Act. Respondent timely filed an answer which, in essence, denied the commission of any unfair labor practices.[2/]

Commencing July 16, 1984, a hearing was held before me in Delano, California. All parties appeared through their respective representatives. Based upon the entire record in the case, including my observations of the demeanor of each witness as he/she testified, and having read and considered the briefs submitted following the close of the hearing, I make the following:

II. FINDINGS OF FACT

A. Jurisdiction

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

2. The Union is and was, at all times material, a labor

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1. All dates refer to 1983 unless otherwise noted.

2. Respondent was duly served with all charges and the Complaint and Notice of the Hearing.

organization within the meaning of the Act.[3/]

B. THE UNFAIR LABOR PRACTICES ALLEGED: THE FACTS PRESENTED

1. Introduction

The events in controversy center around a change in the job function being performed by one of respondent's crews. The crew, at the time of the incidents in question, was involved in a "budding and tying" operation, which consisted of propagating a particular variety by grafting it onto a root stock.[4/] The task is accomplished by inserting a bud or "eye" in a knife-cut in the stock, then tying or wrapping it with a rubber band to hold it in place until the bud knits to the stock and begins to grow on its own.

Once a particular variety has been budded, an operation known as "re-budding" takes place. This task is performed in essentially the same manner as budding, and is warranted after the original bud placed in the root stock does not take. In addition to the grafting component of the job, however, workers must inspect the original bud to determine if it has taken, and whether re-budding is at all necessary. This inspection process may also involve scraping soil off the root stock to get a better look at the original bud.

Workers performing the original budding task are compensated on a piece-rate basis of $32 per thousand units budded.

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3. Respondent admitted the jurisdictional allegations of the Complaint in its Answer.

4. Former supervisor Ken Mauser stated that these operations are performed during two seasons denoted as "spring budding," which occurs in March and April, and "June budding," which takes place from the end of May until the beginning of July.

As re-budding is somewhat more time consuming[5/] and arduous,[6/] crews are generally paid on an hourly basis with an incentive. In addition, while budding workers have some discretion in determining the length of their respective work days,[7/] in the re-budding operation crew members must put in a regular eight-hour shift.[8/]

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5. Production records demonstrated that while a two-member budding and tying team might bud approximately 300 units per hour, re-budding ordinarily can be accomplished at half that pace, or about 150 units per hours.

6. Worker and alleged discriminatee Maria Haddock stated that the position assumed by workers for the inspection and re-budding was more tiring than that needed for regular budding. Additionally, supervisor Bud Norris noted that, when re-budding, workers need to make a deeper cut in the root stock to insert the node.

7. Alleged discriminatees Villegas, Antonio Gonzalez, and Rafael Gonzalez testified that when working piece rate they could leave work after a certain number of hours had elpased. Villegas stateed that he could leave after six hours on the job; A. Gonzalez stated he could leave after five or six hours on the job. By contrast, Ken Mauser testified that piece rate compensated employees might leave the field only after earning, by piece rate, the equivalent of an eight-hour, full days' wage, calculated at the hourly rate: i.e., a particular number of pieces had to be completed before a worker could leave. Record-keeper Patricia Lucio similarly testified that while working on piece rate, employees could leave the job after they earned the equivalent of an hourly paid day's wages, although this might be as early as five hours from the commencement of work day. Lucio added that on occasional Fridays, workers might leave after four hours on the job. Maria Maddock also noted that the amount of time on the job required of employees on piece rate was determined by reference to the "amount of wages earned." Mauser's description of the length of the work day, corroborated by Lucio and Maddock appears more apt.

Nevertheless, although in some instances, as shown by production records, crew members on piece rate work between seven and eight hours, it is clear that the piece rate work day was somewhat shorter than the eight hours necessary for an hourly-paid work day.

8. The word day begins at 6 a.m. When working hourly, quitting time is at 2:15 p.m.

Concomitantly, while working on piece rate employees customarily do not take a half-hour lunch break: they work straight through until quitting time, thereby shortening the work day. When working on an hourly basis, employees take the time between noon and 12:30 p.m. to eat lunch.

2. The Source of the Controversy

The crew in question was, on May 26, 1983, involved in this transition from the budding to the re-budding operation. After working roughly two and one-half to three hours by piece rate, Rafael and Hortencia Gonzalez, Maria Maddock, Eduardo Villegas and Antonio Gonzalez, the alleged discriminatees, were each told that they would then begin re-budding, working for an hourly wage. Each maintained they had not been notified the day prior that this mid-morning change would be taking place.

By contrast, deciduous production manager Bud Norris testified that on May 25 he relayed instructions to Bob Phillips regarding the change. It was Phillips' responsiblity to convey this information to the workers. Although Phillips testified that he was "sure" that he notified everyone, his lack of familiarity with Spanish would seem to hamper his ability to communicate directly with some workers. In fact, Patricia Lucio noted that at times, because of this, she conveyed Phillips' instructions to crew members. Phillips himself stated that when he had instructions for Tony Gonzalez, he would usually give these to Maria Maddock, whom he expected to relay information to Gonzalez.

The totality of the evidence makes clear, however, that at least some crew members did not receive Phillips' instructions, and

I so find. This conclusion is supported by evidence indicating that, some workers were in fact "unprepared" for the change, and, as discussed infra, the company sent Phillips to buy lunches for crew workers, and appeared willing to modify its hours-of-work rules as a result of some crew members being inconvenienced by the change.[9/]

At all events, the alleged discriminatees averred that as a result of this lack of notification, none of them had come to the job site "prepared" to work an eight-hour shift. Villegas, Maddock, and Antonio Gonzalez claimed not to have brought a "lunch" with them. Hortencia and Rafael Gonzalez, in addition to not bringing lunches, also testified that they had a problem with their babysitter, and would have had to depart from work early, or at least by 12 noon, so as not to leave their child unattended.

As developed in their own respective accounts, however, the reasons for leaving which each of the alleged discriminatees gave were not unqualified. Maria Maddock testified that she had brought a lunch with her that day, but something was spilled on it and she could not eat it. Antonio Gonzalez brought two tacos to work with him that morning, but gave one to Maddock, his budding and tying partner, whom he learned had ruined her own lunch. These they ate during the morning break.

Eduardo Villegas brought only two hard-boiled eggs with him that day, hardly qualifying as a "lunch" for one engaged in physical labor. However, as was later established, he left work at noon on

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9. It may additionally be inferred that Respondent's modification of work hours was prompted by a wage "protest", also discussed below.

May 26, not because he had no lunch, but because his ride, Antonio Gonzalez, also left at that time.[10/]

Hortencia and Rafael Gonzalez, as noted, stated that because they were not prepared to work a full eight-hour shift, not only had they not brought lunch,[11/] they had originally planned to leave work that day at 11:30 a.m. because their child's babysitter would be unable to look after their child that afternoon.[12/] Rafael testified on direct examination that his child was the sole reason necessitating the couple's noon departure, and added on cross-examination that, owing to the babysitting problem, he had to leave by noon regardless of whether or not he had brought a lunch with him to work. However, in the ALRB declaration filed by Rafael Gonzalez in support of the underlying charge, he made no reference to this problem with his child. He merely stated therein that he asked Patricia Lucio for permission to leave "because we did not bring lunch." As will be discussed below, Gonzalez also did not use this reason for leaving early as a basis for obtaining permission to do so from Mauser, or refer to it in their confrontation at noon on the 26th. Similarly, Hortencia did not bring the babysitting

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10. Eduardo Villegas admitted this during the course of his cross-examination.

11. Rafael and his wife ate a sandwich at some point during that morning.

12. Rafael testifed that the couple had similar babysitting difficulties thoughout that week, and in the three days previous to May 26 he had left work about 11:00 or 11:30 each day. In contrast, respondent's records, outlined below, showed that the couple worked for six hours, or until 12 noon on Monday of that week, and seven and one-half hours, or until 1:30 p.m., on Tuesday.

problem up in discussions with Mauser that morning.[13/]

Respondent's records demonstrated that employees working on piece rate regularly worked seven to eight hour days.[14/] Thus, it might be argued that the change from budding to re-budding had little effect on the ultimate length of the work day.

However, it was also clearly established that workers on piece rate were permitted some discretion as to when they would be able to leave work. Notwithstanding qualifications to and skepticism about their proffered rationales for the problems created by the change in work duties,[15/] the alleged discriminatees actually did lose something in the transition, and that was the capacity to decide for themselves when they would be able to leave work that

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13. She claimed to have mentioned it to Lucio, however.

14. Field budding records introduced by respondent showed the following time spent in initial budding:

		Hours Worked		
Budding-Tying Pair:		R. Gonzalez H. Gonzalez	A. Gonzalez M. Maddock	E.Villegas E. Guillen
Date:	5/16	8	-0-	8
	17	7½	7½	7½
	18	7½	7½	7
	19	8	7½	7
	20	5	-0-	5½
	23	6	8	7 1/2
	24	7½	7	7
	25	(not produced)	7½	7 1/2

15. The fact that Maria Maddock and Antonio Gonzalez appeared to have brought lunch with them that day would seem to run counter to their assertions that they had not been informed of the prospective job task change, or that they were not "prepared" to work through the afternoon.

day.[16/]

As stated above, each of these workers stated that between 8:30 and 9:00 a.m. they were told for the first time by Patricia Lucio[17/] that their job task, method of payment and hours of work

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16. The power to determine hours of employment is an integral part of the employment relationship (See Morris, Developing Labor Law, 2d Ed. (1983) pp. 757-76).

17. General Counsel alleged Lucio to be a supervisor. She testified that she had been employed at various times as a "crew leader" and a recordkeeper. On the day in question, Lucio was performing record-keeping tasks. From a desk on the bud trailer parked at the work site, she would tell workers to what row they were assigned, and record their counts and hours of work. Her immediate supervisor was foreman Paul Guillen, who in turn reported to Ken Mauser, assistant deciduous department production manager. Mauser worked under Glynn "Bud" Norris, the deciduous production manager.

Apart from recordkeeping, conveying instructions and announcing row assignments, Lucio had no other responsiblities in connection with crew members. For example, as she testified, she did not inspect or correct their work.

Bud Norris testified that while Lucio had been a "crew leader" from time to time, she did not occupy this position at the time of the events in question. Bob Phillips was employed in this capacity for the crew in which the alleged discriminatees worked-Crew leaders are paid more than crew members, and participate in weekly management meetings. They are responsible for maintaining quality control, overseeing the crew's output, bringing performance inadequacies to the attention of individual workers, and instructing or correcting them when necessary. In the event a disciplinary problem arises, the crew leader would generally discuss the problem with the crew foreman, who would then deal directly with the worker involved. While crew leaders had the authority to issue disciplinary notices (three of which issued within six months of one another would subject the worker to discharge), in most instances the issuance required the approval of the foreman.

I specifically find that at the time of the discharges under scrutiny, Patricia Lucio was not a supervisor within the meaning of § 1140.4(j) of the Act. Lucio did not perform any functions which required the use of independent judgment. She was merely a conduit through which respondent's supervisors conveyed

(Footnote continued----)

would be changing that day. In particular, Rafael Gonzalez testified that when he began work on the morning of May 26, he and his wife had a portion of a row to complete.[18/] After finishing their row, they took a break to eat a sandwich, then went to retrieve more budwood from Lucio. It was at that point, the couple claimed, that Lucio told them that they would begin re-budding, paid by the hourly rate. Rafael thereupon asked his wife Hortencia to speak to Lucio to obtain permission to leave at noon. Hortencia stated that she approached Lucio and asked whether they could leave early "just for the reason that we had not been notified that an hourly schedule was going to be changed for that day. That I didn't have a babysitter and we didn't come to prepared to make it an eight-hour day."[19/] Both Rafael and Hortencia testified that Lucio

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(Footnote 17 continued----)

work assignment information to its crew members. Her record-keeping was of a routine, clerical nature. None of her duties involved the authority to hire, fire, or discipline workers, or the responsibility to direct their work, as contrasted with the duties of the crew leader, whose authority did encompass some of these attributes.

18. Gonzalez denied on cross-examination that it was "obvious" to him that he and his wife would be moving to another phase of operations once they finished their row. However, Gonzalez was an experienced budder. The crew, as a whole, was completing the one-year mulberry budding and the re-budding was to be performed as a matter of course in a continuous block which had been initially budded by that crew. Gonzalez reluctantly admitted that rebudding was a normal part of the June budding operation. The inference is quite strong, therefore, that despite his assertion that he was not directly informed, Gonzalez must have had some inkling as to the type of work he would be performing on May 26.

19. As will be seen, Lucio's testimony regarding this exchange contains no reference to the babysitting problem.

responded that it was "okay" for the couple to leave.[20/]

Similarly, Antonio Gonzalez testified that he was just finishing his row about 8:45 that morning when Lucio told him about the change. He stated that he asked Lucio why the change was taking place. She replied that she had just found out about it herself.[21/] Antonio then told her that he was not "pleased" with these arrangements, and asked Lucio for "permission" to leave at noon. Antonio maintained that this permission was granted.[22/]

Eduardo Villegas also stated he learned about the change around 8:30 that morning. Although he "planned" to leave work that day at 'noon, he claimed not to have asked Lucio for permission to

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20. Respondent's counsel made timely objection to Lucio's statements on the basis that they constituted hearsay. As I have found that Lucio was not a supervisor, her statements could not be considered admissions under the automatic imputation of agency which derives from supervisorial status (See Merrill Farms (1982) 8 ALRB No. 4). Although not critical to the ultimate determinations to be made, I additionally find that Lucio could not be considered an "agent" of respondent under the broad principles of agency found to be subsumed within Labor Code 21140.4(c) by the California Supreme Court in Vista Verde Farms v. A.L.R.B. (1981) 29 Cal 3d 307, and discussed by this Board in V.B. Zaninovich & Sons (1983) 9 ALRB No. 54. Despite Lucio's crew leader status in other seasons or operations, and Rafael's claim that she was "the forelady in charge of the budding" (which was properly objected to and the objection sustained), there were no indications that would lead workers to "reasonably believe" that Lucio was acting on behalf of respondent-At times pertinent, Lucio had no authority in connection with discipline of employees or in the direction of their work. Crew leader Bob Phillips and foreman Paul Guillen performed these functions, although Lucio, as noted, may have been a conduit for their instructions to workers. Phillips lack of facility with Spanish, as contrasted with Lucio's capabilities in this regard, may have warranted her intervention•

21. Such comments are, as previously found, inadmissible hearsay.

22. Antonio Gonzalez further stated that when he came out of the field at noon, he again announced his noon departure to Lucio, who reiterated that it was "all right."

leave until noon on May 26. Villegas testified that he told Lucio that "Esteban [Guillen][23] and I were going home because we had not brought lunch," to which Lucio replied "it was all right."

Likewise, Maria Haddock claimed to have learned of the change at about 8:45 a.m. She went to her car to obtain money for lunch, which she subsequently gave to Lucio with the request that if someone went to the store they should get her something to eat. After a meeting among the workers during the 9:00 break,[24] Maddock decided to leave at mid-day. She asked Lucio to return her money, telling Lucio that she would be leaving at noon.[25] As with the other discriminatees, Maddock stated that Lucio said this was "okay".

In contrast to the testimony of the discriminatees, Patricia Lucio stated that the only worker among them[26] who actually asked for permission to leave was Hortencia Gonzalez.[27]

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23. Guillen was Villegas' tying and budding partner.

24. This meeting will be discussed at greater length below.

25. Lucio testified that when Maddock asked for the money back she told the record-keeper that Maddock "was going to see what the rest of the people were going to decide [about whether to leave, presumably]."

26. Two other employees, Juan and Hortencia Sanchez, as will be later discussed, also asked for permission to leave early.

27. Interestingly, Ken Mauser initially stated that he was aware that "some workers" asked Lucio that morning about leaving at noon. When called as a witness by respondent Mauser contradicted this testimony somewhat by stating that neither Rafael Gonzalez nor any other worker informed him of their planned early departure.

She did so on behalf of her husband and herself, and on the basis that the couple had not brought any lunch. Lucio responded that it was "okay" but that she had to talk to Ken Mauser to confirm the permission.

Undue attention was paid to an issue which ultimately appeared to have little or no consequence: whether or not Lucio had the authority to permit crew members to leave before the scheduled end of the work day. Testimony of the discriminatees[28/] established that at a meeting held approximately one year before these incidents, Roldan Ayala, respondent's employee relations manager, informed workers that in the event they needed to leave work early due to an emergency or problem, they should inform the one "in charge of the crew." While Rafael and Antonio Gonzalez specifically noted that they were under the impression that Lucio was "in charge" of the crew, it is clear that, given her work duties, and the existence of the positions of both foreman and crew leader, such was not the case. Additionally, respondent adduced evidence that only Bud Norris or Ken Mauser had the authority to grant a worker permission to leave work prior to the end of his/her shift.[29/] In the event that neither supervisor was present in the field when the request was made, the foreman or crew leader would radio one of these two for his approval. Stated differently, the foreman or crew leader did not possess the authority to grant time off, but would pass requests of this nature on. to Mauser or Norris. Bud Norris

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28. Specifically, Antonio, Rafael and Hortencia Gonzalez, and Maria Maddock.

29. Both Mauser and Norris testified on this point.

specifically noted that Lucio, at the time *of* these events, did not have this power.

More importantly, as will be discussed below, in the exchanges which took place at noon with Mauser, none of the alleged discriminatees who eventually left work mentioned to the supervisor that they had already obtained permission to leave from Lucio[30/] and should have been allowed to depart. It is clear from the testimony of the alleged discriminatees that notwithstanding their statements concerning Lucio's reaction to their requests, none of them felt that the company was permitting them to leave at noon.

3. The Worker's 9:00 a.m. Meeting

a. The Workers' Version

When the crew took its morning break at 9:00 a.m. that day, a number of workers expressed dissatisfaction with the recently-announced change in job duties. Despite somewhat self-serving testimony from the alleged discriminatees, this dissatisfaction was expressed at the meeting, not in terms of the company's failure to inform them of the job task change, their lack of "preparation," or the fact they had not brought lunch, but rather that the wage rate they would be receiving for the re-budding was inadequate from their point of view. Concerted action on behalf of

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30. Maria Maddock alluded to "permission" in a statement she allegedly made to Mauser at noon. However, her question to him was sufficiently ambiguous as to be interpreted as a direct request to Mauser for such permission, rather than a protestation that the approval she had received earlier was being rescinded.

the crew was manifested when Rafael Gonzalez[31/] approached Mauser at or near the end of the break to discuss the possibility of a modification in the wage structure.

General Counsel's witnesses provided fairly consistent accounts as to what transpired during the 9:00 a.m. discussions. Rafael Gonzalez testified that during the morning break the workers got together and discussed the change from piece rate to hourly. One member of the crew, Steve Guillen, announced that he wanted to call supervisors Mike Ahumada or Roldan Ayala to present a demand by the workers for increased compensation. Soon thereafter, Ken Mauser arrived and went directly to Rafael Gonzalez. Mauser asked Gonzalez what the problem was. Gonzalez replied that the workers wanted to talk to him, they were the ones who had called. Mauser responded that Gonzalez was the one that always represented them and that was why he had come to him. The two went to talk to the workers, Mauser asking Gonzalez to ascertain what it was the workers wanted. Gonzalez responded that the workers wanted a pay rate of $100 per thousand pieces. Mauser replied, according to Gonzalez, that he had to go to the office to inquire into the matter. Minutes later, after going to the edge of the field, Mauser returned to the group and told the workers that he could not pay the $100 per thousand rate, but that he would pay them the usual piece rate of $32 per thousand if they wished. The workers thereupon decided that it would be better to work in the re-budding by the regular hourly wage.

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31. Mauser testified that Steven Guillen spoke to him on this issue.

It was then that Gonzalez claimed that the had further discussions with Mauser regarding the hour when he and his wife would be allowed to leave work. Gonzalez stated that he told Mauser "we had not been notified of the change in the morning." He then asked Mauser "if the company was going to pay us the 2 hours, that we were going to leave."[32/] Gonzalez testified further that "he knew that *I* had asked Patricia, I asked her permission to leave. And he said that he knew that we had not been notified, and he said that, regarding the 2 hours, he was going to have to go to the office to inquire. I told him, as you know, I'm leaving at noon. Please let me know prior to noon regarding the question which deals with the 2 hours." Mauser then asked Gonzalez whether anyone else was leaving. Maria Maddock and Antonio Gonzalez responded that, yes, they were.

There were about sixteen to twenty employees in the crew that day. However, not all of these workers were present during Gonzalez' discussion with Mauser. Among those absent, according to Gonzalez, was Eduardo Villegas, one of the alleged discriminatees.

Hortencia Gonzalez corroborated many of the essentials of her husband's recitation regarding his mid-morning exchange with Mauser. Specifically, she referred to the discussion with Mauser on the wage rate, and Mauser's response; her husband's request for the two hours' pay; the importance of receiving the company's answer before their anticipated noon-time departure; and the replies of

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32. The record is not altogether clear as to what exactly Gonzalez meant by the phrase "if the company was going to pay us the 2 hours." Apparently, Gonzalez intended that the company pay a full day's wages to the workers despite the fact that they would be leaving at noon, or two hours before the normally scheduled quitting time.

Maddock and Antonio Gonzalez to Mauser's inquiry whether any other workers were thinking about leaving at noon. Hortencia added that she herself specifically told Mauser that "we had already asked Patricia Lucio for permission" to go home, and that Mauser replied "if we had already notified her, that it was all right."[33/]

Antonio Gonzalez likewise testified that at the 9:00 break workers decided to request a $100 per thousand piece rate from the company, and that he, Maddock, Rafael and Hortencia all conveyed the notion that they would be leaving at noon that day. However, Antonio stated that he instructed Hortencia to tell Mauser that he would be leaving early, that he had spoken with Lucio about it, and that Mauser responded that it was all right if Lucio had already been notified.[34/]

Maria Maddock provided the most extensive narrative regarding the 9:00 a.m. meeting and subsequent discussions with Mauser. Her account dovetails with that provided by Rafael and Hortencia Gonzalez. About twenty of the thirty numbers of the crew, by her account, gathered during the nine o'clock break and expressed their dissatisfaction with the change the company made that

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33. Despite Hortencia's statement, it is apparent that Mauser did not grant her permission to depart from work early. On cross-examination, she stated that after the nine o'clock break, Mauser approached her and engaged her in casual conversation, commenting to her that the work was hard. In response she stated: "It was good that noon was approaching." This prompted a query from Mauser what was going to occur at noon. Hortencia replied "that we were leaving . . . . We had already asked permission from Patricia."

34. Hortencia's testimony did not refer to this exchange.

morning.[35] Many of the workers were "upset" about the lack of notification of the change. Maddock, Rafael and Hortencia Gonzalez, Antonio Gonzalez, and Esteban Guillen were the principal speakers during the meeting. Rafael Gonzalez told the group that it was not fair that the workers should pay for something "the company had done. Not telling us the day before that we had to work all day." He added "that we should do something about it." Maddock expressed the notion that the company should pay for lunch. She further testified that the workers "were all saying they were going to leave at twelve."[36] As a result of their discussions, it was determined that the workers would request a change in the piece rate to $100 per thousand units.

Maddock stated that Steve Guillen told Bob Phillips to contact Mike Ahumada in order for the workers to present their demands. Mauser, rather than Ahumada, came to the fields and spoke to Rafael Gonzalez, asking him what the workers' demands were. Gonzalez presented him with a request for a modification of the piece rate. Maddock corroborated Rafael Gonzalez' testimony regarding Mauser's actions and statements in response to the workers' request. She further corroborated Rafael's presentation of

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35. Significantly, as noted, Eduardo Villegas did not participate in these discussions. Although he observed the meeting taking place, he was, by his own account, "a ways off from it."

36. Maddock appeared to be exaggerating somewhat. Many of the workers had "come prepared" to work all day. No other witness corroborated this assertion regarding an en masse departure.

a demand for two hours' pay,[37/] Mauser's asking the workers who besides Rafael and Hortencia would be leaving at noon and the replies by herself and Antonio Gonzalez. She added that Mauser then stated he would have to check with other people in the company before he might act on their requests, and as Rafael testified, stated that Gonzalez asked Mauser that an answer be brought to them before noon.

b. The Company's Version

Mauser's recitation regarding his encounter with crew members at or near the time of the nine o'clock break differed significantly from that provided by the mutually corroborative accounts of the discriminatees.[38/] When called by counsel for the employer, Ken Mauser testified that he arrived at the field where the alleged discriminatees were working about 8:00 a.m. the morning of May 26. He was summoned there by Bob Phillips, who had reported to him that one of the crew members, Steven Guillen, wanted to talk to him. Mauser spoke to Guillen prior to the morning break,[39/]

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37. Unlike the request for the wage modification there was no evidence that this demand was the direct outgrowth of the workers' 9:00 a.m. discussions.

38. It is their version rather than his which I credit. Mauser's statements were for the most part uncorroborated, and conflicted in several particulars with statements made by respondent's own witnesses. Further, his testimony overall lacked consistency, especially when the recitation provided by Mauser when called as an adverse witness by General Counsel is contrasted with that he provided as one of respondent's witnesses.

39. It would appear somewhat illogical that prior to the break workers would have the opportunity to discuss work problems among themselves. Further, the alleged discriminatees testified that they were not informed of the change until 3:30 a.m., at the earilest. Thus, until they received this information there could not have been a "problem."

while the employee was working, asking him what was the problem. Guillen asked Mauser what the re-bud piece rate was going to be. As Mauser explained it to him, Guillen inquired whether there could be a chance that this rate could be increased. Mauser replied that the rate had been set months prior, that some rebudding had already been done at that rate, and there was not going to be any change. Mauser added that during the course of the conversation with Guillen, the employee was also talking with Antonio Gonzalez,[40/] giving Mauser the impression that Guillen was translating the respective remarks, as Guillen was speaking to the supervisor in English and the worker was speaking to Gonzalez in Spanish.

After speaking with Guillen, Mauser went to the bud trailer, where he met with Bob Phillips and Bud Norris. Mauser related to them what he had discussed with Guillen, and it was decided to offer the workers the option of continuing to work at the same basic piece rate in the re-budding as they had been working under during the budding operation.[41/] Mauser returned with the response to Guillen, who again discussed the matter with Tony Gonzalez. Guillen told Mauser that the workers did not wish to re-bud at the same rate that they were paid for piece work in the budding.

Following this conversation, as Mauser started out of the

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40. Significantly, Bud Norris stated that he observed Mauser speaking with Guillen about 9:00 a.m. that morning, and that Rafael, not Antonio Gonzalez, walked over to join them in the conversation.

41. Norris testified that it was he who told Mauser to present this option to the workers.

field, Rafael Gonzales approached him. Rafael told Mauser that he had not been informed that the rebudding would be taking place and that they would be working by the hour. Accordingly, he had not brought lunch with him that day. Mauser stated that he told Gonzalez that he had been informed by Phillips and Lucio that they would be working by the hour that day, and that he did not understand why he did not bring a lunch. However, since Gonzalez had not brought a lunch, Mauser would see whether any other crew members had also not brought lunch. He would then go to the office to ascertain whether there was somebody they could send out to obtain some food for the workers. Mauser stated he did not say anything to Rafael Gonzalez about the length of the work day, that Gonzalez did not inform him at that time that he would be leaving at noon, and that no other employee was involved in the conversation. Mauser further denied that he asked Gonzalez whether there would be any other employees leaving at that time.[42/]

According to his testimony, Mauser then returned to the office shortly before the 9:00 break. At the office he discussed several possibilities with fellow supervisors as to what might be done about the workers' problem. It was determined that the crew would be offered an option whereby they could either work straight

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42. Mauser's account differs significantly from Norris' testimony as to what Mauser had reported to him after conversation with Steven Guillen and Rafael Gonzalez, wherein Norris stated that Gonzalez had told Mauser that he would be leaving at noon. It also contrasts with a statement Mauser made when called as a witness by General Counsel wherein he stated that some of the workers, including Rafael Gonzalez, had expressed a desire to leave at noon. More particularly, Mauser noted that he was aware that some crew members had spoken to Lucio about leaving early, but that Rafael was the only one who had spoken to him directly.

through their lunch hour and leave work early, or take a lunch break and leave work at 2:15 p.m., the usual quitting time for employees working per hourly wage. Further, as to those workers who had not brought lunch with them that day, it was decided that Bob Phillips would be sent in to town and pick lunch up for them.

Mauser then testified that roughly between 9:30 and 10:00 he returned to the field. He reported to Phillips and Lucio the decisions that had been reached, that they should inform the crew as to what was going on, and that Bob Phillips should determine whether or not any employees wished Phillips to obtain lunch for them.[43/]

4. Noon at the Bud Trailer

When Lucio called the workers out of the field for their lunch break, a confrontation between Rafael Gonzalez and Mauser ensued. As Gonzalez was approaching the bud trailer, he overheard Mauser speaking to crew member Juan Sanchez regarding that worker's "going to school to talk about their child." Mauser asked Sanchez and his wife for a note from school personnel which would explain why the couple needed to leave work at noon that day.[44/]

Gonzalez testified that at that point he asked Mauser whether he had an answer to the question "regarding the two hours, whether the company was going to pay for that. Because it was their fault, due to the fact that they had not notified us." According to

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43. Subsequently, Phillips actually procured lunches for several employees.

44. This discussion figures centrally in an inference, drawn and discussed below, that Rafael and Hortencia Gonzalez were not being entirely candid in testifying as to the rationale behind the necessity of their noon-time departure.

Gonzalez, Mauser responded "that we were a bunch of liars, . . . that we had been notified. And I told him not to give me that bullshit. Because he was the one that was lying." Gonzalez testified further "that's when Patricia . . . stood up and said, Bob Phillips told me, it's not Ken's fault, it mine and Bob Phillips. We forgot to notify you." Thereupon Mauser described the two options available to workers, that they could work straight through or take the half-hour lunch break. After Mauser announced the two options, Maria Maddock asked him "Did that mean that we could not leave?" According to Gonzalez, Mauser responded "No. I'm not saying that. You do what you have to do."

Following this exchange, the five alleged discriminatees announced that they were going to leave. Gonzalez stated that he then placed his budwood in a normal fashion on the table on the bud trailer where Lucio customarily kept her records, and left the work site.[45/]

Hortencia's testimony conformed very closely to that proffered by her husband. Specifically, Hortencia corroborated her husband's assertions regarding Mauser's accusing the workers of being a bunch of liars, that they had been notified of the change, and her husband's response to this statement. Hortencia also corroborated Rafael's testimony regarding the statement attributed to Patricia Lucio and her apology for not notifying the workers of the change in the pay method. After Hortencia reiterated the

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45. The manner in which Rafael returned his budwood, as will be seen below, was given by respondent as another reason for his discharge.

announcement, by Mauser of the two options available to the workers, her testimony departed somewhat from that of her husband. According to Hortencia, it was at that point that Maria Maddock stated that "we had tried to reach an agreement with the company, or made an arrangement with the company, but that we hadn't been successful. And that we felt that we had to leave. We needed to leave." Hortencia further testified that Mauser repeated the two options available to the workers and Maria Maddock responded "Does this mean we don't have permission to leave?" Mauser stated to Maddock, according to Hortencia Gonzalez, "Maria, that's not what I'm saying. You do what you have to do." Hortencia also corroborated her husband's testimony concerning the manner in which he returned his budwood to the trailer.

Maria Maddock presented the following version of what transpired at 12:00 noon that day. The similarties between her account and those of Hortencia and Rafael Gonzalez are apparent. After the workers were called out of the field by Patricia Lucio, Hortencia and Juan Sanchez told Ken Mauser that they would have to leave because they were not notified of the change the previous day and they had to go somewhere. Rafael thereupon asked Mauser whether he had a response to his question. Mauser replied, "What question, there were so many questions asked this morning. Which question are you referring to?" Rafael said at that point it was the "only one question pending. Which was the two hours." It was at that point, according to Maddock, that Mauser accused the workers of all lying, that the workers had been told they were going to be paid by an hourly rate for part of the day. Rafael stated that "that's

bullshit. . . it's your fault you guys did it, you guys didn't tell us so, you know, I think you guys should pay us." Patricia Lucio then stated it was not Ken's fault, it was her and Bob's, since they did not notify the workers. Mauser said nothing to Lucio in response. Instead, he presented the workers with the two options noted previously. Maddock testified "and this was when I told him that if that meant we couldn't leave. He says no, do whatever you have to do."[46/] Maddock also claimed to have stated that "we tried to reason with you on wage increases by contract.[47/] And we tried to get the two hours and the company doesn't give us any response, so we're leaving."

The remaining discriminatees, Antonio Gonzalez and Eduardo Villegas, were not in a position to observe the discussions between Mauser and Rafael Gonzalez. Villegas was not physically present at the bud trailer. Antonio Gonzalez, not conversant in English, did understand the exchanges which took place in that language. Antonio did testify that like his brother, he merely placed his budwood back on the trailer, returning it in the normal manner, then left the field.

As might be expected, respondent's version of the events at noon on the 26th differed somewhat from the foregoing. However, the mutually corroborative accounts presented by the discriminatees are far more worthy of credence. Mauser's testimony is the primary

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46. Mauser's words were ambiguous at, best. However, it is clear that the workers did not obtain permission to leave the worksite.

47. The Spanish term for piece rate is "por contrato," hence this particular phraseology.

source for these facts from respondent's point of view. As noted, he testified on two separate occasions: once as an adverse witness called by the General Counsel, and once as a witness for respondent. The two divergent accounts Mauser presented on each of these occasions provide an ample basis for concluding that the former supervisor was not being entirely candid, or, more charitably, had an imperfect recollection of events. In either event, his testimony cannot be viewed as reliable.

The version Mauser presented as an adverse witness is as follows. After returning from the office at around noon, he spoke to the entire crew gathered around the bud trailer. Mauser told them they had to options: they could either work straight through, not take a lunch break, and work until 1:45, or they could take a half-hour lunch break and leave work by 2:15, the normal quitting time. According to Mauser, Rafael Gonzalez insisted that he had not been informed of the change the day before. Mauser responded that "he had been informed that they were going to be . . . rebudding, and that he was supposed to have brought a lunch." Gonzalez thereupon called the supervisor "a lying son of a bitch," stating, according to Mauser's initial testimony, "I was not informed of the change, I did not bring a lunch, and I am leaving . . . . [Y]ou guys can do with me what you want." Mauser replied by repeating the options available to him (working straight though, etc.). Rafael came over to where Mauser was standing, slammed his bundle of budwood on the trailer, then "turned around and walked . . . away . . . rais[ing] his hands in the air, and said, again, you guys can do with me whatever you want. I'm leaving." The four other alleged

discriminatees also left work at this time.

As a witness for the respondent, Mauser presented this version. After several comings and goings that morning in accordance with the normal performance of his duties,[48/] he returned to the field that morning about five or ten minutes before noon. While at the bud trailer, he spoke with Rafael Gonzalez and Maria Maddock. Bud Norris was present at that time. Rafael walked up to him and asked him what was his decision. Mauser asked Gonzalez what exactly it was that the worker wanted a decision about. Gonzalez responded, "What are you going to do about lunch?" It was at that point that Mauser outlined for Gonzalez the two options regarding whether or not to take a lunch break. Gonzalez then stated that he was not informed of the fact that they were going to be working by the hour that day and "I'm going home." Mauser replied that Bob Phillips had told him yesterday that they would be working in the rebudding by the hour. Thereupon, according to Mauser, Gonzalez stated "You lying son of a bitch. Nobody told me I was going to be working by the hour today. And I'm going home." Mauser then stated that Maria Maddock accused the company of denying the workers their right to a lunch hour. Mauser responded that they were not denying them that opportunity, that they had an option whether to take lunch or not, and that when working by the straight budding rate, they normally did not take any lunch.

It was at that point, according to Mauser, that Rafael

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48. Mauser testified that he appeared at the field at three separate times that morning: once around 9 a.m.; once between 11:00 and 11:30, and once again about noon.

Gonzalez came over to the part of the bud trailer where the supervisor was located and reiterated that no one had told him of the change, he didn't have any lunch, and he was going home. Gonzalez then slammed his budwood down on the trailer and said/ Mauser testified, that "you people can do with me what you want, I don't care or something along that line." Mauser stated that he then told Gonzalez "Ralph, I would not do that if I were you. You know what the consequences are if you do."[49/] Gonzalez responded "I don't care, I'm leaving." After Gonzales put his budwood on the trailer his brother Tony also informed Mauser "I'm leaving too."[50/] Tony also then slammed his budwood down on the trailer floor.

Mauser stated that he could not remember whether Maria Maddock questioned whether his giving the two options to the employees meant that they could not leave. He denied ever giving permission to any of the five employees which would allow them to leave early. He similarly denied that any of the five employees had been given permission to leave by Patricia Lucio.

Regarding Patricia Lucio's participation in the discussion Mauser had with the workers at the bud trailer, Mauser stated that Lucio had asked him previously whether the Sanchezes might have permission to leave work early that day. He also stated that Lucio interjected in his discussion with Rafael Gonzalez, saying that

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49. No other witness mentioned this aspect of Mauser's interaction with Rafael Gonzalez.

50. Antonio Gonzalez, as noted, is not altogether familiar with the English language.

"Ken's just telling you *what* we told him, that Bob and I told you that you were going to be working by the hour."

Mauser also specifically denied assertions made by various witnesses for the General Counsel that Maria Maddock said anything to him regarding an effort to reach an agreement with the company on the piece rate and pay for two hours that afternoon or pay for hours not worked after 12:00. Mauser further denied that he told the workers that they could do what they had to do.

Patricia Lucio, another of respondent's witnesses, stated that after Mauser presented the two options available to the members of the crew,[51/] Rafael Gonzalez stated that he did not like either of the two and told Mauser "he didn't give a damn what the company did with him. That he was going to leave." Lucio denied that she "apologized"[52/] to the workers for not informing them of the change. Rather, she stated that she clarified Gonzalez' understanding as to who had told him about the change, that it was Bob Phillips, not Mauser himself. When in response Rafael told Mauser he was lying, Lucio's attention was thereupon diverted by the Sanchezes and she was unable to hear anything which was said subsequently.

Lucio did substantiate, however, Mauser's characterization as to how Rafael and Antonio Gonzalez "slammed" their budwood on the bed of the trailer. She added that after the two had done so, the

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51. Parenthetically, Lucio also noted that all of the employees chose to work though the lunch break and avail themselves of the opportunity to leave by 1:45 p.m. In contrast, Mauser testified that some workers did take the lunch break.

52. I.e., she denied saying "that it was her and Bob's fault" for not notifying the employees.

budwood was picked up and thrown away.

Deciduous production manager Bud Norris testified that as the workers gathered at the bud trailer that noon, Rafael Gonzalez asked Mauser "what had been decided upon." Mauser outlined the two options available to the workers. According to Norris, Rafael Gonzalez responded that "we're going to go home because you didn't tell us that we were going to work all day." When Mauser responded by saying "Yes, I told you," Rafael, replied: "You're a lying son of a bitch. . . I'm going home. I don't give a damn what you do to me." At that time, Rafael slammed his budwood down on the trailer and Tony Gonzalez shortly thereafter did the same.[53/] Norris denied hearing Mauser tell Gonzalez that he was a liar,[54/] or informing the departing employees to "do what they have to do."

Crew leader Bob Phillips was just returning to the field[55/] when he heard Rafael Gonzalez tell Mauser "I don't give a damn what the company does with me, I'm leaving." Phillips stated that as he alighted on the trailer he actually had to step over the budwood

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53. Interestingly, in contradiction to the testimony of other witnesses, Norris stated that the budwood was thrown away the following day, that company personnel did not bother to pick it up that afternoon.

54. Norris stated at one point that Mauser had said "I told you." At another point in his testimony he said "Ralph, you were told." Norris testified that on May 25 he informed Bob Phillips of the job function change by delivering to him a note to that effect. If Norris had merely passed this information on via a note about the job change to Bob Phillips, Mauser would not have been the one to inform the workers of the change.

55. Presumably, Philips was, at that time, returning from purchasing lunch for several crew members. He testified that prior to noon he asked every employee whether he/she would like for him to get a lunch for them, and did in fact obtain lunches for some of the crew.

which was strewn about. Once up on the trailer, Phillips claimed to have picked up the budwood and thrown it away.

At all events, several witnesses concurred that the exchange between Mauser and Gonzalez was somewhat heated. Following this, each of the alleged discriminatees left work.

5. Prior Union Activities

The parties stipulated to a rather detailed set of facts concerning the Union activities of four of the alleged discriminatees, and the Union activities of their close relatives with whom they were associated. Pursuant to that stipulation, the following facts were established.

Maria Maddock is the wife of Ben Maddock, the director of the Union's Delano field office. Ben Maddock has been actively involved in the organization of respondent's workers, taking access to its property in May 1982 in order to discuss unionization with these employees. Ms. Maddock's mother is Julia Zuniga, a worker who was alleged to have been discriminatorily discharged by the respondent. Following the filing of a charge with the ALRB concerning her tenure, Ms. Zuniga was reinstated pursuant to a settlement agreement containing a non-admissions clause. Maria Maddock also has two sisters, Carmen Zuniga and Hortencia Gonzalez, who similarly were alleged to have been discriminated against by the company and who were also reinstated as a result of a settlement of unfair labor practice charges. Hortencia Gonzalez is married to Rafael Gonzalez. Antonio Gonzalez is Rafael's brother.

In 1981 and 1982 the company was the scene of approximately a half-dozen work stoppages involving demands for higher wages

and/or improved working conditions. Work stoppages were from two hours to half-a-day in length. Maria Maddock, Rafael Gonzalez, Hortencia Gonzalez and Antonio Gonzalez participated in these stoppages. Each of them, at one point or another, acted as spokespersons for the workers, discussing the job actions with management.

Maria Maddock, Rafael Gonzalez, Hortencia Gonzalez and Antonio Gonzalez were members of the Union's organizing committee established in the fall of 1981, and also were leaders of several Union organizing drives. During the drives, they distributed leaflets, Union buttons, and authorization cards, advocating the merits of organization on countless occasions with respondent's workers.

Lastly, Maria Maddock and Rafael Gonzalez also frequently acted as spokespersons for the workers in their crew concerning work related grievances and complaints, voicing these complaints to respondent's supervisors.[56/]

6. The Discharges

When the alleged discriminatees returned to work the next day,[57/] each was given a termination notice by Mauser.

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56. As should be apparent, Eduardo Villegas' name is conspicuously absent from any agreed upon or testified to facts regarding participation in protected concerted activities.

57. Hortencia Gonzalez testified that when she left the field on May 26th, she asked Lucio for the location of the work site for the following day. Lucio responded that the site would be the same, adding that the work would be "by the hour." Employees customarily asked the location of operations for the next day at the end of the previous day. Rafael Gonzalez stated that he so asked Phillips on the 25th, but that Phillips, in imparting the information, did not tell him the type of work he would be doing.

The termination notices delineated the reasons for the dismissals as keyed to respondent's personnel handbook, based on violations of various work rules. The work rules in the handbook are divided into two sections. Violations of a rule in the first section "may result in immediate termination" ("discretionary dismissal" violations) whereas a violation of a rule in the second grouping "will" result in immediate termination ("mandatory dismissal", violations).

The reasons given for the discharges of Hortencia Gonzalez, Maria Haddock, and Eduardo Villegas were that each had violated the following "discretionary dismissal" rules: "7. Leaving assigned work during working hours without notifying your supervisor, unless in the performance of assigned duties; 9. Failure to observe departmental work schedules, including starting, break, meal, rest periods and quitting times." Additionally, each of the foregoing workers was stated to have violated the "mandatory dismissal" rule: "2. Insubordination, failure or refusal to perform work assigned."

The termination notices for Antonio and Rafael Gonzalez, in addition to setting forth as reasons for the dismissals violations of work rules 7 and 9 in the first section and rule 2 in the second, stated that they also had violated rule 5 in section 2, "willful or malicious misuse of company and employee property . . . ." This purported violation undoubtedly stemmed from the two "slamming" their budwood on the trailer prior to their leaving work on May 26. Mauser testified that although the basic budwood material was obtained from the backyard of company supervior Ralph Torres, and hence nominally free for the taking, two of the Respondent's workers had to be sent to obtain the wood, cut it and then deleaf it. They

were occupied for about one entire day in this capacity. Mauser thus estimated the value of the budwood to be about $100, although his estimate was not confined to the two bundles ostensibly "destroyed"[58/] by Antonio and Rafael.[59/]

Further reasons for the termination of Rafael Gonzalez were also noted. These included violations of discretionary dismissal rules 1 ("false remarks about the company or fellow employees") and 14 ("using profane, abusive or racial derogatory language on company premisses"),and mandatory rule 4 ("fighting or belligerency on the job").

After the discriminatees received their notices, they went to Roldan Ayala's office to see whether anything might be done to alter the personnel action that had been taken.[60/] Ayala informed the five, in essence, that it was too late, that there was nothing that could be done about their situation.

General Counsel attempted to demonstrate, via the introduction of documentary evidence, that the disciplinary action

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58. Damage to the "eyes" on the budwood would render it unusable. Bruises on the wood would not readily appear, unlike tears. Both could be caused by "slamming" down the wood. Apparently, Mauser or Norris determined that after the alleged incident, the budwood could not be utilized, and ordered it discarded.

59. Norris estimated the particular value of the Gonzalez[1] bundles by calculating their cost to be about 4£ per "eye," twenty or so "eyes" per stick, and thirty to forty sticks per bundle, thus making the total value of the bundles allegedly destroyed to be between $25 and $30.

60. Maria Maddock admitted that she was under the impression that she would receive some sort of discipline for her action on May 26, e.g., a suspension, but did not think she would be terminated.

taken against the alleged discriminatees was unduly severe, that other employees who had engaged in conduct as egregious had not received dicipline as harsh. This evidence, consisting of disciplinary notices issued to some twelve separate employees, was a miniscule sampling of the two to three hundred such notices issued by respondent in the period between October 1, 1981 and June 18, 1984 which General Counsel subpoenaed and presumably reviewed. With minor exception, these notices provide little evidence of discriminatory treatment.

An examination of the notices issued other employees reveals, in most instances the conduct for which the discipline was received was of a different nature than that given as the reason(s) for the discharges of the alleged discriminatees. Work rule violations occurring in the former examples were, for the most part, within the ambit of the respondent's "discretionary," rather than "mandatory" dismissal policies.[61/] For example, employee Charles Marshall, on December 2, 1982, "left his assigned work without notifying the crew leader," a violation of discretionary rule 7, as stated on the form. When he failed to report for work for three consecutive days, each failure resulted in the issuance of a separate disciplinary notice. Following the third day of absence, Marshall was discharged.[62/]

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61. The handbook states that the work rules in section 2 "are regarded as very serious infractions and are dealt with differently than the minor rules. In the event they are violated, the employee will be terminated immediately."

62. According to respondent's personnel policies, the receipt of three disciplinary notices within a six-month period results in termination.

Rogelio Garcia, in January 1983, received a warning notice for fighting on the job. This would seem a violation of a "second section" rule (number 4). Garcia was not discharged. His case appears to be somewhat of an aberration. No background evidence was introduced to explain the discrepancy between this ostensible violation of a mandatory dismissal rule and the continued retention of the employee.

Carrel Edward Hart "missed work" on four consecutive days in late December, 1982 without being terminated.[63/] As reflected in respondent's written phone memos produced in evidence, Hart called in on the second day of his absence: the notation "sick" appears on the message. On the warning notice that Hart received, it is written that he "came back to work without Dr. excuse (sic)," and that "procedure was explained to Carrel." Hart's problem was obviously of a different dimension than that of the alleged discriminatees.

A disciplinary notice issued to Esaya Gonzalez reflects that she arrived thirty minutes late to work on November 24, 1982, then left the work area without authorization in violation of section 1, rule 7. She was not terminated immediately but on November 29, after "not calling in" following her departure on the 24th, she was discharged. Again, this employee initially violated a "discretionary dismissal" rule, thus differentiating her situation from that of the alleged discriminatees.

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63. Hart's conduct might be construed as a violation of section 1 (discretionary dismissal) rule 15: "failure to inform your supervisor, foreman or office by telephone of other means when you are unable to report to work."

Other disciplinary notices produced in evidence described situations which were likewise dissimilar to those in the instant case. These circumstances involved absences from work without notice, tardiness, and poor quality work. None of these situations involved conduct of the caliber of which the alleged discriminatees were accused, and which they appear to have demonstrated. Rather than evincing a discriminatory motivation for the discharges herein, they more readily demonstrate a certain consistency in the effectuation of respondent's work rules. This is especially so when it is recalled that General Counsel had at his disposal literally hundreds of disciplinary notices from which to attempt to make his point, and chose but a few not altogether apposite examples.[64/]

III. LEGAL ANALYSIS AND CONCLUSIONS

A. Were the Activities of the Alleged Discriminatees "Concerted" and Hence Subject to the Protections of the Statute?

The National Labor Relations Board, in Meyers Industries, Inc., (1984) 368 NLRB No. 73, re-defined the concept of "concerted activity" as it had been construed since Alleluia Cushion Co., (1975) 221 NLRB 999. Noting that the N.L.R.A. envisions "concerted" action in terms of collective activity, i.e., the formation of or assistance to a group, or action as a representative on behalf of a group, (Meyers Industries, Inc., BNA Daily Labor Report No. 6, p. E-2 (1/11/84)) that Board held that in order to find employee activity to be concerted, it shall require that the activity be engaged in "with or on the authority of other employees, and not

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64. See Evidence Code section 412.

solely by or on behalf of the employee himself." Meyers, loc cit., p. E-4. The National Board further stated that this revised standard more accurately placed on the General Counsel the burden of proving the elements of a violation, adding that "it will no longer be sufficient for the General Counsel to set out the subject matter that is of alleged concern to a theoretical group and expect to establish concert of action thereby."[65/] "Id."

As set out in Meyers, loc cit., p. E-5, the elements of a section 8(a)(l) violation (the NLRA equivalent to ALRA section 1153(a)) consist of activity by an employee which is established to be concerted; employer knowledge of the concerted nature of the activity; proof that the activity was protected by the Act; and a showing that the adverse employment action at issue was motivated by the concerted activity. "Meyers, loc cit, p. E-4. Lastly, the NLRB emphasized that "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient to prove concert of action." Meyers, loc cit., p. E-5, emphasis in original.

This Board specifically adopted the above National Board standard for concerted activity, in Gourmet Farms (1984) 10 ALRB No. 41, making it "applicable precedent" under ALRA section 1148.

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65. Under Alleluia Cushion, supra, as indicated in the ALJ's opinion in Meyers,a presumption was created that an individual engaged in concerted activity where his/her conduct arose out of the employment relationship and was a matter of common concern among employees. The presumption might be rebutted by a showing that the action was not made in good faith or was simply "the idiosyncracies of a super sensitive individual whose concerns could not have been shared by other [employees] in similar circumstances."

There, the Board found that an individual employee, during a meeting attended by fellow irrigators called by their foreman to announce a new work rule, intended to enlist the aid of his fellow workers and expressed concerns on behalf of this group. He therefore was engaged in concerted activity at the meeting by protesting the rule change, and was not merely expressing his personal individual dissatisfaction.[66/]

Applying the foregoing principles to the instant case, it is found that the alleged discriminatees were merely expressing individual concerns when they walked off the job prematurely on May 26, and were not engaged in concerted activity. The evidence demonstrated that many of the discriminatees' fellow crew members were in fact informed the day prior of the anticipated change from piece rate to hourly method of payment.[67/] That some employees may not have been told directly of the change underscores the individualized nature of the alleged discriminatees' complaints.

General Counsel made no showing that the actions of the alleged discriminatees were taken on behalf of, or with the authority of, other employees, or were engaged in with the object of inducing some form of "group" activity other than that engaged in by

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66. Ultimately in that case the Board determined that despite the employee's concerted activity and his employer's knowledge thereof, the employee's discharge one week later was not motivated by the participation in. the activity but rather because the employee was found to have been drunk on the job.

67. This finding is based on evidence that a number of crew members had brought their lunches with them that day, as well as the testimony of Bob Phillips and Patricia Lucio to the effect that they personally apprised workers on May 25 what they would be doing the following day.

the alleged discriminatees themselves. To the contrary, the evidence established that earlier in the day of May 26, workers had gathered to discuss problems with the change in work function and payment method and had ostensibly authorized Rafael Gonzalez[68/] to speak with management representatives about a possible modification of the wage structure. Worker dissatisfaction was then expressed not in terms of the problems created by the company's failure to inform them of the change, but rather in terms of the more arduous, and potentially less remunerative, nature of the different job task to which they had been recently assigned. Management responded by presenting the workers with an alternative to the customary work schedule in order to alleviate the workers' dissatisfaction.[69/]

Rafael Gonzalez' demand that "the company pay 'us' the two hotnrs~** for the failure to notify him of the change was nothing but a personal reaction to his particular problem: he himself admitted that he would have had to leave at noon that day under any circumstances. In contrast with the demand for a wage modification, there was no evidence that the crew or anyone in it had authorized him to make this proposal, much less stage a walkout when the proposal was not accepted. By walking off the job Gonzalez and his wife were not demonstrating an intention to enlist group support for

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68. For reasons expressed in the factual exposition supra, I credit Rafael's testimony, rather than Mauser's, to the effect that it was he, not Steve Guillen, who spoke to the supervisor around the time of the 9:00 a.m. break.

69. Nevertheless, a certain awareness of the workers' personal scheduling problems which arose or their lack of lunches was apparent from the company's responses, as the scheduling change appeared tailored to meet these concerns.

his demand, but were engaging in an activity solely on their own behalf. The root cause of their leaving that noon was not to protest the company's purported "change"[70/] in working conditions without prior notification, but was prompted, according to their testimony, by the necessity of looking after their child.[71/]

Likewise, the actions of Eduardo Villegas were not designed to enlist group support, nor were they taken on behalf of any group. The lack of his participation in prior Union and other concerted activities, and his conspicuous absence both from the workers' 9:00 a.m. meeting and the gathering of the crew at the bud trailer at noon, bespeak an intent not to associate himself with concerted protest. His leaving the job on May 26 was not the result of a dispute over working conditions, but was caused by the fact that the employee he rode to work with, Antonio Gonzalez, was also leaving at noon.

More difficult to analyze is the nature of the activities

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70. The difference in work schedules occasioned by the shift from piece rate to hourly wage, as shown by company records, did not result in a significant difference in the length of the usual work day. Employees on piece rate customarily remained on the job for seven hours or more. However, as pointed out above, when working on piece rate employees were permitted some latitude in determining when they might leave.

71. I am not altogether convinced that the lack of a babysitter was the true reason why Rafael and Hortencia Gonzalez needed to leave work at noon. This problem was not made known to any supervisorial personnel at the time, nor was it referred to in Rafael's declaration filed with the A.L.R.B. It appears to be an after-the-fact contrivance prompted, no doubt, by the realization that the company was willing to permit the noon departure of Juan and Hortencia Sanchez, who also had a problem involving their child. There is nothing to indicate that respondent would have declined to accept a similar excuse from the Gonzalezes had one been contemporaneously and sincerely voiced.

of Maria Maddock and Antonio Gonzalez. Their walking off the job might be viewed as an attempt to demonstrate solidarity with Rafael and Hortencia Gonzalez. This Board has recognized the right of employees to present grievances on matters affecting terms and conditions of employment and to act concertedly in furtherance of that goal. (See George A. Lucas & Sons (1984) 10 ALRB No. 33.) As stated in Giannini and Del Charro (1978) 6 ALRB No. 38, "When an employee comes to the aid of another worker involved in a dispute with a supervisor which arises out of the employment relationship, this act constitutes protected, concerted activity [citations] . . . . The law allows employees leeway in presenting grievances over matters relating to their working conditions." (See also Golden Valley Farming (1980) 8 ALRB No. 8.) Nonetheless, those cases, and the lines of NLRB authority which they follow, generally involve verbal conduct, heated arguments peppered with insults and obscenities, or picket line (mis)conduct. Here, the alleged discriminatees were discharged not so much for what they said[72/] as for what they did: leaving the job site before the end of their shift.

Additionally, analysis along these lines of the behavior of Maddock and Antonio Gonzalez focuses more on the question of whether their activity was "protected"[73/] rather than on whether it was

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72. Despite the fact that some of the stated reasons for the discharge of Rafael Gonzalez involved verbal conduct ("false remarks"; "using profane, abusive . . . language"; and " . . . belligerency on the job"), it is doubtful that these factors, absent other considerations, would remove this situation from the Act's protection.

73. This issue will be treated below.

"concerted." Under the Meyers Industries standard outlined above these two employees engaged in an activity "with . . . other employees." Their actions might be construed as an attempt to provide assistance to a group (i.e., Rafael and Hortencia Gonzalez) It thus might be argued that their activity was in fact concerted.

Notwithstanding these considerations, the National Board in Meyers also stated the qualification that "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient to prove concert of action." In the instant situation, lack of notification to certain individuals of a change in scheduling created problems of an individualized nature. Hortencia and Rafael Gonzalez maintained that their problem involved the lack of a babysitter; Maddock and Antonio Gonzalez maintained that theirs was a lack of lunch. Even considering Haddock's somewhat self-serving statement that her departure was occasioned by respondent's refusal to accept the workers' wage demands, and was thus prompted by a matter of broad-based concern, the fact that no other employees manifested complicity with her stance on wages would negate the inference that she acted on their behalf. Accepting her words as the rationale for her actions, her conduct can only be viewed, therefore, as an expression of individual dissatisfaction with, in her eyes, the company's refusal to come to terms. The conduct of Antonio Gonzalez can be similarly viewed as a manifestation of individual dissatisfaction with the then-current state of affairs.

Although the precedential underpinnings for the Board's decision in B & B Farms (1981) 7 ALRB No. 38 have been substantially

eroded by the overruling, in Meyers Industries, supra, of Alleluia Cushion, supra, and by this Board's "application" of the Meyers precedent in Gourmet Farms, supra, an examination of the "constructive" concerted activity theory enunciated in B & B is instructive in determining whether the actions of the alleged discriminatees herein might be deemed concerted. This approach seems to focus more on the effects of the activity in question, rather than on the number of individuals who participated by word or action in it.

In B & B, a tractor driver individually protested the lack of a specific lunch period during the tomato harvest. For the harvest the company employed two tractor drivers whose tractors pulled the trailers in which the tomatoes were taken from field to loading area. While one set of trailers, pulled by one driver, was being loaded, the other driver was essentially idle, "on call" waiting at the loading area for the return of the first driver. The company's general policy was to expect drivers to take their lunch during these slack periods, as opposed to the regularly set break and lunch periods which the sorters and harvester driver shared.

The Board held in B & B that the "constructive" concerted activity principle/doctrine of Alleluia Cushion, supra, was "applicable" precedent. Under this principle, the ostensibly individual actions of a single employee are deemed "concerted activity" where these acts would necessarily affect other employees similarly situated (such as complaints to administrative agencies on matters involving worker health and safety). The Board added the caveat, however, that such precedent "should be applied with caution

and precision."

Examining the further extension of the Alleluia Cushion "constructive" concerted activity theory in the NLRB cases Hansen Chevrolet (1978) 237 NLRB 584 and National Wax Company (1980) 251 NLRB No. 147, this Board declared in S & B that concerted activity might be found where an individual's protest "demanded a managerial reaction which would affect other employees in addition to the one protesting." The converse of this principle was also noted, and utilized as the basis for the ultimate finding of no violation in B & B, that no concerted activity would be found where an individual employee's protest "did not foreclose the employer from reacting solely to the individual employee."

Turning to the instant case, the "protest" occasioned by the absence of prior notification to certain individuals of a modification in work scheduling did not foreclose a managerial reaction which would solely affect those individuals.[74/] The noon-time departures could have been excused, or the lack of a noon-time meal could have been remedied by respondent's obtaining lunches for those individuals, as it did in several instances. Thus, even if some sort of "constructive" concerted action theory is applied herein, it would be unavailing to the alleged discriminatees to characterize their actions as concerted.

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74. The discriminatees did not accept respondent's proposal to exercise the option of leaving work one-half hour early. In contrast to their noon protest, managerial reaction to the earlier (9:00 a.m.) protest did affect the work force as a whole.

B. Assuming Arguendo that the Noon Walkout Constituted "Concerted[1] Activity, Was that Activity "Protected?"

In its strictest sense, "concerted activity" may involve action taken by more than one employee -- "with . . . other employees" in the language of Meyers. Here, the five alleged discriminatees walked off the job at noon on May 26 more or less en masse. Notwithstanding the foregoing analysis under Meyers, if the action of the five is considered "concerted," it must also be deemed "protected," under ALRA section 1152, in order for this employer to be held accountable for disciplining these employees as a result.

The evidence demonstrates that each of the five discriminatees left the work site on May 26 with the clear intent to return to work the following day. Thus, they did not engage in a full-blown strike or refusal to withhold their services consistent with that characterization, but rather engaged in an activity more aptly characterized as a partial strike, akin to a refusal to work overtime. This Board has repeatedly held that the Act's protection does not extend to employees who engage in activities designed to dictate their own terms and conditions of employment. (Sam Andrews Sons (1979) 5 ALRB No. 68; Sam Andrews Sons (1983) 9 ALRB No. 24; cf. Pappas & Co. (1979) 5 ALRB No. 52.)

Although the Board has noted that under N.L.R.B. v. Washington Aluminum (1962) 370 U.S. 9, a one-time work stoppage "is presumed protected unless it is violent, unlawful, in breach of contract, or indefensible," it has adopted the NLRB test enunciated in Polytech (1972) 195 NLRB 695, that employer countermeasures to activity such as stoppages are permissible "when and only when the evidence demonstrates that the stoppage is part of a plan or pattern

of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of work normally expected of them by the employer." (9 ALRB No. 24 at p. 17, quoting Polytech, supra; emphasis supplied). Here, there was nothing unusual about employees, even when working by piece rate, to remain on the job until 1:45, as the company proposed on May 26. The work was "work normally expected of them." A stoppage under these circumstances would hence be unprotected.

This Board has thus followed a line of NLRB precedent which stands for the proposition that an "employee cannot continue in his employment and openly or secretly refuse to do his work." (N.L.R.B. v. Local 1229 IBEW (1953) 346 U.S. 464.) In N.L.R.B. v. Kohler Company (C.A. 7 1955) 220 F.2d 3, 35 LRRM 2606, the Court stated that employees could not insist on remaining at work under their own terms and conditions. As in the instant case, "[i]t is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which employees sought to and intended to continue to work upon their own notion of which terms should prevail." (35 LRRM at 2611.)

The Ninth Circuit in Shelley and Anderson Furniture Company v. N.L.R.B. (C.A. 9 1974) 497 F.2d 1200, 86 LRRM 2619, listed four criteria which needed to be met in order that employee concerted activity be considered "protected": (1) the activity must be a work-related complaint or grievance; (2) it must further a group interest; (3) it must seek a specific remedy or result; and (4) the activity should not be unlawful or otherwise improper. The phrase "otherwise improper" was construed by the court to include actions

which were neither work nor strike, such as partial work stoppages. "Generally, in order to be protected, the employee must choose either to be on the job and subject to the employer's rules or be off the job and bear the commensurate economic burden." (86 LRRM 2621.)

The recent NLRB case of Bird Engineering (1984) 270 NLRB No. 214 contains several parallels to the instant situation. There, the employer promulgated a "closed campus" rule for its night shift which prohibited employees from leaving its premises during their lunch break. The rule was designed to prevent theft, tardy returns and drinking during the lunch hour.

Four welding department employees protested the implementation of the new "closed campus" rule of which they were advised during the course of their shift. They were told by management that the rule was effective immediately, that permission to leave the facility would not be granted, and that anyone disobeying the rule would be terminated.[75/] Another employee, after learning about it, told respondent that the rule was unfair, and that he had no lunch inside the plant. An additional employee, after being warned by his leadman that he could be terminated for leaving, asked a supervisor for permission to go to his vehicle parked outside to retrieve his medication. The supervisor denied the permission. The employee insisted on his need for the medication, and stated that if he would not be permitted to obtain it, he should be given a termination slip. The supervisor obliged.

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75. The employees here were not so warned. I do not credit Mauser's testimony to that effect.

Three of the four welders also received termination slips after following their pre-rule practice of punching out during lunchtime. They decided on this course of action after management initially informed them of the rule. The fourth employee, a few days later, together with the employee who had no lunch with him the first day, determined that the rule was contrary to state statute, and punched out at lunch time that day in preparation for leaving the building. When they returned from lunch, they were informed they were dismissed.

The National Board stated the following in its decision, applicable with equal force to the instant case:

> While there is no question that the issue of lunch break policy is a condition of employment of common concern to all employees and that there is a concerted element present in at least five of the six discharges which occurred here, we find that actions of these employees were unprotected under the Act. These employees did not engage in a strike, withholding of work, or other permissible form of protest to demonstrate their disagreement with Respondent's rule. Instead they simply chose to ignore the rule in direct defiance of the directions and warnings of management. By treating the rule as a nullity and following their pre-rule lunchtime practice they did not participate in a legitimate protected exercise but rather engaged in insubordination. These employees were attempting both to remain on the job and to determine for themselves which terms and conditions of employment they would observe. (Slip op. p. 3 .)

Similarly, when the five employees concerned herein left the work site at noon, they acted in defiance of a management directive. Rather than adopting a legitimate form of protest to voice objection to what they felt was the unfair implementation of a work rule, they simply chose to ignore the rule. Insubordination, the proffered reason for discharge common to all the discharges, was thus established.

Given the supportable ground for the terminations, the

prior well-established Union and concerted activities of four of the five alleged discriminatees[76/] could not, in the absence of proof of disparate treatment, provide the essential "but-for" causational element to render the discharges unlawful.—' (See Royal Packing Co. (1982) 8 ALRB No. 48; Bruce Church (1982) 8 ALRB No. 81.)

That an employee is participating or has participated in union activities "does not insulate him from discharge for misconduct or give him immunity from ordinary employment decisions. (Royal Packing Co. v. ALRB (1980) 10 Cal.App.3d 826, 831.) In J & L Farms (1982) 8 ALRB No. 46, the Board recognized that discriminatory handling of worker tenure might manifest itself in the guise of superficially explainable discipline. There, terminations were effectuated in response to employee acts which previously had resulted only in the issuance of "warning" slips. Since the discipline received by the discriminatees was harsher than was customary, the Board concluded that the discharges could only have been explained as retaliation for participation in prior concerted, protected activities.

Here, by contrast, insufficient proof was adduced that theoretically non-Union or "non-active" employees were treated more leniently for like offenses. Although two examples were shown of employees who left the work site without permission and who were not

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76. Maria Maddock, Rafael and Hortencia Gonzalez, and Antonio Gonzalez.

77. It may go far in explaining the decisive, perhaps impulsive, reaction to the scheduling change, however.

immediately discharged,[78/] given the literally hundreds of disciplinary notices issued by respondent over a period of several years, an adverse inference could be drawn that these examples proved the exception rather than the rule.

Additionally, leaving work without permission was not the only ground cited as a basis for the dismissals. The cumulative effect of additional work rule violations, particularly in the cases of Antonio and Rafael Gonzalez,[79/] provided ample legitimate bases for the discharges.

That the proffered rationales for the discharges have evidentiary support likewise militates against a finding, urged by the General Counsel, that the discharges were pretextual. This is so notwithstanding the fact that abusive language uttered in the context of a grievance discussion might not, standing alone, provide a lawful basis for discharge (see analysis, pp. 41-42, infra), and that the value of the property allegedly destroyed was arguably de minimus.

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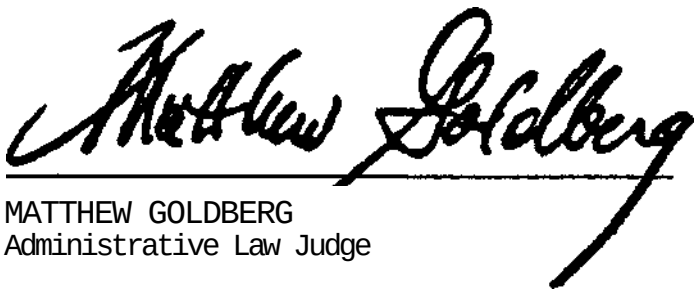
78. They were discharged subsequently for three consecutive absences.

79. All the company's witnesses uniformly testified that Antonio and Rafael had destroyed their budwood and it was discarded Worker witnesses uniformly testified that the budwood was returned in a normal, non-destructive fashion. Despite reservations I expressed regarding Mauser's credibility, *I* am unable to conclude that the destructive conduct did not in fact occur. The inconsistences in Rafael Gonzalez[1] recitation, noted thoughout this opinion, also prompt reservations as to his particular credibility. In regard to the budwood incident, the testimony of a disinterested witness would have been of- assistance in resolving this conflict- When faced with a direct conflict in the testimony, absent additional evidence to shed light on the truth of the matter, the General Counsel has not met his burden of proof. (S . Kuramura (1977) 3 ALRB No. 49 .)

V. RECOMMENDED ORDER

It is recommended that the complaint herein be dismissed in its entirety.

DATED: February **22,** 1985



MATTHEW GOLDBERG
Administrative Law Judge