

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

V. B. ZANINOVICH & SONS,	)	
	)	
Respondent,	)	Case No. 83-CE-262-D
	)	
and	)	
	)	
ANTI-RACIST FARM WORKERS UNION	)	
	)	12 ALRB No. 5
Charging Party.	)	
	)	
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ERRATUM

In paragraph 1. ( a ) of our Order (page 11 of our Decision) in the above-captioned matter, we erroneously commanded Respondent to cease and desist from "Failing or refusing to hire or rehire, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act ( Act ) . "

That error is therefore corrected by deleting the above-referenced language and substituting therefor:

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

Dated: October 28, 1986

JOHN P. McCARTHY, Member  
JORGE CARRILLO, Member  
PATRICK W. HENNING, Member  
GREGORY L. GONOT, Member

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DECISION AND ORDER

On October 2, 1984-, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision in this matter. Thereafter, Respondent, V. B. Zaninovich & Sons, (VBZ) timely filed exceptions to the ALJ's Decision and a brief in support thereof, and General Counsel filed a reply brief.

Pursuant to the provisions of Labor Code section 1146<sup>1/</sup> the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.<sup>2/</sup>

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided

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<sup>1/</sup>All section references herein are to the California Labor Code unless otherwise specified.

<sup>2/</sup>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 took no part in the consideration of this case.

to affirm his rulings, <sup>3/</sup> findings of fact, and conclusions of law as modified herein and to adopt his recommended Order with modifications.<sup>4/</sup>

The relevant facts of this case may be briefly stated as follows. Marcial Gonzalez, the alleged discriminatee, was an outspoken advocate on behalf of the Charging Party at Respondent's grape growing operations and his union activity was known to Respondent.<sup>5/</sup> On September 7, 1983, the day before the incident that is the focus of our inquiry, Gonzalez met with several of his fellow employees and ascertained that one of them, Francisco Sanchez, was having difficulty getting his developmentally disabled brother-in-law rehired by Respondent. The brother-in-law, Jorge Perez, had been discharged from Respondent's employ the previous

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<sup>3/</sup> Respondent objects to a ruling by the ALJ which prevented Respondent's counsel from cross-examining General Counsel's witness Francisco Sanchez with respect to the confrontation between Gonzalez and Zaninovich in the VBZ sales office. The ALJ concluded that such cross-examination would be outside the scope of Sanchez' direct examination by the General Counsel. We agree with Respondent's contention that Sanchez did indicate on direct examination that he was present in the sales office with the other employees and that the confrontation was part of the entire transaction about which Sanchez had been called to testify by the General Counsel. Although we consider it to have been error for the ALJ to limit cross-examination on the basis of an artificial distinction of time (People v. Goldstein (1948) 84 Cal.App.2d 581, 588), we find that such error was cured when the ALJ allowed Respondent to take Sanchez as its own witness and to ask leading questions of him over the objection of the General Counsel.

<sup>4/</sup> We find no merit in Respondent's objections to the well-established cease-and-desist, mailing, and notice-reading remedies employed in the ALJ's recommended Order. (See M. Caratan (1980) 6 ALRB No. 14; Jack or Marion Radovich (1984) 10 ALRB No. 1.)

<sup>5/</sup> Like the ALJ, we do not find it necessary to reach the question of whether Respondent's alleged anti-union animus played a part in its decision to fire Gonzalez.

year because of his inability to learn the proper way to prune. Gonzalez considered Perez to be the victim of discrimination and a hiring preference that he believed was being given to Filipinos in certain of Respondent's crews. It was agreed that the group would assemble the next day at Respondent's offices, with Sanchez going in first to ask again about employment for his brother-in-law.

The next day, September 8, 1983, approximately 20 employees gathered outside the Employer's sales office after their work for the day had been completed. As planned, Sanchez went into the office to ask about work for his brother-in-law. He emerged a few minutes later and informed Gonzalez and the others that Vincent Zaninovich, Respondent's general manager and one of the owners of the company, had promised to hire Perez in three days to a week. Sanchez, who knew Zaninovich to be a man who kept his word, was satisfied with Zaninovich's response but was somewhat uncertain about the outcome because of Perez' prior difficulties on the job. One of the employees who was involved in the previous day's strategy meeting scoffed at the reported promise and it was decided that the group would carry out the previous day's plan and go into the office.

According to Sanchez, Vincent Zaninovich was not disturbed when Sanchez reentered the office with Gonzalez and the group of employees, some of whom had to stand outside for lack of space. Gonzalez complained that Sanchez had been given the runaround in trying to get work for his brother-in-law and demanded to know once and for all whether they were going to give Perez any work or not. In the same breath, he said that they were also there

to protest against discrimination that was occurring in many of the crews. This was met with a denial by Vincent Zaninovich that there was any discrimination at VBZ and an angry and shouted response from Tony Zaninovich, Vincent's uncle. Tony accused Gonzalez of being a troublemaker, claimed that he did not represent the workers and demanded that he leave the office. Somebody in the group said that Gonzalez was there to interpret for Sanchez and Tony replied that he was not needed for that purpose as the company already had someone who was available to interpret.

Vincent repeated the demand that Gonzalez leave the office, but Gonzalez continued talking and interpreting. The demand that Gonzalez leave was repeated several times and Gonzalez, in a response that was audible to a VBZ sales employee in his closed office, said words to the effect that he would leave when he was finished. Vincent came around to the front of the counter where Gonzalez was standing and attempted to escort him out the door. Gonzalez resisted this effort, but Sanchez persuaded him that he ought to leave at that point. At Zaninovich's request, Sanchez and his wife stayed behind while Gonzalez and the group left. During the course of the incident which had just occurred, Zaninovich had called for Perez' employment file to be produced from the nearby records office. It was apparently at that time that he realized that Perez had previously been employed by the company. After discussing the matter further with Sanchez, Zaninovich told Sanchez to have Perez come in and get his work card the next day, Friday, and to have him report for work on the following Monday. The work was to be in picking.

The morning after the incident, Zaninovich gave Gonzalez a disciplinary notice for insubordination. That being his third notice for the year, not counting one that Zaninovich tore up, Gonzalez was informed that he was being terminated "as of right now." Gonzalez said he was not leaving and Zaninovich replied that he would have the Sheriff pick him up. Gonzalez retorted that that was what Zaninovich would have to do if he wanted him to leave. The record does not indicate what happened thereafter.

We begin our analysis by recognizing that Gonzalez and his fellow workers were engaged in concerted activity when they entered the VBZ sales office on September 8, 1983. What had begun as a personal concern on the part of Sanchez became a group concern based on the tacit understanding that the mutual aid for the aggrieved worker might also be extended to any other member of the group who wanted assistance with a job-related problem in the future. Moreover, although not a well-articulated problem, the matter of "discrimination" in the crews was shown to be a concern of the group which formed a further basis for their visit to Respondent's offices.

Respondent argues that even if Gonzalez was engaged in concerted activity he was unable to assume the mantle of protected conduct because he acted in bad faith and with knowledge of the falsity of the complaint that he advanced on behalf of Francisco Sanchez. In support of this argument, Respondent points to the fact that Gonzalez knew, before entering the VBZ offices, that Zaninovich had already promised Sanchez that he would rehire his brother-in-law within three to seven days and notes that Gonzalez

tried to enhance his justification for confronting Respondent by testifying, contrary to all the other witnesses, that Sanchez had reported being rebuffed by Zaninovich. While Gonzalez may have welcomed the opportunity to confront the Employer and construed Sanchez' report in a manner that best suited his own agenda for action, it does appear that he had some legitimate basis for wanting to talk with the Employer on Sanchez' behalf. After his initial meeting with Zaninovich, Sanchez did exhibit some uncertainty about the offer he had received and indicated that he desired further clarification, even though he was not dissatisfied with what he had been told by Zaninovich. In addition, Sanchez apparently desired Gonzalez' services as a translator. In view of this situation, and the absence of evidence that Gonzalez had engaged in a pattern of advancing spurious grievances, we find that Gonzalez' involvement in the concerted activity was protected.<sup>6/</sup>

The more difficult question in this case is whether Gonzalez' conduct during the concerted activity was such as to cause the loss of protected status for his participation. Flagrant conduct of an employee, even though occurring in the course of otherwise protected activity, may justify disciplinary action by the employer. (NLRB v. Thor Power Tool Co. (1965) 351 F.2d 584 [60 LRRM 2237]; Royal Packing Co. v. ALRB (1980) 101 Cal.App.3d 826, 834 [161 Cal.Rptr. 870].) On the other hand, not every impropriety

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<sup>6/</sup> However, we wish to emphasize that, for our finding of protected activity, we rely not on the evidence of the result of the protest but on evidence of concern expressed by Gonzalez' co-workers regarding employee rehire rights. In such a context, neither Gonzalez' personal motivations nor any antipathy he may have felt toward his employer defeats the protected nature of the protest.

committed during such activity places the employee beyond the protective shield of the Act. (NLRB v. Thor Power Tool Co., supra, 351 F.2d 584.) Respondent contends that Gonzalez' conduct resulted in a disruption of Respondent's business operations <sup>7/</sup> and constituted an indefensible defiance of the Employer's authority. At issue here is a conflict between an employee's right to engage in concerted activity and the Employer's right to maintain order and respect in the conduct of its business. (United States Postal Service (1983) 268 NLRB 274. [114 LRRM 1281].)

Whether conduct during the course of concerted activity loses its protected status will depend to some degree on the setting in which the conduct takes place. Some leeway for impulsive

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<sup>7/</sup>Business may have been disrupted in two ways. First, a company representative was discussing business with a major customer in a separate room at the back part of the office when the confrontation occurred. The commotion out front appeared to have caused the customer to become distracted and to leave -the meeting prematurely. Second, the company's receptionist left her desk at the front of the office because she was apprehensive about the confrontation that was taking place. The ALJ rejected Respondent's claim of business disruption on the grounds that the customer could not have been "frightened" by what was going on, that the claim appeared to have been an afterthought in Vincent Zaninovich's testimony, and that personal offense at Gonzalez' conduct rather than concern over potential loss of business was what motivated Zaninovich to fire Gonzalez. The ALJ did not address the issue of the receptionist being frightened.

While disruption of business could have occurred without the customer being in an actual state of fright, we agree with the ALJ that the customer's alleged early departure was not Zaninovich's principal concern. Although the receptionist may indeed have been frightened, her absence from her post for the short duration of the incident does not appear to have interfered with Respondent's business operations in any significant way. Moreover, given the legal standards which we employ, infra, and the fact that grievance meetings are not precluded from the sales office during business hours, some small degree of disruption of business must be tolerated in such situations.

behavior will be permitted when the conduct in question occurs during an organizing campaign, during the processing of a grievance, or in the course of collective bargaining. (NLRB v. Thor Power Tool Co. , *supra*, 351 F. 2d 58-4, 587; NLRB v. Prescott Industrial Products Co. (1974) 500 F.2d 6 [86 LRRM 2963]; NLRB v. Illinois Tool Works (194-6) 153 F. 2d 811 [17 LRRM 84-1].) Because of the nature of those activities, "tempers of all parties flare and comments and accusations are made which would not be acceptable on the plant floor." (United States Postal Service, supra, 268 NLRB at 275.)

In a grievance or bargaining meeting the "employees must be placed in the status of equals in dealing with management." (NLRB v. Prescott Industrial Products Co., *supra*, 500 F.2d 6; NLRB v. Red Top, Inc. (1972) 455 F.2d 721 [79 LRRM 2497].) The federal act

has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. Both the Board and the courts have recognized that some tolerance is necessary if grievance meetings are to succeed at all; as we have noted before, 'bruised sensibilities may be the price exacted for industrial peace.' [Citations omitted.] (United States Postal Service v. National Labor Relations Board (1981) 652 F. 2d 409 [107 LRRM 3249].)

We find that the conduct in question here did occur in a setting which calls for greater leeway for impulsive behavior. While the employees did not have the benefit of a grievance procedure established by contract, they did have the right to rely on the Grievance Procedure Article contained in Respondent's Company Handbook. That article makes it clear that if an employee has a

complaint, he or she can bring it directly to the attention of the company's owner.<sup>8/</sup> Nothing is stated therein with regard to the appropriate time or place for approaching the owner. Although the meeting here occurred in an impromptu fashion, Vincent Zaninovich gave no indication at the outset that he considered either the time or place to be inappropriate.

Having thus determined that Marcial Gonzalez was engaged in a legitimate grievance meeting when, as Respondent alleges, he disrupted the Employer's business and committed acts of insubordination, we must now consider whether Gonzalez' conduct was so flagrant as to be unprotected even within the context of a grievance meeting.

In some cases, the employee's conduct during the meeting has been found to be so opprobrious or disruptive that the Act's protection must give way to the employer's right to maintain discipline in its establishment. When the employee's conduct during a grievance meeting is 'indefensible under the circumstances,' the employer may indeed discipline the employee without violating the act. NLRB v. Florida Medical Center, Inc., supra, at 673. (United States Postal Service v. National Labor Relations Board, supra, 652 F.2d 409 [107 LRRM 3249].)

We note initially that Zaninovich and his uncle reacted in a loud and angry manner to Gonzalez' statement about

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<sup>8/</sup>The grievance procedure, contained in Article XI of the Company Handbook, reads in its entirety as follows:

#### XI GRIEVANCE PROCEDURE

In order to resolve any problems or difficulty, the proper person must know about it. If you have a complaint, the first person to consult is your immediate foreman, or if you wish, the farm owner. If you and the foreman cannot work out a satisfactory solution to your problem the foreman will bring it to the attention of the farm owners. We will carefully review all the facts from both you and the foreman and will make a decision based on the information presented.

discrimination in the crews. In so doing, they themselves were largely responsible for making the meeting acrimonious and causing office business to be disrupted to the degree that it was. While it appears that Gonzalez did resort to some invective during the course of the meeting, the record indicates that this did not occur until after the owners had begun shouting at Gonzalez.<sup>9/</sup> Regarding Gonzalez' refusal to comply with repeated demands by the owners that he leave the office, we note that this refusal was spontaneous in nature<sup>10/</sup> and of relatively brief duration. Moreover,

the Act's protection of an employee's conduct during a grievance meeting does not necessarily terminate the instant when the employer ends [or desires to end] the discussion. [Citations omitted.] Surely the principals involved in a heated exchange cannot be expected to suppress their emotions at a moment's urging by one who has been their adversary. . . . [t]he Act's protection of employee participation in grievance meetings would be seriously threatened if the employer could at any emotional and argumentative point during the meeting call an immediate halt to the operation of the Act. . . . (United States Postal Service, supra, 652 F.2d 409 [107 LRRM 3251].)

While Gonzalez' conduct did contain some of the elements which the National Labor Relations Board (NLRB) and the courts have considered as being indefensible in other contexts (see e.g., NLRB v. Prescott Industrial Products Co., supra, 500 F.2d 6; United States Postal Service, supra, 268 NLRB 274), we find that it was

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<sup>9/</sup>Although the testimony from employee witnesses which was credited by the ALJ indicates that Gonzalez was not angry and threatening, Vincent Zaninovich testified without contradiction that Gonzalez called him "prejudiced" and "racist." These remarks, if actually made, would appear to have been precipitated by the Zaninovichs' immediate and hostile reaction to Gonzalez' more innocuous allegation of "discrimination in the crews."

<sup>10/</sup>There is no indication that Gonzalez had planned in advance to stage an occupation of the Employer's offices.

not so aggravated as to remove it from the scope of tolerance that must be afforded to participation in a grievance meeting. His acts were therefore part of the exercise of his section 1152 rights and do not, under the circumstances of this case, constitute lawful grounds for the imposition of discipline or discharge.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent V. B. Zaninovich & Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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

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

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

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

(b) Make whole Marcial Gonzalez for all losses of pay

and other economic losses he has suffered as a result of his discharge on September 8, 1983, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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

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

( e ) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between September 8, 1983 and September 8, 1984.

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

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

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

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

Dated: March 12, 1986

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Vincent B. Zaninovich, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging employee Marcial Gonzalez because of his protected concerted activities. 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 (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 hereafter discharge, lay off, or in any other way discriminate against, any agricultural employee because he or she has engaged in protected concerted activities.

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

Dated:

Vincent B. Zaninovich

By: \_\_\_\_\_  
Representative (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

V. B. Zaninovich & Sons

Case No. 83-CE-262-D  
12 ALRB No. 5

ALJ Decision

Employer discharged employee for alleged insubordination stemming from his presentation of a worker's grievance to company representatives at the Employer's sales office during business hours. ALJ found that employee's actions constituted protected concerted activity, and that Employer's discharge of the employee violated section 1153(a).

Board Decision

The Board affirmed the ALJ's Decision and Order and adopted his recommended Order with modifications. The Board held that although the employee refused to leave the Employer's office on demand and continued to engage in heated discussion with the Employer, his conduct did not lose its protected status, since Employer himself was largely responsible for making the meeting acrimonious and causing partial disruption of office business; employee's refusal to leave premises was spontaneous and brief; and a small amount of disruption of business must be tolerated where grievance meetings were not precluded from Employer's sales office during business hours.

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

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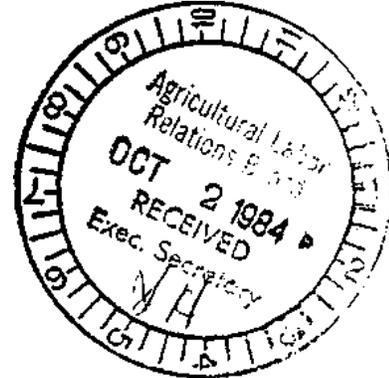
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: )  
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 V. B. ZANINOVICH & SONS, )  
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 Respondent, )  
 )  
 and )  
 )  
 ANTI-RACIST FARMWORKERS UNION, )  
 )  
 Charging Party. )

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Case No. 83-CE-262-D



Appearances:

Raymond Kepner  
 Seyfarth, Shaw, Fairweather & Geraldson  
 Los Angeles, California  
 for Respondent

Marcial Gonzales  
 Anti-Racist Farmworkers Union  
 Delano, California  
 for Charging Party

Susan Adams  
 Agricultural Labor Relations Board  
 Delano, California  
 for General Counsel

Before: Thomas M. Sobel  
 Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS M. SOBEL, Administrative Law Judge:

This case was heard by me on July 24-27, 1984, in Delano, California. Based upon his investigation of charges filed by the Anti-Racist Farmworkers Union,<sup>1/</sup> General Counsel alleged that Respondent Vincent B. Zaninovich, an admitted agricultural employer, discriminatorily discharged Marcial Gonzales for exercising his rights under the Act.

STATEMENT OF THE CASE

On September 8, 1983, Marcial Gonzales<sup>2/</sup> and a group of employees confronted several of Respondent's officials in Respondent's main office. Although exactly what was said and why were the stuff of hearing, there is no question that Gonzales was terminated the day after the incident.

My sole focus in this decision will be on the events of that day although both General Counsel and Respondent have somewhat more complicated contentions regarding what this case is about. For its part, Respondent contends that it discharged Gonzales for receiving three disciplinary notices, the third of which was admittedly given for the part Gonzales played on September 8, 1983

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1. For the purposes of this hearing, Respondent stipulated that the Anti-Racist Farmworkers Union is a labor organization.

2. It is apparent that Gonzales is an outspoken proponent of employee rights and Vincent Zaninovich knew him to be one; indeed, Zaninovich described Gonzales as being of the opinion that nothing the company ever did was fair or right. (IV:94-95.) Zaninovich's opinion is supported by Gonzales<sup>1</sup> testimony that the company's employee handbooks were "hypocrisies" (I:143-144) and Gonzales<sup>1</sup> impression (unsupported by the record) that everytime he was disciplined it was in retaliation for exercising his rights. There is no question (and Respondent does not contest) that it had knowledge of Gonzales militant opinions and his activities.

which Respondent contends was beyond the pale of statutory protection. Since General Counsel contends that Gonzales' actions on that day were protected, the positions of both parties require me to scrutinize the events of September 8. General Counsel goes further, however; she also argues that Respondent used the events of September 8 merely as a pretext to fire Gonzales and that the real reason was his union activities. In General Counsel's reckoning, proof of the pretextual use of the incident of September 8 lies in the Respondent's alleged practice of giving Gonzales disciplinary notices whenever he engaged in protected activity. General Counsel's alternative argument is pertinent, however, only if I were to conclude that Respondent could have disciplined Gonzales for his part in the events of September 8, for if she is correct as to her primary contention, that Gonzales' actions on September 8 were entitled to statutory protection, an unfair labor practice is made out without need for further inquiry. Since, as will be discussed below, I find Gonzales' actions to be "protected", there is no need for me to consider General Counsel's alternative contention that Respondent was "out to get him."<sup>3/</sup>

#### THE EVENTS OF SEPTEMBER 8, 1983

The events of September 8, 1983, were set in motion the evening before when Gonzales, and two other employees, Oscar Martinez and Luis Velez, chanced to discuss a problem that a co-worker, Francisco Sanchez, was having in obtaining harvest work

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3. I should note that upon completion of relevant aspects of Respondent's case, I advised the parties that Respondent had credibly justified the discipline meted out to Gonzales in 1983 and that, as a result, I saw no merit to General Counsel's contention.

for his mentally-retarded<sup>4/</sup> brother-in-law, Jorge Perez. Sanchez had been to the office and had talked to Vincent Zaninovich a couple of times about obtaining harvest work for Perez (II:171), but had been unable to get him hired. Perez had unquestionably worked for Respondent in a previous pruning season, but had been discharged because Vincent was not satisfied by his work. What is not clear is whether he had also worked for Respondent during a previous harvest. Unfortunately, the record is extremely scanty and confusing in this regard. Sanchez testified he thought Perez had worked for Respondent during the harvest (II:174, 175, 176, 178, II:189), and while this testimony is not the strongest, Respondent did not present any evidence that Perez had not worked in the harvest. Since it was peculiarly within Respondent's power to settle the matter, I conclude that he did.<sup>5/</sup> (Evidence Code section 412.)

Gonzales, Martinez and Velez discussed Perez' problem as one which at least, in part, involved the company's hiring people without any seniority. (I:112, 116-117 [Gonzales]; II:110, 147-148 [Oscar Martinez]; III:35 [Luis Velez]; II:187-189 [Sanchez].)

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4. Sanchez speaks of Perez as "thinking like a child." (II:182.)

5. Respondent's employee handbook provides that hiring shall be crew seniority. The record is not clear whether crew seniority refers to seniority aquired under particular foremen or in particular operations. Since Perez had been fired in the pruning, if he worked in the harvest work he would have acquired some seniority of either type. Although the Board has stated that the merit of a grievance is not determinative of its "protected" nature, Venus Ranches (1982) 8 ALRB No. 60, enf'd 4 Civil No. 29363, that Perez may have had some harvest seniority infuses some merit into Sanchez' concern about this failure to be hired. Respondent has not shown that Sanchez or the group had no reason to believe Perez ought to be hired. The group's concern over Respondent's failure to hire Perez also appears to have been held -in good faith.

Gonzales argued that such actions by the company demonstrated the need for a union. ( I:112.) The group decided to protest the failure to rehire Perez on the following day after Sanchez once again had the chance to ask Vincent Zaninovich to hire Perez. (I:113.)

As planned, a group of employees met outside the office after work. ( I:114.) Sanchez preceded them inside and emerged after 4 or 5 minutes. ( I:114.) Gonzales testified that upon emerging from the office Sanchez told the group Vincent had said "He was not going to hire anyone, and that's the last he wanted to hear of it." ( I:114.) Every other witness testified, and I so find, that Sanchez said Vincent told him he would give Perez work in 3 or 4 days or a week.<sup>6/</sup> According to Sanchez, despite Vincent's "promise" to rehire Perez, he was not sure Jorge would get a job (II:173, 1980), since Vincent had told him before to "wait a little bit." (II:173, 180, 183.) Upon hearing what Vincent told Sanchez, Oscar Martinez commented derisively, "Promises, as always"<sup>7/</sup> and, according to Martinez, Sanchez himself echoed the characterization. (II:111, 123.) The group decided to go in to discuss the matter with Vincent. Sanchez recalls Gonzales saying he wanted to talk to Vincent about discrimination at the company (II:187), but he also testified that he wanted to go back in to make sure Perez would be hired<sup>8/</sup> and further that they were merely fulfilling the plan of the

6. (II:111 [Oscar Martinez], II:173 [Sanchez: "When I came out a co-worker asked me what happened. I told him that again they had made me the offer that 3 days or a week they would give him some work."])

7. (II: 173 [Sanchez]; II: 111 [Martinez].)

8. (I: 114 [Gonzales]; II: 183)

previous evening when it was agreed the whole group would press the issue as a matter of principle on Jorge's behalf. (II:186-187, 189.)

There are sharply conflicting accounts about what happened when the group entered the office. On the one hand, Gonzales testified that he entered the office calmly and asked the receptionist if he could speak to Vincent. After Vincent and his uncle, Tony Zaninovich, appeared and stood on the opposite side of a long counter facing the group, Gonzales began to explain that they had come on behalf of Francisco Sanchez who:

had unsuccessfully attempted to get his brother-in-law rehired . . . and that was unfair because other people in the same crew . . . who had no seniority were hired for the first time that picking season. And that we were also there to protest against discrimination which existed in many of the other crews as well. (I:116-117.)

According to Gonzales, Vincent immediately interrupted him to deny any discrimination at the company, and Tony Zaninovich began to shout at him, calling him a troublemaker. Charging that Gonzales did not represent the workers, Tony ordered him out of the office. (I:117.) Gonzales translated this for the workers. When Oscar Martinez said Marcial was there to interpret (I:118, II:114), either Vincent or Tony replied, "They didn't need him to interpret." After Tony asked Vincent if the group worked for Respondent and Vincent said they did (I:118), Tony began to yell at Marcial telling him he had better leave or he would call the police. Marcial agreed to leave, but told Vincent and Tony, "This is not the end of the issue." (I:117.) Vincent repeated, "Leave or you will be fired." As the group left, Vincent or Tony told Francisco and his wife to stay. According to Gonzales, he was calm throughout the episode,

only raising his voice a little towards the end in order to be heard over Tony and Vincent's yelling.

Martinez' testimony is similar to that of Gonzales'. According to him, Gonzales told Vincent and Tony the group had come there to protest the "runaround" Francisco was getting and to find out once and for all whether Perez would be rehired "because there was a lot of discrimination going on at the company." (II:113.) Upon hearing this, Tony immediately accused Marcial of being a troublemaker, ordered him out of the office and threatened to call the police if he didn't leave. Vincent tried to push Marcial out of the office and Marcial told him not to. (I:118.)

According to Sanchez, the meeting had a much milder tone. He testified Vincent was not manifestly angry, even though he and Tony repeatedly asked Gonzales to leave the office. Gonzales/ however, continued to talk contending he was there to interpret. (III:15-17.) However, Sanchez also testified, he asked Gonzales to leave because he could see that "Tony and them were pretty well heating up." (III:22-23.)

Vincent Zaninovich, on the other hand, testified that Gonzales was angry, denunciatory and threatening:

Marcial came to the office mad and demanded why I didn't hire a certain person back. He came in and his tone of voice was loud and uncalled for and I said, Marcial, if you can't hold your tone of voice down and if we can't do this in a civilized manner, I'm going to have to ask you to leave the office.

He did not respond. He kept yelling and saying I want to know how come you're giving this guy the runaround. You're prejudiced and a racist.

I said: What is that of concern to you. He said, I'm here to interpret and I said we have people to interpret for him. . .

Nobody else said anything. (III:95-98.)

According to Vincent, as Marcial spoke to him, he pounded the counter and pointed his finger. (III:99-100.) When Gonzales was asked to leave, he refused to, saying he would leave when he was ready<sup>9/</sup> and even when Vincent came around the counter to shepherd him out and to threaten him with the police if he didn't leave, Gonzales said to him "You haven't seen the last of me. You can count on that." (III:101.) Zanimovich decided to fire him because Gonzales had no reason to call the company names and because of his insulting and hostile manner. (III:115-116.)<sup>10/</sup>

Rachel Alvarado, an employee, testified that she entered the office out of curiosity when she saw the crowd. She heard Gonzales say the group had come "to talk for Francisco about a job that he . . . had been coming to ask for . . . and all they were doing was giving him . . . the runaround." (II:64.) When Gonzales said the workers have rights and accused the company of

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9. See also Testimony of Kaz Takemoto, II:137.

10. Respondent also contends that Vincent decided to fire Gonzales because he disturbed a sales meeting taking place in one of the interior offices by frightening a buyer from another company. I do not credit this testimony. In the first place, Respondent's Counsel had to lead Vincent Zanimovich to proffer this as one of his reasons for firing Gonzales. (III:117, lines 8-9.) Secondly, rarely have I seen a witness reveal his feelings so openly as Vincent did about his confrontation with Gonzales: at first a stiff, well-contained witness, he relaxed visibly as his counsel took him through testimony concerning the layout of his office, becoming open and obviously anxious to help his auditors understand, only to tighten up once again when he began to discuss the incident with Gonzales. It seems clear to me that what happened between him and Gonzales was offensive to him personally. I also find it hard to believe that a salesman would flee an office in fear because of a commotion going on in another room which, by all accounts, involved only the two Zanimoviches and one employee. There was no mob action outside: the rest of the crowd was neither unruly nor vocal.

discrimination in the crews Tony replied, "there was no discrimination in the company," and, pointing his finger at him, accused him of being a troublemaker. ( II : 6 5 . ) Vincent moved around the counter toward Gonzales and both Tony and Vincent shouted at him to leave.<sup>11/</sup> Vincent told Marcial that, "if he didn't leave he would be without a job. " ( II : 6 6 . ) She heard Gonzales translate this to the workers just before she left the office.

Thus, all the employee witnesses testified that Gonzales was calm and well-controlled. Only Vincent Zaninovich testified that he was angry and threatening. Three employees, Gonzales Martinez and Alvarado, testified Vincent and Tony reacted angrily at Gonzales, and Sanchez, whose testimony was most favorable to Respondent, ventured that Vincent and Tony "were becoming" angry enough for him (Sanchez) to ask the other employees to leave. Even Kaz Takerato, one of Respondent's own witnesses, testified he could hear Vincent's voice through the door. I find that Gonzales was not angry and abusive in the discussion and that Vincent reacted angrily to him.<sup>12/</sup> I specifically do not credit Zaninovich's testimony that

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11. Kaz Takemoto also testified he could hear Vincent shouting through the closed door. ( II : 3 6 . )

12. In view of these findings, I will not address Respondent's argument that Gonzales' actions were indefensible. Even through Gonzales did not leave immediately upon being asked to leave by Zaninovich, I do not think his refusal to do so puts his actions in the class of those contumacious employees whose discharges were upheld as lawful in the cases cited by Respondent. Obviously, no bright line separates protected from unprotected activity in contexts such as these, but all the cases cited by Respondent focus upon whether the employee was aggressive in pressing his grievance beyond what the circumstances objectively appeared to call for. Under the facts of this case, I couldn't conclude Gonzales overstepped the invisible bounds of propriety in refusing to leave immediately upon being asked without conferring on Respondent a right to unilaterally declare when activity must cease under penalty of losing its protection.

ANALYSIS AND CONCLUSIONS

Respondent first contends that because Francisco Sanchez was only seeking to obtain employment for his brother-in-law, the group's efforts to help him toward this end were necessarily "personal" in nature rather than "concerted." In support of its argument, Respondent relies on NLRB and ALRB cases concerning "constructive" concerted activity. I do not think the cases are apposite.

The doctrine of "constructive" concerted activity was developed by the national Board to bring the activities of individual employees within the scope of a statute which defines the rights it creates as those which arise from the concert of employees.

Section 7 of the NLRA provides:

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 and or protection. . . .

The rights created under Labor Code Section 1152 are the same. In view of this language, there was some question about "the precise manner in which . . . actions of an individual employee [had to] be linked to the actions of fellow employees in order to permit it to be said that the individual [was entitled to the protections of the Act]".

N.L.R.B. v. City Disposal Systems Inc., \_\_\_ U.S. \_\_\_,  
115 LRRM 3193 at 3197.

Some actions, undertaken by individuals alone, were nevertheless considered "concerted" under a variety of approaches to which the rubric "constructive" concerted activity was generally

applied. The Board's doctrine of constructive concerted activity was not uniformly well-received by the courts, see generally, Morris, *The Developing Labor Law*, second Edition , Vol. 1, pp. 136-141, and was the subject of considerable internal debate within the NLRB itself, as a result of which its scope expanded and contracted, until its once greatest extension has been entirely overruled. (See Meyers Industries (1984) 268 NLRB No. 73 . )

It was within the context of this debate that the distinction between "personal" and "group" concerns upon which Respondent relies emerged as the dividing line between what falls within the definition of rights contained in the labor Acts. In this case, since Gonzales did not act alone, but as spokesman for a group, these cases, which "make up for" the absence of group activity from the nature of the interest asserted, have no application.

Respondent has cited no case in which group support of an individual claim has been held not to be concerted because the claim was considered purely personal. Sanchez or Perez (another agricultural employee) had a grievance with the company and his co-workers came together to render him aid; the statute gives them the right to do that harmlessly. As Learned Hand explained in N.L.R.B. v. Peter K. Swiss Choc. Co. (2d Cir. 1940) 130 F.2d 503, 505.

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are

all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. (Emphasis added.)

Respondent next contends that the action of the employees was unprotected because it was in bad faith and intended solely for the purposes of harassment since Vincent Zaninovich had already promised to hire Jorge Perez and his promise had been communicated to the group before it decided to confront him. It is true that Sanchez relayed Vincent's promise to the group; but it is also true that after the incident in the office Vincent hired Jorge Perez "on the spot" which he had not done previously. The "promise" given, then, was weaker than the command as any person who has ever sought work must readily appreciate and, in the context of Sanchez already believing that he was being placated rather than satisfied, I cannot draw the conclusion that the group was acting solely for the purposes of harassing Respondent's officials. This case is thus distinguishable on at least these grounds from those relied upon by Respondent.<sup>13/</sup>

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13. Gonzales' action do appear to arise more from some deep well of suspicion and mistrust than the circumstances call for-And I do not doubt that he derives some political satisfaction from confronting Respondent's officials. However, so long as the results of the group's effort were more than what Sanchez had been able to achieve by himself, the short answer to Respondent's claims that his actions were undertaken solely to harass Respondent is that, judged by their success, there appears to to have been a sufficient reason for them.

ORDER

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

1. Cease and desist from:

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

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

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

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

(b) Make whole Marcial Gonzales for all losses of pay and other economic losses he has suffered as a result of his discharge on September 8, 1983, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

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

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

( e ) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the last full payroll period encompassing the date of Marcial Gonzales' discharge.

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

( g ) Arrange for a representation of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at times(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors

and management, to answer any questions the employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

DATED: October 2, 1984

A handwritten signature in dark ink, appearing to read "Thomas M. Sobel", written over a horizontal line.

THOMAS M. SOBEL

Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we Vincent B. Zaninovich, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging employee Marcial Gonzales because of his protected concerted activities. 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 hereafter discharge, lay off, or in any other way discriminate against, any agricultural employee because he or she has engaged in protected concerted activities.

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

DATED:

VINCENT B. ZANINOVICH

By: \_\_\_\_\_  
Representative (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California. The telephone number is (805) 681-2565.

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

DO NOT REMOVE OR MUTILATE

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STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of :	)	Case No. 83-CE-262-D
V. B. ZANINOVICH & SONS,	)	
	)	ERRATUM
Respondent,	)	DECISION OF THE
	)	ADMINISTRATIVE LAW JUDGE
and	)	
	)	
ANTI-RACIST FARMWORKERS UNION,	)	
	)	
<u>          Charging Party.          </u>	)	

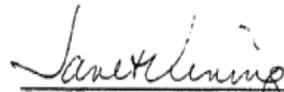
The last line of text on page 9 of the Decision of the Administrative Law Judge in the above-captioned matter was inadvertently omitted. The last sentence should read: "I specifically do not credit Zaninovich's testimony that Gonzales threatened him or truculently refused to leave the office." Please substitute in the decision the attached pages 9 and 10 which have been corrected.

Additionally, on page 13, lines 3 and 4, the name of the Respondent should read: "V. B. Zaninovich & Sons".

The parties are hereby given twenty (20) days in which to take exception to the decision of the Administrative Law Judge referred to above. All parties must now file said exceptions with the Executive Secretary by October 29, 1984.

JANET VINING

DATED: October 5, 1984



JANET VINING  
Executive Secretary

discrimination in the crews Tony replied, there was no discrimination in the company," and, pointing his finger at him, accused him of being a troublemaker. (II:65.) Vincent moved around the counter toward Gonzales and both Tony and Vincent shouted at him to leave.<sup>11/</sup> Vincent told Marcial that, "if he didn't leave he would be without a job." (II:66.) She heard Gonzales translate this to the workers just before she left the office.

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11. Kaz Takemoto also testified he could hear Vincent shouting through the closed door. (II:36.)

12. In view of these findings, I will not address Respondent's argument that Gonzales' actions were indefensible. Even though Gonzales did not leave immediately upon being asked to leave by Zaninovich, I do not think his refusal to do so puts his actions in the class of those contumacious employees whose discharges were upheld as lawful in the cases cited by Respondent. Obviously, no bright line separates protected from unprotected activity in contexts such as these, but all the cases cited by Respondent focus upon whether the employee was aggressive in pressing his grievance beyond what the circumstances objectively appeared to call for. Under the facts of this case, I couldn't conclude Gonzales overstepped the invisible bounds of propriety in refusing to leave immediately upon being asked without conferring on Respondent a right to unilaterally declare when activity must cease under penalty of losing its protection.

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