

STATE OF CALIFORNIA
AGRICULTURAL LABOR
RELATIONS BOARD

GARTH CONLAN, JEFF POLINI , JOHN)	Case Nos. 83-CE-141-SAL
FRISE, JAMES DOGGER, DIRK)	84-CE-21-SAL
ANDREWS, ROBERT ROESELER, J R . ,)	84-CE-45-SAL
TYE M. CONLAN, KENNETH)	
DEMURICHY, individually and as)	
partners, d/b/a LIGHTNING FARMS,)	
)	
Respondents,)	
)	
and)	
)	
MELINDA ZARAGOZA, JESUS URIBE,)	
CELIA ALVAREZ, ALBERTO)	12 ALRB No. 7
HERNANDEZ, TOMAS HORNELAS)	
and AGUSTIN BELTRAN,)	
)	
Charging Parties.)	
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ERRATUM

In paragraph 2 (a) of our Order (page 7 of our Decision) and in the Notice to Agricultural Employees (following p. 8 of our Decision) in the above-captioned matter, the Agricultural Labor Relations Board (ALRB or Board) erroneously omitted the names of Refugio Gonsale Valdibia, Santiago Perez and Atanacio Ramirez.

We hereby correct that error and direct that those named above be inserted in the appropriate places. The corrected order is attached hereto and should be substituted for the previously issued Notice and Order.

Dated: February 26 , 1987 JOHN P. McCARTHY, Acting Chairman

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

his familial relationship to Pacheco. As such, it may raise a suspicion of unlawful motive in Respondents' decision to lay off Homelas, but is insufficient to meet General Counsel's burden of proof. We therefore dismiss the portion of the complaint alleging discrimination against Tomas Homelas.^{3/}

Respondents' other exceptions^{4/} to the ALJ's Decision are without merit. We find, in agreement with the ALJ, that six named parsley employees, among others, were discharged for concertedly protesting their working conditions and that subsequent requests to be reinstated were denied because they had concertedly protested the wage rate. Discharge for failure to cease a protected work stoppage violates the Act. (See, e . g . , NLRB v. United States Cold Storage Corp. (5th Cir. 1953) 203 F.Supp. 924 [32 LRRM 2024]; Sam Andrews Sons (1983) 9 ALRB No. 24.^{5/}

^{3/}Member Henning, for the reasons given in the ALJ's Decision, would adopt the ALJ's analysis in this matter.

^{4/}We are unable to determine whether Respondent also retaliated against the cauliflower workers by creating onerous working conditions. The ALJ made no findings on this portion of the complaint, though he concluded that supervisor Orlando Garcia had created harsh working conditions against Pacheco in retaliation for his protected concerted activities. While the ALJ's Decision appears to agree with witnesses that Garcia changed working conditions adversely when complaining employees were reinstated in November, there is no finding regarding why those new conditions were imposed. Absent such a finding, and absent exception by the General Counsel to such a lack of analysis, we are unwilling to speculate as to the actual motivation behind the imposition of the new, harsher working conditions.

^{5/}The record amply supports our finding that Respondents unlawfully retaliated against the parsley employees for engaging in protected concerted activity. Garth Conlan testified that he terminated the workers "because they violated work rules and they refused to work." The foreman of the parsley crew Miguel

(Fn . 5 cont. on p. 6.)

We accordingly adopt the ALJ's Decision except as modified/ and issue the attached Order.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondents Garth Conlan, Jeff Polini, John Prise, James Dugger, Dirk Andrews, Robert Roeseler, Jr., Tye M. Conlan, Kenneth Demurichy, individually and as partners, d/b/a Lightning Farms, their 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 or she has engaged in concerted activity protected by section 1152 of the Agricultural Labor Relations Act (ALRA or 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:

(Fn. 5 cont.)

Rivera testified that when some of the employees returned to request their jobs back, he refused them rehire because they *had* refused to work in the parsley. Dirk Andrews, a partner in Lightning Farms, corroborated the above testimony, stating that he told the striking employees to leave because "Lightning Farms doesn't have a job for them." Further support for our conclusion here is General Counsel Exhibit 5, the termination slips for Guadalupe Mosquedia, Amelia Martinez, Ramon Martinez and Ernest Espinoza. These slips demonstrate that the striking parsley employees were fired for engaging in the work stoppage.

(a) Offer to Refugio Gonsale Valdibia, Santiago Perez, Atanacio Ramirez, Jose Pacheco, Amelia Martinez, Agustine Beltran, Guadalupe Mosquera, Ramon Martinez, Abel Gonzalez, and Ernesto Espinoza immediate and full reinstatement to their former or substantially equivalent positions and make them whole for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 .

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise 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 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 September 1, 1983 to April 30, 1984.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for

60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

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

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

Dated: May 2, 1986

JOHN P. McCARTHY, Acting Chairman PATRICK

W. HENNING, 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 (ALRB or Board) issued a complaint which alleged that we, Lightning Farms, 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 laying off Jose Pacheco because Jose Pacheco protested that Respondent should pay premium pay for a holiday, Labor Day, and by firing Amelia Martinez, Agustin Beltran, Guadalupe Mosqueda, Ramon Martinez, Abel Gonzalez, Ernesto Espinoza, Refugio Gonsale Valdibia, Santiago Perez, and Atanacio Ramirez because they protested in favor of an hourly rate rather than a piece rate. 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 discharge or layoff any employees for engaging in protests over wages or other working conditions.

WE WILL reimburse Jose Pacheco, Amelia Martinez, Agustin Beltran, Guadalupe Mosqueda, Ramon Martinez, Abel Gonzalez, Ernesto Espinoza, Refugio Gonsale Valdibia, Santiago Perez, and Atanacio Ramirez 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:

LIGHTNING FARMS

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GARTH CONLAN, JEFF POLINI, JOHN)	Case Nos. 83-CE-141-SAL
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and AGUSTIN BELTRAN,)	
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Charging Parties.)	

DECISION AND ORDER

On March 13, 1985, Administrative Law Judge (ALJ) Arie Schoorl issued a Decision and Proposed Order in this proceeding. Thereafter, Respondent Garth Conlan, individually and on behalf of the other Respondents in this matter, timely filed exceptions to the ALJ's proposed Decision and a supporting brief.

Pursuant to the provisions of Labor Code section 1146,^{1/} the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel. The Board has considered the record^{2/} and the ALJ's

^{1/} All section references herein are to the California Labor Code unless otherwise specified.

^{2/} Copies of the exhibits submitted in this matter were requested by the Board. However, in April 1986, the original exhibits were transferred to the Board by the ALJ.

Decision in light of the exceptions and brief and has decided to affirm the rulings, findings and conclusions of the ALJ as modified and to adopt his proposed Order with modifications.

Respondents filed several exceptions to the proceedings and practice of the ALRB as well as to the General Counsel's conduct of this matter. Specifically, Respondents objected to the conduct of hearing at a time when they lacked legal representation; to the use of affidavits from Respondents' witnesses that were submitted to the General Counsel as part of an external complaint regarding the conduct of regional personnel; to the failure of the General Counsel to put certain witnesses on the stand or to allow investigation into an Unemployment Insurance hearing; and to the fact that Respondents received a defective copy of the ALJ's Decision.

Regarding the representation of Conlan pro se, any inadequacy in the presentation of evidence or defense of the charges was a consequence of Respondents' failure to acquire counsel. Respondents' attorneys of record withdrew in mid-August 1984, and the hearing was not held for nearly two months thereafter. Further, Respondents expressly waived the right to appear by counsel at the hearing and voluntarily elected to be represented by their managing partner, who was given considerable leeway in presenting Respondents' case and in cross-examining witnesses. (Boro Burgler Alarm Co. (1978) 234. NLRB 389[97 LRRM1269]; Tred-Air of California, Inc. (1971) 193 NLRB 672[78 LRRM1361] enforced Tred-Air of California, Inc. v. NLRB (9th Cir. 1972) [82 LRRM2080]; Air Transport Equipment, Inc.

(1971) 190 NLRB 377 [77 LRRM 1431] enforced without opinion Air Transport Equipment, Inc. v. NLRB (2nd Cir. 1972) 4.86 F.2d 1394 [82 LRRM2392].)

Respondents were not deprived of the opportunity to fully present and argue evidence either by the evidentiary rulings or by the selection of witnesses. As such, the conduct of the hearing in this matter does not present any question concerning a lack of due process. (Sam Andrews' Sons (1982) 8 ALRB No. 58; NLRB v. Lee Office Equipment (9th Cir. 1978) 572 F.2d 704 [98 LRRM2235]; NLRB v. American Wholesalers, Inc. (4th Cir, 1976) 546F.2d 574[94 LRRM2031].)

The Executive Secretary rectified her failure to provide Respondents with a complete copy of the ALJ's Decision and afforded Respondents additional time to file exceptions.

During the hearing, Respondents objected to the General Counsel's use of declarations Conlan had submitted earlier in support of an external complaint against certain agency personnel. The Board's external complaint policy was developed to provide a procedure whereby members of the public and parties appearing before the Board could bring allegedly improper conduct of Board employees to the Board's attention. The General Counsel's transfer of the declarations to its trial counsel in this case undermines and jeopardizes the effectiveness of the Board's external complaint policy, as litigants may be inhibited from complaining about allegedly improper Board employee conduct, for fear that any documents they submit might be used against them at a subsequent hearing. However, the impact of the General Counsel's actions

on the effectiveness of the external complaint policy does not establish any failure to provide Respondents full due process in this unfair labor practice hearing. We find that trial counsel's use of the declarations in this case did not result in any prejudice to Respondents, since the declarations were not necessary to the ALJ's conclusions and we have not relied on them in reaching our conclusions (see, e.g., NLRB v. American Wholesalers, Inc., *supra*, 546 F.2d 574) and, as noted above, Respondents were afforded full due process in both the hearing and briefing before the Board.

While we are persuaded that the ALJ correctly resolved the conflicts in the record and properly determined that Respondents retaliated against Jose Pacheco for engaging in activity protected by the Act by laying him off, we are unable to conclude that Tomas Hornelas was also discriminated against. In certain circumstances, we have concluded that a familial relationship with a person who has engaged in activity protected by the Act was the motivation behind discriminatory treatment. However, in such cases we concluded either that the familial relationship between the discriminatees and the relationship between the discriminatees and their employer was such that to lay off one was to lay off the family member (see, e.g.

George Lucas (1985) 11 ALRB No. 11; Anton Caratan and Sons (1982)

8 ALRB No. 83); or, that an employer retaliated against the activist by discriminating against the relative (see, e.g., Visalia Citrus Packers (1984) 10 ALRB No. 44.). Here, however, the only evidence in support of General Counsel's case for Hornelas is

his familial relationship to Pacheco. As such, it may raise a suspicion of unlawful motive in Respondents' decision to lay off Hornelas, but is insufficient to meet General Counsel's burden of proof. We therefore dismiss the portion of the complaint alleging discrimination against Tomas Hornelas.^{3/}

Respondents' other exceptions^{4/} to the ALJ's Decision are without merit. We find, in agreement with the ALJ, that six named parsley employees, among others, were discharged for concertedly protesting their working conditions and that subsequent requests to be reinstated were denied because they had concertedly protested the wage rate. Discharge for failure to cease a protected work stoppage violates the Act. (See, e . g . , NLRB v. United States Cold Storage Corp. (5th Cir. 1953) 203 F.Supp. 924. [32 LRRM 2024]; Sam Andrews Sons (1983) 9 ALRB No. 24.)^{5/}

^{3/} Member Henning, for the reasons given in the ALJ's Decision, would adopt the ALJ's analysis in this matter.

^{4/} We are unable to determine whether Respondent also retaliated against the cauliflower workers by creating onerous working conditions. The ALJ made no findings on this portion of the complaint, though he concluded that supervisor Orlando Garcia had created harsh working conditions against Pacheco in retaliation for his protected concerted activities. While the ALJ's Decision appears to agree with witnesses that Garcia changed working conditions adversely when complaining employees were reinstated in November, there is no finding regarding why those new conditions were imposed. Absent such a finding, and absent exception by the General Counsel to such a lack of analysis, we are unwilling to speculate as to the actual motivation behind the imposition of the new, harsher working conditions.

^{5/} The record amply supports our finding that Respondents unlawfully retaliated against the parsley employees for engaging in protected concerted activity. Garth Conlan testified that he terminated the workers "because they violated work rules and they refused to work." The foreman of the parsley crew Miguel

(Fn. 5 cont.on p.6 .)

We accordingly adopt the ALJ's Decision except as modified, and issue the attached Order.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondents Garth Conlan, Jeff Polini, John Frise, James Dugger, Dirk Andrews, Robert Roeseler, Jr., Tye M. Conlan, Kenneth Demurichy, individually and as partners, d/b/a Lightning Farms, their officers, agents, successors and assigns shall:

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

(b) 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:

(Fn. 5 cont.)

Rivera testified that when some of employees returned to request their jobs back, he refused them rehire because they had refused to work in the parsley. Dirk Andrews, a partner in Lightning Farms, corroborated the above testimony, stating that he told the striking employees to leave because "Lightning Farms doesn't have a job for them." Further support for our conclusion here is General Counsel Exhibit 5, the termination slips for Guadalupe Mosquedia, Amelia Martinez, Ramon Martinez and Ernest Espinoza. These slips demonstrate that the striking parsley employees were fired for engaging in the protected work stoppage.

(a) Offer to Jose Pacheco, Amelia Martinez, Agustine Beltran, Guadalupe Mosquera, Ramon Martinez, Abel Gonzalez, and Ernesto Espinoza immediate and full reinstatement to their former or substantially equivalent positions and make them whole for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-
Ette Farms, Inc. (1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise 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 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 September 1, 1983 to April 30, 1984.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined

by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Arrange for a representative of Respondent

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

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

Dated: May 2, 1986

JOHN P. McCARTHY, Member JORGE

CARRILLO, Member PATRICK W.

HENNING, 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, Lightning Farms, 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 laying off Jose Pacheco because Jose Pacheco protested that Respondent should pay premium pay for a holiday, Labor Day, and by firing Amelia Martinez, Agustin Beltran, Guadalupe Mosqueda, Ramon Martinez, Abel Gonzalez, and Ernesto Espinoza because they protested in favor of an hourly rate rather than a piece rate. 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 discharge or layoff any employees for engaging in protests over wages or other working conditions.

WE WILL reimburse Jose Pacheco, Amelia Martinez, Agustin Beltran, Guadalupe Mosqueda, Ramon Martinez, Abel Gonzalez, and Ernesto Espinoza 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:

LIGHTNING FARMS

By:

Representative Title If you have a

question about your rights as farm workers or about

this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

LIGHTNING FARMS

Case Nos. 83-CE-141-SAL
12 ALRB No. 7

ALJ DECISION

In late 1983, a member of a cauliflower crew for Lightning Farms requested premium pay for scheduled holiday employment on behalf of the crew. This holiday pay request was denied and shortly thereafter, the spokesperson was given more onerous work assignments. Later, Lightning Farms laid off the spokesperson and his nephew, citing lack of work and poor production. The ALJ found that Lightning Farms violated the Act by laying off the spokesperson and his nephew, ruling that the layoff was in retaliation for his request for premium pay.

At about the same time as the above layoffs, Lightning Farms also laid off another entire cauliflower crew. The crew complained to the ALRB and several months later, they were reinstated for a short time. Members of this crew complained again of their subsequent layoff and of harsh working conditions created during their brief reemployment. The ALJ found that Lightning Farms had not violated the Act by its subsequent decision to layoff this crew.

In early 1983, a parsley crew, of Lightning Farms protested the wage rate offered and refused to work until a guaranteed hourly wage was established. Lightning Farms ordered the crew back to work and terminated those who refused. Subsequent requests by some of the terminated employees for reemployment were denied. The ALJ found that the crew had engaged in a protected concerted work stoppage and were unlawfully retaliated against for that activity.

The ALJ also found no procedural irregularities or lack of due process were provided representatives of Lightning Farms by the hearing and evidence in this case.

BOARD DECISION

A three-member panel of the Board affirmed the rulings, findings and conclusions of the ALJ in large measure. The Board, with Member Henning dissenting, found insufficient evidence to support the charge of discriminatory discharge of the spokesperson's nephew. The Board also affirmed the basic fairness of the proceedings, but took issue with the General Counsel's use of affidavits that had been provided by Lightning Farms as an external complaint against certain ALRB personnel. The Board refused to rely on the affidavits and instead based its decision only on other evidence provided.

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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of :

GARTH CONLAN, JEFF POLINI,
JOHN FRISE, JAMES DUGGER,
DIRK ANDREWS, ROBERT
ROESELER, JR., TYE M. CONLAN,
KENNETH DEMURICHY,
individually and as partners,
d/b/a LIGHTNING FARMS,

Respondents,

and

MELINDA ZARAGOZA, JESUS
URIBE, CELIA ALVAREZ,
ALBERTO HERNANDEZ, TOMAS
HORNELAS and AGUSTIN BELTRAN,

Charging Parties.

Case Nos. 83-CE-141-SAL
84-CE-21-SAL
84-CE-21-SAL



Appearances:

Nancy Bramberg, Esq. for General
Counsel

Garth Conlan
for Respondents

Before: Arie Schoorl
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARIE SCHOORL, Administrative Law Judge:

This case was heard by me on October 9, 10, 11, 12, 16, 17 and 19, 1984, in Salinas, California. The complaint herein, which issued on June 28, 1984, based on charges 83-CE-187-SAL, 83-CE-189-SAL, 83-CE-191-SAL and 84-CE-21-SAL, which were duly served on Respondent on December 15, 1983, December 20, 1983, December 28, 1983 and February 28, 1984 respectively, alleged that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter called the ALRA or the Act).

A first amended complaint, which issued on August 23, 1984, based on charges filed by Tomas Homelas (83-CE-141-SAL)^{1/} and by Agustin Beltran (84-CE-45-SAL) duly served on Respondent on October 5, 1983 and March 28, 1984 respectively, alleges that Respondent committed additional violations of the Act in 1983 and 1984 and reiterates the allegations in the original complaint based on a charge (84-CE-21-SAL) filed by Melinda Zaragoza, Jesus Uribe, Celia Alvarez and Alberto Hernandez. On August 31, 1984, Regional Director Lupe Martinez issued an Order dismissing charges 83-CE-187-SAL, 84-CE-198-SAL and 83-CE-191-SAL and severing charge 84-CE-21-SAL from the aforementioned three charges. In response to a motion by General Counsel, I granted an amendment to delete Roberto Uribe's name from the caption of the first amended complaint since he had erroneously been designated as a charging party.

The General Counsel and the Respondent were represented at

1. On August 8, 1984, Regional Director Lupe Martinez issued an Order withdrawing an informal settlement agreement with respect to charge 83-CE-141-SAL and reinstated it for Respondent's failure to comply with the terms of the agreement.

the hearing, the latter by its general partner, Garth Conlan. After the close of the hearing, the General Counsel and Respondent filed timely post-hearing briefs and Respondent timely filed a reply brief. Upon the entire record, including my observation of the demeanor of the witnesses and after considering the post hearing briefs of the parties, I make the following:

FINDINGS OF FACT:

I. Jurisdiction

Respondent admitted in its answer, and I find, that it was an agricultural employer within the meaning of Section 1140.4(c) of the Act during all times material herein and that Melinda Zaragoza, Jesus Uribe, Celia Alvarez, Alberto Hernandez, Tomas Hornelas, and Agustin Beltran are agricultural employees within the meaning of section 1140.4(j) of the Act.

II. The Alleged Violations of the Act

General Counsel alleges that Respondent, on or about September 10, 1983, unlawfully laid off Jose Pacheco in violation of Section 1153(a) of the Act because on September 2, 1983, he requested Labor Day vacation pay on behalf of the members of the cauliflower crew. General Counsel further alleges that on or about September 19, 1983, Respondent through foreman Orlando Garcia unlawfully laid off Tomas Hornelas in violation of Labor Code section 1153(a) because his uncle, Jose Pacheco, had requested Labor Day vacation pay. General Counsel further alleges that on or about February 6, 1984, Respondent laid off the entire cauliflower crew for lack of work and when work resumed on February 27, 1984, Respondent failed to recall members of the crew, including Melinda

Zaragoza, Jesus Uribe, Celia Alvarez, Alberto Hernandez and Roberto Uribe because of their complaints concerning terms and conditions of employment including but not limited to the failure to provide work breaks, changes in the method of cutting cauliflower, the speed up of the cauliflower harvesting machine, the assignment of more arduous work to packers Melinda Zaragoza and Celia Alvarez, and because of their filing unfair labor practice charges against Respondent and therefore violated sections 1153(a) and (d) of the Act. General Counsel further alleges that on or about March 26, 1984, Respondent through its foreman Mike Rivera, unlawfully laid off Abel Gonzalez, Lupe Mosqueda, Ramon Martinez, Ernesto Espinoza, Agustin Beltran and Amelia Martinez in violation of section 1153(a) because they engaged in a work stoppage in support of their demand for a wage increase.

III. General Background

Respondent, a general and limited partnership, raised a variety of vegetables on owned and leased land in the Salinas Valley. The number of employees working for Respondent varied from season to season, but the maximum was 100 employees. Garth Conlan was the one general partner and acted as the general manager of Respondent's farming operation. Andy Hernandez was the general foreman. Orlando Garcia was the foreman of the cauliflower crew in September, October, November and most of December 1983 until Andres Escalera replaced him on December 27, 1983, as foreman. Jorge Godines and Salvador Cervantes succeeded Escalera as foreman. In September Respondent decided not to replant cauliflower, but harvested all the cauliflower it had planted. The harvest lasted

until the end of March 1984. On May 3, 1984 Respondent, the partnership, as well as the managing partner Garth Conlan, filed Chapter 11 bankruptcy proceedings. All harvesting operations ceased at the end of April 1984 and the Respondent is in the process of liquidation.

IV. The Alleged Discriminatory Layoffs of Jose Pacheco and Tomas Homelas

A. Facts

Respondent employed two crews to harvest its cauliflower crop up to the early part of September 1983. Crew #1, consisting of approximately 14 employees worked with a small harvesting machine, and Crew #2, consisting of 21 employees, worked with a large harvesting machine.

On Friday, September 2, 1983, Jose Pacheco, a member of Crew #2, learned that Respondent had scheduled his crew to work the following Monday, Labor Day. He conferred with his fellow crew members and told them that it would be better if Respondent paid them time and a half on Labor Day. They expressed their agreement. Pacheco inquired of foreman "Nino" Hernandez whether the crew would receive premium pay on Labor Day and Hernandez replied that he did not know but that he would consult with the general foreman Andy Hernandez.

Foreman Hernandez relayed the request for information to general foreman Hernandez who in turn informed Garth Conlan about the matter. Conlan instructed Andy Hernandez to tell the crew that the crew was so bad that it was behind "in picking the product", that the company was not obliged to pay them time and a half on Labor Day; that it would not pay them such a rate and if any workers

failed to report to work on Labor Day there would no longer be any work for them at Respondent's.

Later that day, foreman "Nino" Hernandez and Pacheco conversed with general foreman Andy Hernandez about Pacheco's inquiry. Andy Hernandez said that the crew was obliged to work Monday but would receive no premium pay and if a crew member did not report for work Monday, he would be discharged. Pacheco turned to the crew and commented that they, the crew, had heard what Hernandez had said, that they were to show up to work on Monday or be fired.

Crew #2 worked Monday, Labor Day, received their regular pay and there is no evidence that any crew member failed to work that day.

The following week Orlando Garcia replaced Nino Hernandez as foreman.^{2/} On the first day after Garcia took over, he ordered Jose Pacheco to cut two rows of cauliflower while the other cutters had to cut only one row. Pacheco protested to Garcia that he should not have to cut two rows because his co-workers who were earning the same as he only had to cut one row. From the second day on, Pacheco only cut one row.

Foreman Garcia testified that Jose Pacheco had countermanded his work instructions to the crew and told his co-workers to perform their tasks the way they wished. Garcia testified that on one occasion, Pacheco almost collided with his car as the latter pulled in front of him and then shouted "Watch out" to

2. Hernandez' son, an employee of Respondent's, had turned over a truck load of cauliflower for which Respondent had fired him. Because of this Hernandez decided to quit his employment with Respondent.

him.

During the early part of September, Respondent laid off 26 of 40 employees including all the members of Crew #1^{3/} and most of the members of Crew #2 including Jose Pacheco and his nephew Tomas Homelas.^{4/} Garcia testified that he selected the crew members for

Homelas filed an unfair practice charge with the ALRB alleging that Respondent had laid off his uncle and him because his uncle had protested about no premium pay on Labor Day. Later Respondent entered into an informal settlement agreement of the charge. However, on August 8, 1984, the Regional Director vacated the settlement agreement alleging that Respondent had failed to fulfill the terms of the agreement by not offering Pacheco and Homelas the same or equivalent employment.

3. Respondent informed the crew members the reason for their lay off was because the small harvesting machine had broken down.

4. Respondent has knowledge of the Pacheco-Homelas relationship as their foreman saw that they arrived to work every day in the same motor vehicle and that their addresses were the same on the foreman's list of employees' names and addresses.

5. Garcia laid off Pacheco and Homelas on the same day he laid off two other employees and he selected the four at random the same way he had selected all the other employees for layoff.

Garth Conlan testified that he had believed that he had rehired Jose Pacheco because there was a member of his broccoli crew with that same name. However, it was not the same Jose Pacheco. At first Garth Conlan contended he had offered Homelas employment in the spinach crew some time in the fall of 1983 (he was not sure about the date) and Homelas had turned it down. He explained that he had offered him work in the spinach crew rather than the cauliflower crew because the work was ending in the cauliflower. Later at the hearing he admitted that he had not made the offer of reinstatement until April of 1984.

B. Analysis and Conclusion

To establish an unlawful discriminatory discharge, the General Counsel must prove by a preponderance of the evidence that the alleged discriminatee engaged in protected concerted activities, that Respondent employer had knowledge of such activities and that there is *a* causal connection between Respondent's knowledge of the activities and the subsequent discriminatory treatment of the employee. (Lawrence Scarrone (1981) 7 ALRB No. 13 .)

It is undisputable that Pacheco engaged in protected concerted activities when he protested to the foreman about premium pay for Labor Day work and Respondent had knowledge of such activities.

Pacheco conferred with his fellow crew members about the need for premium pay and they agreed. Later he proceeded to protest to foreman "Nino" Hernandez and general foreman Andy Hernandez about the subject. After Andy Hernandez informed him and his fellow crew members about the fact that there would be no premium pay on Labor

Day, Pacheco turned to his co-workers and repeated to them what Hernandez had said.

It is obvious that Pacheco had acted as a spokesman for the group on a subject of general interest to it as a group and the crew had impliedly authorized him to protest to management when he first conferred with them about the subject of Labor Day pay. Moreover, Respondent knew of his participation in the concerted acts as he protested to the foreman and the general foreman about the premium pay. Such knowledge of concerted activities by the foreman and the general foreman is imputed to Respondent.

(Foster Poultry Farms (1980) 6ALRB No. 15 .)

To prove the causal connection between the employer's knowledge of an employee's protected concerted activity and the subsequent discriminatory action, it is almost always necessary to resort to circumstantial evidence, such as timing and animus against protected activities.

In the instant case Respondent laid off Pacheco and Hornelas one week after Pacheco engaged in the protected concerted activity. Such a short period of time between the concerted activity and the layoff gives rise to an inference that the concerted activity was the cause of the layoff.

Respondent's animus was exhibited in its response to Pacheco's protest about the holiday pay by the tone of Conlan's instructions to foreman Hernandez and the latter's antagonistic manner of informing Pacheco and the rest of the crew about the consequences, an automatic discharge, they would suffer if they failed to report to work on Labor Day. Moreover, animus was shown

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against Pacheco a few days later as foreman Orlando Garcia⁶ singled him out to cut two rows of cauliflower rather than the normal one row.

Consequently the circumstantial evidence in the instant case in respect to "timing" and "animus" gives rise to a strong inference that Respondent selected Pacheco and Homelas for layoff because of the former's protected concerted activity. Accordingly, I find that General Counsel has proven a prima facie case.

Respondent now has the burden to prove that it laid off the two alleged discriminatees because of a legitimate business reason.⁷ Respondent argues, in this respect, that it would have laid off Pacheco and Homelas regardless of the former's protected concerted activities as it exercised no criteria at all in selecting employees for layoff, e . g . at random, and that it was pure chance that foreman Orlando Garcia so chose them.

It appears that the "at random" system compared to other criteria, i . e . "seniority," "ability," etc. presents the most difficulty in detecting what was the employer's actual motive in respect to the layoff of certain employees.

6. Although there is no proof Orlando Garcia had knowledge of Pacheco's protest about holiday pay, such knowledge is imputed. In Arco Seed Co. (1985) 11 ALRB No. 1, the Board stated that such knowledge shall be imputed unless an employer proves affirmatively that such knowledge on the part of a foreman did not exist.

7. Respondent introduced evidence that Pacheco had countermanded foreman Garcia's orders to the crew and that at one time attempted to run Orlando Garcia off the road with his vehicle. However, Respondent failed to claim any of the two incidents as the reason for laying off Jose Pacheco and consequently they are immaterial in respect to my determination of Respondent's actual reason for laying off Pacheco and Homelas.

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It is not difficult to ascertain motive in those situations where the "seniority" method is applied. If a senior employee is laid off and a junior employee is retained, an inference of discrimination can be made. However, when the "at random" system is used, it is difficult to prove whether such a system was applied in a discriminatory or non-discriminatory manner since there is no yardstick or norm that can be reviewed both in the formation and the application of such a criterion.

In fact the "at random" method would be an effective method to be used by an employer to dissimulate a "discriminatory" layoff. Therefore, if an employer uses another method for layoffs, i . e . , seniority, productivity, etc. and then changes to the "at random" procedure at the time of alleged discriminatory layoffs, it would raise an inference that the employer resorted to such a system because of the difficulty to prove discrimination on his part.

According to the record evidence, Respondent customarily utilized the criterion of "productivity" to decide the order of layoffs and the utilization of the "at random" method in the early September layoff was an exception to Respondent's general practice. Respondent's change to the "at random" method raises a strong inference that it made the change in order to dissimulate its discriminatory motive in laying off Pacheco and Homelas. In order to offset such an inference, Respondent had to present evidence regarding a reason for making such a change. However, it failed to do so.

In light of the strong inferences from the facts as proven by General Counsel, especially with regard to foreman Garcia's

singling out of Pacheco for special treatment in respect to the number of rows to be cut just a day or two after his protected concerted activity and Respondent's failure to prove a valid business reason for the layoffs of Pacheco and Homelas, I find that Respondent laid off Jose Pacheco and Tomas Homelas due to the former's concerted activity and has violated section 1153(a) of the Act.

V. Alleged Discriminatory Layoff of the Cauliflower Crew

A. Facts

On or about September 10, 1983, Respondent laid off Crew #1 including but not limited to Melinda Zaragoza, Celia Alvarez, Roberto Uribe, Jesus Uribe and Alberto Hernandez. A week later Melinda Zaragoza conferred with general foreman Andy Hernandez about the layoff and informed him that she had heard that the crew had been laid off because she had wanted to bring in the union. She told him that it was not true about her wanting to bring in the union. She requested Hernandez to find out whether her alleged union sympathies had played a role in the layoff. Hernandez conferred with management and a few days later informed Zaragoza that management had no knowledge of her union activities.

A few days later Alberto Hernandez and Gregorio Chavarria conferred with Andy Hernandez about the layoff and the latter informed them that the reason for the layoff was because the crew was bad and wanted to bring in the union.

Shortly thereafter Melinda Zaragoza, Alberto Hernandez and Celia Alvarez filed an unfair labor practice charge against Respondent for a discriminatory layoff.

In early November Respondent and the ALRB reached a settlement of the charge and Respondent rehired the five alleged discriminatees^{8/} and they resumed employment with Crew #1 with the large machine.

Beginning the first week of September and later in November (upon the return of Melinda Zaragoza, et al., to the cauliflower crew) and December, foreman Orlando Garcia and the members of Crew #1 were at loggerheads. The most constant bone of contention was the rest breaks. According to Respondent's practice, the employees were entitled to three breaks per day, two of 15 minutes each in the morning and afternoon respectively, and one of 30 minutes at midday. With very few exceptions, the crew had to remind Garcia when the break time was due. He unvariably would delay 10, 15, 20, 25, 30 minutes. All the cutters^{9/} except the brothers Francisco and Arcadio Martinez and all the packers, except one, Esperanza, reminded Garcia every day about the break.

On one occasion, thirty minutes had passed after the designated break time and Garcia still had not called for the workers to stop even though they had reminded him to do so. Roberto Uribe suggested to his fellow cutters to take the break on their own. The six cutters, including Francisco and Arcadio Martinez, sat

8. Zaragoza, Alvarez, Alberto Hernandez and the two Uribe brothers.

9. Roberto Uribe testified that the only cutters who did not protest to Garcia about the breaks were the brothers Francisco and Arcadio Martinez. On one occasion Arcadio Martinez reminded Uribe that it was time for the break and someone should tell Garcia about it but he himself refrained from protesting about it to Garcia.

down to take their break. Garcia approached them and demanded to know who among them had signaled for the break. Roberto Uribe admitted that he had done so. Garcia threatened to give him a written notice, but the 5 other cutters, including the Martinez brothers, said that if he gave Roberto a notice he would have to give all of them one because they all had stopped. Garcia gave no one a warning notice.

Another constant source of friction was the speed of the harvesting machine. Frequently, the cutters would complain that the excessive speed of the machine made it difficult for the two cutters, Roberto and Jesus Uribe, who were working in line with the two front wheels to avoid being run over. Garcia never slowed the machine down and only responded to their requests by telling them to move their hands faster.

On days when the fields were muddy, Garcia would order Melinda Zaragoza to go in front of the machine and cut and remove the cauliflower so they would not be covered by the mud from the wheels of the harvesting machine. Zaragoza complained to Garcia about how difficult it was to perform the task and asked that they job be rotated. Crew member Amelia Martinez requested Garcia to let her replace Zaragoza at times. Roberto and Jesus Uribe protested to Garcia about his assignment of that arduous work only to Zaragoza. Garcia's reply to them essentially consisted of his repeating that he was the foreman and he decided those questions and adding that Zaragoza had wanted her job back with the crew and now she should be content since she had it once again.

The crew members also protested to Garcia about shortages

in their pay checks. Garcia and Conlan admitted in their testimony that there had been some shortages. Respondent had corrected some of them but the crew members claiming that not all had been corrected filed a wage claim with the Labor Commissioner. The employees, however, failed to appear at the hearing. Garth Conlan attended and was upset when his employees failed to appear.^{10/}

In December nine members of the crew filed charges with the ALRB alleging that Respondent through its agent, foreman Orlando Garcia, was treating them in a discriminatory manner because of their protected concerted activities.^{11/}

Roberto Uribe and Melinda Zaragoza served a copy of one of the charges on Garth Conlan as Respondent's office and Conlan became upset and commented on how much such a charge costs the firm. Roberto Uribe testified that he testified that he decided to serve the next charge by mail rather than go in person and incur Garth's expression of discontent.

Melinda Zaragoza delivered a copy of another unfair labor charge (which had been filed by Jesus Uribe) to foreman Garcia. The

10. Roberto Uribe testified that he did appear for the hearing but was informed at the commissioner's office that there would be no hearing as nobody else, either a worker claimant or a representative of company was present. I have refrained from deciding the veracity of Roberto Uribe's testimony in this respect because the important factor is that the crew members filed a wage claim against Respondent and Garth Conlan was upset about that fact and their non-attendance at the hearing.

11. Incidentally, Roberto Uribe testified that he talked to the Martinez brothers about the filing of the charge and they agreed to accompany their fellow crew members to the ALRB to file the charge. However, they did not appear at the ALRB office nor did their names figure on any of the charges that the crew members filed in December.

latter reacted in an angry manner and informed the crew that if they were trying to impose rules on the job that he could "lay down the law too" and added that if anyone left 3 cauliflowers in one row they would receive a warning notice.

On December 27, 1983, Garcia resigned as foreman of Crew #1 and explained to Conlan that he was disgusted with the crew and thought that he was not doing the job that was expected of him.

Respondent replaced Garcia with Andres Escalera for a week or ten days. Andres Escalera credibly testified that while he had the crew it raised its production substantially and that he believed that in time he could have developed the crew into a better one. He added that he had a few problems in the crew but he had solved this with dispatch. Melinda Zaragoza asked him to slow the machine down because she could not keep up because of a hand condition. He explained to her he couldn't slow the machine down for one person, especially when they were working piece rate and suggested that she see a doctor about her hands. Escalera said he gave out one verbal warning about a cutter who was leaving cut cauliflower in the field and that after the warning, the problem never recurred. Jorge Godines and Salvador Cervantes succeeded Escalera for an equal amount of time. These foremen had little or no trouble with the crew, the crew worked in tranquility and its production continued to be very satisfactory.

On February 6, 1984, general foreman Andy Hernandez ordered the crew to recut a field a second time.^{12/}
The cutters complied

12. The crew foreman Salvador Cervantes had ordered the crew when they originally harvested the field not to harvest any overripe cauliflower.

with the order and cut the cauliflower even though they realized that it was overripe. General Foreman Andy Hernandez gave each one of the cutters, including Francisco and Arcadio Martinez, a written warning for having cut yellow, overripe cauliflower. On the same day, Respondent laid off the entire cauliflower crew. Andy Hernandez told them the reason was that the cauliflower was too small and he would recall them in two or three weeks. When he failed to do so, Jesus Uribe and Alberto Hernandez went to one of Respondent's fields where they saw a broccoli crew, including the Martinez brothers, under the supervision of Andres Escalera, harvesting cauliflower.

Shortly thereafter, Uribe and Hernandez informed Zaragoza about the resumption of the cauliflower harvest. She went to Respondent's office and told the secretary that she knew that Respondent had resumed the harvesting of cauliflower and she wanted to know the reason why Respondent had not recalled the cauliflower crew to finish the harvest. The secretary denied that the cauliflower harvest had recommenced but when Zaragoza pointed out that Jesus Uribe and Alberto Hernandez, two crew members, had been out in the field and had observed the harvesting first hand, the secretary admitted it but added that it was only a temporary arrangement because the cauliflower was not good yet. Zaragoza responded that Uribe and Hernandez had said that the cauliflower was good.

Later, Zaragoza conversed with Garth Conlan about the cauliflower harvest. He explained that he had compared the work of the cauliflower crew and the broccoli crew and the broccoli crew had

a better production record and that the company was to have an ongoing broccoli program so he switched that crew over to finish the cauliflower harvest which would finish in a couple of weeks. Conlan started to explain about production rates, but Zaragoza interrupted him and said that she did not understand but would like to know whether they, the cauliflower crew had been fired and Conlan replied, "You said that, not me ". Zaragoza asked about the Martinez brothers and he replied that they had been rotating between broccoli and cauliflower.^{13/}

Conlan testified that he had decided to have the broccoli crew harvest cauliflower because it was a better crew both in respect to quality and quantity of production. He wanted to keep the broccoli crew busy since he was going to stop raising cauliflower and to concentrate on broccoli. Conlan had placed Andres Escalera as foreman of the broccoli crew and had plans for Escalera to take over an additional broccoli crew to be formed later. Escalera was an efficient foreman. He was the successor to Garcia as foreman of the cauliflower crew and under his supervision the production rose dramatically. Dirk Andrews testified that Respondent was running out of broccoli and so he would switch Escalera's crew to cauliflower for a few days and then to broccoli for a few days and then back to cauliflower. Andrews in his testimony described the broccoli's crew's performance in respect to the cauliflower harvesting as good in respect to both quality and quantity. He also testified that there were days when production

13. Conlan testified that Escalera had hired the Martinez brothers for the broccoli crew.

was low because they were cutting fields that they would not normally cut.

2. Analysis and Conclusion

The alleged discriminatees participated in protected concerted activities during the time they worked under the supervision of foreman Orlando Garcia, that is, the first week of September and most of November and December. There is undisputed evidence that they protested against Garcia¹'s supervision in respect to breaks, the velocity of the harvesting machine, his assignment of arduous tasks to Melinda Zaragoza and Celia Alvarez etc. Of course, foreman Garcia's knowledge of such activity is imputed to Respondent.

The alleged discriminatees sought redress from the ALRB in September 1983 and then later in December of the same year.

To prove the causal connection between the employer's knowledge of the employees' protected concerted activities (and their recourse to the ALRB), it is almost always necessary to resort to circumstantial evidence, such as timing and animus against concerted activity.

The alleged discriminatees ceased participating in protected concerted activities at the end of December and it was not until 5 weeks later, February 6, that Respondent laid them off and 8 weeks later, February 27, that Respondent failed to recall them. Far from dispelling the inference of discriminatory motive in this case, the timing could well point to the possession of one in view of the fact that Respondent would have been reluctant to have taken reprisal action earlier against the crew, e . g . , November and

December because in November Respondent had just settled charges against it for discrimination against members of this same crew. Accordingly, the break in the cauliflower harvest in February was the first opportunity Respondent would have had to retaliate against the crew members without raising a strong inference that the motive was to rid itself of the cauliflower crew because of their concerted activities and recourse to the ALRB.

In addition to the factor of timing, there is some indication of animus: Conlan's resentment of the crews' protests and filing of unfair labor practice charges and wage claims in November and December 1983. However, Conlan was also resentful toward the crew for non-concerted activities such as their low productivity and unwillingness to cooperate with foreman Garcia.

However, there is sufficient animus combined with the timing factor to support a finding that General Counsel has proven a prima facie case.

Respondent now has the burden to prove that it had a legitimate business reason to lay off the cauliflower crew on February 6, 1984, and failed to recall any members of the crew with the exception of Francisco and Arcadio Martinez, to work in the cauliflower harvest in February and March 1984.

It is evident from the record that Respondent with a decline (temporary) in its broccoli harvest and a decline (permanent) in its cauliflower harvest, had to decide which of the two crews, the broccoli or the cauliflower, would harvest both the broccoli and the cauliflower. It is obvious that to have the two crews continue in their own specialties would not be a feasible

alternative since the crew members would be working only one or two days a week. Respondent chose the broccoli crew over the cauliflower crew for legitimate business reasons.

First of all, since Respondent was to terminate its cauliflower production with the current harvest and was to continue to raise and harvest broccoli, it is indeed logical to select the broccoli crew, with its experience in working with that particular crop, to harvest both the broccoli and the cauliflower for a month and to continue thereafter in the broccoli.

Secondly, as Garth Conlan credibly testified, he considered the broccoli crew more efficient than the cauliflower crew. Moreover, Conlan was very enthusiastic about the broccoli crew's foreman, Andres Escalera, who had been so successful in securing a high rate of production from the crews he supervised and thus it would be preferable, from a point of view of efficiency, to keep Escalera and the crew, that he supervised, working at Respondent's.^{14/}

General Counsel argues that Respondent's alleged reason for selecting the broccoli crew over the cauliflower crew is false because the cauliflower crew produced more than the broccoli crew in that the former harvested a higher amount of boxes per hour in January and the first part of February than the broccoli crew did in the last part of February and March. The argument carries little weight for the following reasons:

14. Escalera's ability in this respect was substantiated by the way that he improved production in the cauliflower crew immediately after the departure of foreman Garcia.

(1) In determining which crew to select to harvest both the broccoli and cauliflower, Respondent based its decision on the comparative production records^{15/} of the two crews during the months of September, October, November, December and perhaps January.^{16/} The record indicates that the broccoli crew had a better production record than the cauliflower crew during this 4 1/2 month period.

(2) The cauliflower crew harvested cauliflower during the principal months of the harvest while the broccoli crew harvested cauliflower during the last month of the season during which the crew harvested fields they would not normally do.^{17/}

Furthermore, General Counsel has offered no arguments to offset Respondent's reasons, other than comparative production records (but during different months of the harvest for each crew) to select the broccoli crew over the cauliflower crew.

General Counsel also argues, though, that Respondent's discriminatory motive is revealed by the fact that Respondent recalled the brothers, Francisco and Arcadio Martinez, the two

15. Conlan testified that the records were kept in this respect but Respondent did not offer such records into evidence. General Counsel either subpoenaed these records or had access to them through a subpoena but did not offer them into evidence. So Conlan's testimony on this point stands uncontradicted.

16. It appears from the record that Respondent made the decision to do without the services of the cauliflower crew at the end of December or the first part of January as was evidenced by its subsequent frequent changing of the foremen of the crew.

17. General Counsel in its argument about the broccoli crew's production being low in the February and March 1984 cauliflower harvest, points out that it should have been higher since according to Dirk Andrews' testimony, the crew harvested larger cauliflowers which are faster to do. I consider such testimony was offset by Andrew's testimony that the broccoli crew had to harvest fields that were normally not harvested.

employees "who never engaged in protected concerted activities." However, General Counsel overlooked the incident in which Francisco and Arcadio Martinez had engaged in a protective concerted activity and that was the occasion when the 6 cauliflower cutters, including the Martinez brothers, decided to take a break without the permission of foreman Garcia and the six sat down and took the break. When Garcia threatened to give Roberto Uribe a warning notice for calling the break, all six of the cutters, including the Martinez brothers, told him he would have to give all six a ticket. So it is untrue that the Martinez brothers never engaged in a protected concerted activity.

It is true that the brothers engaged in protected concerted activity on a smaller scale than the five most active militants of the crew, Zaragoza, Alvarez, Hernandez and the Uribe brothers. Although the Martinez brothers agreed to accompany other members of the crew to the ALRB headquarters to file an unfair labor practice charge, they failed to do so.

However, Respondent had a legitimate reason to hire them for work on the broccoli crew in February. The record evidence indicates that one of the reasons Respondent did so was because Respondent had rotated the brothers between the cauliflower and broccoli harvests. General Counsel contends that the Martinez brothers worked only in cauliflower. However, the only proof General Counsel presents for that fact is Zaragoza's testimony that the brothers worked on the cauliflower crew from November 5 when Melinda Zaragoza returned to the cauliflower crew until February 6. However, General Counsel failed to offer any proof of where the

Martinez brothers worked before November 5. Conlan admitted that the Martinez brothers worked on the cauliflower crew but added that they had been brought over from the broccoli crew.

Moreover, Melinda Zaragoza testified that Conlan informed her, in response to her inquiry about the Martinez brothers inclusion in Escalera¹'s broccoli crew in February and March 1984, that Respondent rotated the brothers between the broccoli and cauliflower harvests. Accordingly, I conclude that the Martinez brothers worked on the broccoli crew for some time in August, September and October 1983.

There are other factors that convince me that Respondent did not have an improper motive when it recalled only the Martinez brothers to work on the broccoli crew. In answer to a question by me, Conlan replied in a spontaneous and unguarded manner about his plans for the future to concentrate on broccoli because he had found a foreman, Andres Escalera, who could work with crew members in a positive manner and augment production to a significant degree.

The second factor is that Escalera, not Conlan, hired the Martinez brothers and from my evaluation of Escalera^{18/} I detected that he took pride in his work and that his objective was to improve his crew's production and his only criterion in hiring certain crew members was their harvesting ability and/or experience and not the degree of their participation in protected concerted activities.

18. Based on my observation of his demeanor during his testimony and the contents thereof.

VI. The Alleged Discriminatory Discharge of the Parsley Crew

A. Facts

On March 26, 1984, nine harvesters from Respondent's spinach crew and 12 newly hired individuals went to work harvesting parsley. Their foreman informed them that their compensation would be the piece rate of \$1.50 per box. After an hour the crew members complained to the foreman that each team (five cutters and one packer) was able to only harvest 5 boxes an hour and that it was not worthwhile to continue to work at such a piece rate and they requested an hourly rate. The foreman replied that he was new and would have to contact his superior(s) to see whether or not the hourly rate could be paid.

A few minutes later foreman Mike Rivera arrived and told the crew that Respondent would pay the hourly rate of \$4.50 an hour but they would have to pick three boxes an hour.^{19/} Nine harvesters informed Rivera that they would not continue to harvest under those conditions. Rivera told them to turn in their knives, go to the office to pick up their checks and he did not want to see them

19. Rivera might have said the company would pay the hourly rate but added that the crew would have to pick three boxes an hour or come close to it. The reason I make this conclusion is that Rivera consulted with both Conlan and Andrews and both gave detailed explanations of why it was imperative to average 3 boxes per hour per employee so as to make the harvest profitable. These reasons must have been reflected in Rivera's instructions to the crew. Moreover, Rivera has a manner of speaking in a rapid and impatient manner which very likely contributed to the lack of complete understanding by the 9 crew members about the method of compensation. Of course, whether Respondent offered the piece rate or the hourly rate is not pivotal because the question is whether the nine employees protested or not, not whether they had legitimate reasons to protest.

around there again.²⁰

Crew members, Amelia Martinez, Agustin Beltran, and Ernesto Espinoza went to pick up the checks at the office but they were not ready. They returned at 1:00 p . m . Rivera and the parsley crew members who had finished out the day were present. Rivera told the latter to return the next day at the same time. Amelia Martinez asked Rivera whether or not she could return to work the next day (Martinez testified that the reason she requested to go back to work in the parsley was because that way she would also be able to continue to work in the spinach harvest) and he replied that she was fired and he did not want to see her around any more.

A few days later Agustin Beltran and other crew members, who had refused to continue to harvest parsley, returned to the fields and requested Rivera to return to work in the parsley but Rivera told them there was no more work for them.

2. Analysis and Conclusion

Amelia Martinez, Agustin Beltran and the rest of the parsley crew engaged in a work stoppage to find out whether they would be able to be paid at an hourly rate rather than piece rate-Respondent's foreman informed them that an hourly rate would be paid but that the harvesters would have to harvest three boxes an hour which was in effect a continuation of the piece rate. Nine of the parsley crew refused to work for such compensation and in effect

20. The names of six of the nine employees, who refused to continue to harvest, are Amelia Martinez, Agustin Beltran, Ernesto Espinoza, Guadalupe Mosqueda, Ramon Martinez and Abel Gonzalez. General Counsel requested leave to supply the names of the three remaining employees, subsequent to the hearing, but failed to do so in a timely fashion and the record was closed.

stopped work to protest such compensation, in order words, they went on strike.

However, at 1:00 p . m . Amelia Martinez, in asking for her job back, made an unconditional offer to return to work which Respondent rejected as foreman Rivera told her she had been fired. A few days later, three additional employees, including Agustin Beltran, in requesting to go back to work in parsley, made an unconditional offer to return to work and Respondent also rejected that offer.^{21/} Respondent has not indicated, let alone proved, that it had hired permanent replacements in the interim. Furthermore, at the time Amelia Martinez made her offer to return to work, Respondent had had no opportunity to hire replacements.

Accordingly, I find Respondent violated section 1153(a) of the Act in discharging these employees because of their protected concerted activities.

21. In Frudden Produce, Inc. (1982) 8 ALRB No. 42 (reversed and remanded to the Board on other grounds in Frudden Enterprises, Inc. v. Agricultural Labor Relations Board (April 25, 1984) 1 Civ. No. AO18 374 .), the Board determined that an employer's refusal to reinstate economic strikers who unconditionally apply for reinstatement and have not been permanently replaced constitutes a violation of the Act.

In the same case, The Board cited the NLRB case N . L . R . B . v. Fleetwood Trailer Co., Inc. (1967) 389 U . S . 375 (66 LRRM 2737) and called attention to the holding therein that strikers' unconditional offers to return to work need not measure up to any formal requirements. In Frudden Produce I n c . , supra, the Board also referred to Leon Ferenbach I n c . , 212 NLRB 896 (87 LRRM 1 63 1) , a case in which the NLRB held that the appearance of strikers at a plant to solicit an answer to the question of whether they still had their jobs, was tantamount to an unconditional offer to return to work.

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 or she has engaged in 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 Jose Pacheco, Tomas Hornelas, Amelia

Martinez, Agustine Beltran, Guadalupe Mosqueda, Ramon Martinez, Abel Gonzalez, and Ernesto Espinoza immediate and full reinstatement to their former or substantially equivalent positions and make them whole for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise 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 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 the beginning of the 1983 cauliflower season to April 1984.

(e) Post copies of the attached Notice, in all

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

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the


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

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of

this Order, of the steps Respondent has taken to comply with its terms, and continue to

report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: March 13, 1985.


ARIE SCHOORL Administrative Law
Judge

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, Lightning Farms, 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 laying off Jose Pacheco and Tomas Homelas because Jose Pacheco protested that Respondent should pay premium pay for a holiday, Labor Day, and laying off Amelia Martinez, Agustin Beltran, Guadalupe Mosqueda, Ramon Martinez, Abel Gonzalez, and Ernesto Espinoza because they protested in favor of an hourly rate rather than a piece rate. 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 discharge or layoff any employees for engaging in protests over wages or other working conditions.

WE WILL reimburse Jose Pacheco, Tomas Homelas, Amelia Martinez, Agustin Beltran, Guadalupe Mosqueda, Ramon Martinez, Abel Gonzalez, and Ernesto Espinoza 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:

LIGHTNING FARMS

By:

_____ (Representitive) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161

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

DO NOT REMOVE OR MUTILATE.

