

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

AGRI-SUN NURSERY,	)	
	)	
Respondent,	)	Case No. 85-CE-64-D
	)	
and	)	
	)	
UNITED FARM WORKERS	)	
OF AMERICA, AFL-CIO,	)	13 ALRB No. 10
	)	
Charging Party.	)	

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DECISION AND ORDER

On November 12, 1986, Administrative Law Judge (ALJ) Barbara Moore issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions to the ALJ's Decision along with a supporting brief, and General Counsel timely filed a reply brief.

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

The ALRB has considered the record and the ALJ's Decision in light of the exceptions, briefs and reply briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions, as modified herein, and to adopt her proposed Order,

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

<sup>2/</sup> The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

as modified.

The complaint alleges that Respondent violated section 1153(a) and (c) of the Agricultural Labor Relations Act (ALRA or Act) by discharging Atanacio Zuniga and Raul Espino on April 18, 1985,<sup>3/</sup> because of their protected concerted and union activities.

On April 10, Zuniga, Espino and several other employees who were on layoff went to speak to supervisors Frank Lopez and Burt Binger and demanded to know why Binger had hired a labor contractor's crew to plant grape cuttings instead of recalling the regular crew. Binger attempted to explain that he had no authority to hire the regular crew and no money to pay them, while the labor contractor's crew, which he had hired for only one day, would not have to be paid immediately.<sup>4/</sup> Not satisfied with Binger's explanation, the employees decided to go to the field where the contractor's crew was working and speak to the foreman. Shortly thereafter, Binger and the contractor himself arrived at the field and the contractor, seeking to avoid any confrontation, told his foreman to go tell his employees that the immigration authorities were coming. The foreman did so, and the crew immediately ran out of the field.

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<sup>3/</sup> All dates herein refer to 1985 unless otherwise noted.

<sup>4/</sup> Respondent was experiencing financial difficulties at that time, and the Company's general manager George Howard, who was out of the country, had instructed Binger not to hire anyone during his absence. Because of a sudden change in the weather, Binger needed to get the grape cuttings planted immediately, and he had hired the labor contractor, who agreed to bill Respondent for the work after a few weeks.

Singer then told the regular employees, including Zuniga and Espino, to start planting the grapes. However, when Zuniga questioned Singer about what wage rate he would receive for the work, Singer became very angry, told everyone there would be no more work that day, and directed them all to go home. He said that the next day he would decide who was going to work and who was not.

After leaving the field, the employees went to an office of the United Farm Workers of America, AFL-CIO, (UFW or Union) to ask for advice, and then to Zuniga's house where they began to make signs to support their protest. Later in the day, Respondent's harvest and budding supervisor Lupe Gonzales came to the house and told them Singer wanted them to return to work the next day. The following day, the crew went to work and, after about 15 minutes, stopped briefly and made a show of putting on UFW buttons; however, there was no visible reaction from the supervisors. The crew continued working until April 18, two days after George Howard returned from overseas, when Zuniga and Espino were terminated.

The ALJ concluded that Zuniga and Espino were engaged in protected concerted activity when they participated in the April 10 protest. Respondent argues that the spectre of a violent confrontation removed the employees' protest from the realm of protected conduct.<sup>5/</sup> However, we affirm the ALJ's finding that

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<sup>5/</sup> Respondent also argues that Zuniga and Espino refused Singer's offer of an apple staking job on April 10, and that the refusal

(Fn. 5 cont. on p. 3.)

although the employees were upset and angry, their actions were not tainted with violence, threats, intimidation, or any other misconduct, nor were Respondent's witnesses genuinely concerned for their safety during the incident. This Board has followed National Labor Relations Board (NLRB) precedent in holding that employees are entitled to leeway in presenting grievances to employers over matters relating to their working conditions. (Giannini & Del Chiaro Co. (1980) 6 ALRB No. 38; Southwestern Bell Telephone Company (1982) 260 NLRB 237 [109 LRRM 1231], *affd.* (5th Cir. 1982) 694 F.2d 974 [112 LRRM 2526].)

Such activity is protected by the provisions of section 1152, except in flagrant cases where the employees' manner of presenting their grievances is so violent or of such a serious nature as to render the employees unfit for further service.

(Giannini & Del Chiaro Co., *supra*, 6 ALRB No. 38; Firch Baking Co. (1977) 232 NLRB 772 [97 LRRM 1192].)<sup>6/</sup> Thus, we affirm the ALJ's conclusion that the employees' April 10 protest constituted

(Fn. 5 cont.)

entitled Respondent to terminate them. However, we affirm the ALJ's finding that there was no response from any of the crew either to accept or reject the offer, and that it was not clear whether they actually heard Binger.

<sup>6/</sup> Unlike the ALJ, we do not rely herein on V. B. Zaninovich & Sons (1986) 12 ALRB No. 5, which is currently the subject of a Petition for Review before the California Supreme Court. In that case, we held that a partial disruption of the employer's business during presentation of a worker's grievance did not remove the grievant's actions from protection of the Act where the employer himself was largely responsible for making the meeting acrimonious, the disruption was brief, and presentation of grievances was not limited to any particular time or place by the company handbook. In the instant case, Agri-Sun's employees were not purporting to act within an established grievance procedure, and no disruption of the Employer's business occurred.

protected concerted activity.

Both Singer and Howard acknowledged that Zuniga and Espino were terminated in large part because of their conduct on April 10. However, Respondent argues that pre-existing work-related problems showed that Zuniga and Espino were unsatisfactory employees who would not have been rehired during the normal April recall, and that they were rehired by Binger only to avoid a physical confrontation on April 10. Moreover, Respondent argues, since the evidence herein suggests the existence of both a lawful and an unlawful basis for discharge of the two employees, the ALJ erred in failing to apply the "but for" test applicable in dual motive cases. (Nishi Greenhouse (1981) 7 ALRB No. 18.)<sup>7/</sup>

Once it was established that Zuniga and Espino engaged in protected concerted activity, General Counsel had the burden of making a prima facie showing that the protected conduct was a motivating factor in the Employer's decision to discharge the employees. (Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enforced 662 F.2d 899 (1st Cir. 1981) [108 LRRM 2513], cert. den. 455 U.S. 989 (1982) [109 LRRM 2779].)

All three of the reasons listed on Espino's April 18 termination slip related to the April 10 incident: walking off

<sup>7/</sup>We agree with Respondent that the ALJ erred in failing to apply the "but for" test, under which the Board must determine whether an employer's adverse action would have been undertaken even in the absence of (or not undertaken "but for") the employees' protected activity. Nevertheless, we reach the same conclusions as the ALJ after applying the test infra.

the job April 10, causing the work stoppage April 10, and refusing work offered April 10. Of the five reasons listed on Zuniga's April 18 termination slip, three related to the April 10 protest: walking off the job April 10, causing the April 10 work stoppage, and refusing work on April 10. A number of witnesses testified that Zuniga and Espino were the primary spokesmen in the April 10 incident, and Binger insisted that the termination slips include the "illegal work stoppage" as a reason for termination, because he felt the labor contractor employees were prevented from working by threats of physical violence in the field.

Another factor indicating that the April 10 activity was a motivating factor in Respondent's decision to terminate the two employees is the timing of the discharges. As soon as Howard returned from his trip overseas, Binger told him about the labor contractor incident and about Zuniga and Espino's leadership role in it. Howard immediately ordered Binger to prepare termination slips for the two employees. Although Howard claimed he ordered their termination because he had previously fired them for cause, neither of the April 18 slips mentioned this as a reason, and the previous separation slips for both employees (dated February 27 for Espino and March 27 for Zuniga) were marked layoff rather than termination.

We conclude that General Counsel made a prima facie showing that Zuniga and Espino's protected concerted conduct was a motivating factor in Respondent's decision to terminate them.

Respondent's other asserted reasons for termination of the two employees ( i . e . , other than the April 10 incident) do not

appear to be entirely pretextual. That is, some of the factors in Zuniga and Espino's work histories may have formed at least part of the basis for Respondent's decision to terminate them on April 18. Therefore/ we must determine whether Respondent carried its burden of showing that it would have taken the same action against the two employees even in the absence of their engaging in protected conduct. (Wright Line, Inc., supra, 251 NLRB 1083.) Or, as this Board has stated the same test, we must determine whether the Employer's adverse action would not have been undertaken "but for" the employees' protected activity. (Nishi Greenhouse, supra, 7 ALRB No. 18.)

Zuniga began working for Agri-Sun in 1983 as a mechanic, welder and fabricator, and in October 1984 was given a merit pay increase. In January 1985 Zuniga resigned and was replaced by another employee who left after one week. Although Howard and Binger testified that there had been a number of problems with Zuniga's work,<sup>8/</sup> Zuniga was rehired in February 1985 at a substantial raise. In March 1985 Howard observed Zuniga coming to work late and instructed supervisor Steve Ball to check Zuniga's time cards. After Ball reported that Zuniga had incorrectly recorded his time, Howard testified, he instructed Ball to dismiss Zuniga for the incident. However, Ball testified that he could recall only that Howard told him to, take "appropriate action;" the only action he took was to dock Zuniga's pay.

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<sup>8/</sup> Such problems included Zuniga's alleged failure to order parts or complete repairs on time, failure to take orders from supervisors, failure to keep adequate maintenance records, and failure to come to work on time every day.

Another incident listed on Zuniga's April 18 termination slip involved his alleged driving of a hydraulic spray rig in March while the rig was not running properly. However, Howard testified that he did not learn of this incident until after he returned from overseas ( i . e . , after he had assertedly told Ball to terminate Zuniga).

Ball marked Zuniga's March 27 separation form "layoff" rather than "termination" and he checked "yes" by the box labeled "eligible for rehire" because, he said, he felt that Agri-Sun might want to rehire Zuniga in the future. Although Howard claimed that he did not realize until he returned from abroad (on April 16) that Ball had failed to discharge Zuniga in early March, Howard himself signed Zuniga's March 27 layoff notice at the same time he signed layoff notices for the other employees laid off on that date. Moreover, supervisor Frank Lopez testified that Zuniga was part of the large layoff in March and said he telephoned Zuniga to tell him he was laid off because Agri-Sun was out of money.

Thus, we find that the incidents cited in Zuniga's April 18 termination slip (other than those relating to the April 10 protected activity) were not incidents for which Agri-Sun either discharged, or intended to discharge, Zuniga. Further, we affirm the ALJ's finding that the alleged incidents of Zuniga's poor work performance were more consistent with a resulting layoff than a dismissal. Therefore, we conclude that Zuniga would not have been discharged on April 18 in the absence of his protected concerted activity on April 10.

Espino began working for Agri-Sun in 1983 as a mechanic's helper, and after about a month went to work in the fields. In October 1984 he was promoted to crew leader. His February 27, 1985, layoff notice listed "attitude lacking" as a reason. Respondent's witnesses testified that Espino caused problems with his racial attitude by complaining of company favoritism toward Caucasian employees and developing a personal feud with a co-worker. Supervisor Lupe Gonzales admitted, however, that the co-worker was partly responsible for carrying on the feud. Although Howard testified that he directed Ball to dismiss Espino because of complaints he had received from several supervisors, Gonzales testified that he recommended Espino be laid off, not dismissed.

Ball did lay off Espino in February, rather than discharge him, because he thought Espino was a good enough employee not to have a bad mark put on his record. During his exit interview with Espino, Ball did not recall discussing Espino's racial attitude but only his attitude about wanting more money to do a specific job. Since Ball was irritated with Espino for refusing to drive a van two or three days prior to his layoff, the ALJ correctly concluded that if Howard had told Ball to discharge Espino, Ball would not have had any reason to disobey Howard and do Espino the favor of laying him off. Although Ball told Espino that he would probably not be rehired, Espino was

rehired by Burt Singer on April 10.<sup>9/</sup>

Finally/ the only reasons mentioned in Espino's April 18 termination slip are reasons relating to the April 10 incident; nothing is mentioned about his attitude problem or his alleged prior dismissal for cause. Therefore, we conclude that the evidence as a whole demonstrates that Espino would not have been discharged on April 18 in the absence of his protected concerted activity on April 10.

Having found that Espino and Zuniga would not have been discharged but for their protected concerted activity, we conclude that Respondent violated section 1153(a) of the Act by discharging the two employees. (Wright Line, Inc., supra, 251 NLRB 1083; Nishi Greenhouse, supra, 7 ALRB No. 18.)

Although Respondent was aware of its employees' visit to a UFW office on April 10 as well as the crew's conduct in putting on union buttons the following day at work, no causal connection was established between either incident and the termination of Espino and Zuniga. In view of the failure of proof, as well as General Counsel's failure to file exceptions on this issue, we affirm the ALJ's recommended dismissal of the portions of the complaint alleging retaliation for union activity in violation of section 1153(c).

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<sup>9</sup>We affirm the ALJ's finding that Respondent's witnesses greatly overstated their concern for their physical safety on April 10, and we do not credit Singer's testimony that he was "afraid" not to rehire Espino and Zuniga. Moreover, the April 10 incident had ended and everyone had left the field when Binger sent Gonzales to Zuniga's house specifically to invite all the employees back to work the following day.

ORDER

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

1. Cease and desist from:

( a ) Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment because he or she has engaged in concerted activity protected by 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 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 Atanacio Zuniga and Raul Espino immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights and privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of their discharge, the 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. )

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

( 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 April 18, 1985 to April 18, 1986.

( 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 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 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 the 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 make further reports at the request of the Regional Director, until full compliance is achieved.

Dated: June 26 , 1987

BEN DAVIDIAN, Chairman

JOHN P. McCarthy, Member

IVONNE RAMOS RICHARDSON, Member

CASE SUMMARY

Agri-Sun Nursery

13 ALRB No. 10

Case No. 85-CE-64-D

ALJ Decision

The complaint alleged that the Employer violated Labor Code section 1153(a) and (c) by discriminatorily discharging Atanacio Zuniga and Raul Espino because of their protected concerted and union activities. The ALJ found that the two employees were engaged in protected concerted activity when they and several other employees who were on layoff went to speak to company supervisors and demanded to know why the Company had hired a labor contractor's crew instead of recalling the regular crew. The ALJ found that although the employees were upset and angry during their protest, their conduct was not tainted with violence, threats, intimidation or other misconduct that would remove it from the realm of protected conduct. Because she found the employees' conduct to be protected, and since the Employer's supervisors acknowledged that the employees were discharged in large part for their protest activities, the ALJ concluded that the Employer had violated section 1153(a) by discharging the two employees. The ALJ declined to find a 1153(c) violation, since the only union activity of which the Employer was aware was the crew's show of putting on union buttons on the first day back at work, and no causal connection was established between that conduct and the discharges.

Board Decision

The Board affirmed the ALJ's finding that the employees' protest constituted protected concerted activity. The Board also concluded that General Counsel had made a prima facie showing that the protected conduct was a motivating factor in the Employer's decision to terminate the employees. The Board concluded that the Employer's other asserted reasons for termination of the employees did not appear to be entirely pretextual, and that the ALJ had therefore erred in failing to apply the "but for" test applicable in dual motive cases. (Wright Line, Inc. (1980) 251 NLRB 1083; Nishi Greenhouse (1981) 7 ALRB No. 18.) The Board itself examined the evidence concerning the employees' work histories and concluded that the evidence demonstrated that the employees would not have been discharged but for their protected concerted activity, and that the Employer had consequently violated section 1153(a) by discharging them. The Board found that although the Employer was aware of the employees' visit to a union office on the day of the protest as well as the crew's conduct in putting on union buttons the following day at work, no causal connection had been established between either incident and the two employees' termination. The Board therefore affirmed the ALJ's dismissal of the allegations relating to violation of section 1153(c).

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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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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 that alleged that we, Agri-Sun Nursery, 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 Atanacio Zuniga and Raul Espino on or about April 18, 1985, because they protested not being recalled to work. 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 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 to obtain a contract covering 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 or 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 hereafter discharge any employee for engaging in concerted activities.

WE WILL reinstate Atanacio Zuniga and Raul Espino to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their discharges, plus interest.

Dated:

AGRI-SUN NURSERY

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 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209) 627-0995.

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

Agri-Sun Nursery

13 ALRB No. 10  
Case No. 85-CE-64-D

ALJ Decision

The complaint alleged that the Employer violated Labor Code section 1153(a) and (c) by discriminatorily discharging Atanacio Zuniga and Raul Espino because of their protected concerted and union activities. The ALJ found that the two employees were engaged in protected concerted activity when they and several other employees who were on layoff went to speak to company supervisors and demanded to know why the Company had hired a labor contractor's crew instead of recalling the regular crew. The ALJ found that although the employees were upset and angry during their protest, their conduct was not tainted with violence, threats, intimidation or other misconduct that would remove it from the realm of protected conduct. Because she found the employees' conduct to be protected, and since the Employer's supervisors acknowledged that the employees were discharged in large part for their protest activities, the ALJ concluded that the Employer had violated section 1153(a) by discharging the two employees. The ALJ declined to find a 1153(c) violation, since the only union activity of which the Employer was aware was the crew's show of putting on union buttons on the first day back at work, and no causal connection was established between that conduct and the discharges.

Board Decision

The Board affirmed the ALJ's finding that the employees' protest constituted protected concerted activity. The Board also concluded that General Counsel had made a prima facie showing that the protected conduct was a motivating factor in the Employer's decision to terminate the employees. The Board concluded that the Employer's other asserted reasons for termination of the employees did not appear to be entirely pretextual, and that the ALJ had therefore erred in failing to apply the "but for" test applicable in dual motive cases. (Wright Line, Inc. (1980) 251 NLRB 1083; Nishi Greenhouse (1981) 7 ALRB No. 18.) The Board itself examined the evidence concerning the employees' work histories and concluded that the evidence demonstrated that the employees would not have been discharged but for their protected concerted activity, and that the Employer had consequently violated section 1153(a) by discharging them. The Board found that although the Employer was aware of the employees' visit to a union office on the day of the protest as well as the crew's conduct in putting on union buttons the following day at work, no causal connection had been established between either incident and the two employees' termination. The Board therefore affirmed the ALJ's dismissal of the allegations relating to violation of section 1153(c).

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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: }  
AGRI-SUN NURSERY, }  
Respondent, }  
and }  
UNITED FARM WORKERS OF }  
AMERICA, AFL-CIO, }  
Charging Party. }

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Case No. 85-CE-64-D

Appearances:

William Lenkeit, Esq.  
627 Main Street Delano,  
California for the  
General Counsel

Spencer H. Hipp, Esq. Littler,  
Mendelson, Fastiff &  
Tichy  
4944 East Clinton Way, Suite 101  
Fresno, California  
for the Respondent

Before: Barbara D. Moore  
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge:

This case was heard by me on February 25, 26, 27, 28, and March 3, 1986,<sup>1</sup> in Fresno, California.

The complaint herein issued on September 17, 1985,<sup>2</sup> and was based on charge number 85-CE-64-D 3 filed by the United Farm Workers of America, AFL-CIO, (hereafter "Union" or "UFW") on April 23, 1985. The complaint alleges that Respondent violated sections 1153(a) and (c) of the Agricultural Labor Relations Act<sup>4</sup> (hereafter "ALRA" or "Act") by discriminatorily discharging Atanacio Zuniga and Raul Espino because of their protected concerted and union activities.

All parties were given a full opportunity to participate in the proceedings. The General Counsel and Respondent were both represented at the hearing, and both filed briefs after the close of the hearing pursuant to 8 Cal. Admin. Code section 20278.<sup>5</sup>

Based on the entire record, including my observation of the demeanor of the witnesses, and after full consideration of the arguments and briefs submitted by the parties, I make the following findings of fact and conclusions of law.

<sup>1</sup>Volume V of the transcript is incorrectly dated March 6, 1986. 2

<sup>2</sup>All dates herein are 1985 unless otherwise noted.

<sup>3</sup>The charge was duly served on Respondent, Agri-Sun (hereafter "Agri-Sun," "Respondent" or the "Company").

<sup>4</sup>section references herein are to the California Labor Code unless otherwise specified.

<sup>5</sup>After the close of hearing, Respondent filed a Motion to Correct the Hearing Transcript contending that in Volume III, at page 149, line 14, the answer given by witness George Howard should be "No"

## FINDINGS OF FACT

### I. Jurisdiction

As admitted by Respondent in its Answer to Complaint, I find that Respondent Agri-Sun is an employer within the meaning of section 1140. 4 ( c ) of Act, and the UFW is a labor organization within the meaning of section 1140. 4 ( f ) of Act.

### II. The Alleged Unfair Labor Practices

The complaint alleges that Respondent violated sections 1153 ( a ) and ( c ) of the Act by discharging Atanacio Zuniga and Raul Espino on April 18, 1985, because of their protected concerted and union activities. Respondent denies that it violated the Act in any respect. It contends that Mr. Zuniga and Mr. Espino were fired for cause and for participation in an unprotected work stoppage.

### III. Background

Agri-Sun operates a year-round nursery operation in Selma, California. Despite the fact that Agri-Sun operates year-round, there are periodic layoffs as different processes begin and end.

During the time period covered by the instant case, George Howard was both sales manager and general manager of

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(footnote 5 cont.)

rather than "Yes". No response to this motion was filed by General Counsel, and my notations at hearing indicate that Respondent is correct. The motion is granted, and the transcript is hereby corrected to reflect that Mr. Howard's answer was "No". Hereafter, citations to the official transcript are noted as (Volume): (Page).

Agri-Sun. Burt Binger was the production manager. By virtue of this position, he had overall responsibility for the mechanic shop where Mr. Zuniga worked. In the fall of 1984, Steve Ball, the ranch manager, directly oversaw the shop functions, and from October 1984 through August of 1985, Glen Foth directed the machine shop. Lupe Gonzales was the harvest and budding supervisor, and Frank Lopez was the budwood supervisor as well as the processing supervisor.

In early 1985, Agri-Sun was experiencing severe financial difficulties. George Howard traveled overseas to collect various monies owed to the company. Mr. Howard, Mr. Binger, and Mr. Ball discussed the work that needed to be done in Mr. Howard's absence, calculated the number of people who would be needed and kept eight or nine employees on the payroll to cover the anticipated work. The rest of the work force, approximately 10 people, was laid off on March 22. Mr. Howard placed Burt Binger in charge of the company in Howard's absence and told Binger not to hire anyone since the company did not have the money to pay them. On March 31, Mr. Howard left for Yemen.

Approximately one week after Mr. Howard left the country, a sudden change in the weather caused Mr. Binger to decide that the grapes must be planted immediately or the company would suffer a substantial loss. He was faced with a dilemma, he had instructions from Mr. Howard not to hire anyone, the company had virtually no money, and if the grapes were not planted immediately, there would be dire financial consequences.

Mr. Singer contacted Will Barrera a labor contractor with whom he had worked previously. He arranged for Barrera to bring a crew in to plant the grape cuttings, but to wait for 2 or 3 weeks before submitting his invoices to be paid.

Mr. Zuniga learned from Ruben Allejandro, a co-worker who is a cousin of supervisor Lupe Gonzales, that the company was going to hire a labor contractor to work at Agri-Sun. Mr. Zuniga contacted Raul Espino, Ruben Allejandro and several other employees who had been laid off in late March and suggested they go to the company and ask for their jobs.

#### IV. The Events of April 10

Early on the morning of April 10, Mr. Espino, Mr. Zuniga, Mr. Allejandro and approximately 4 to 6 other Agri-Sun employees who were on layoff (hereafter referred to as the employee crew) appeared in the yard near the shop and production office at Agri-Sun. They spoke with Frank Lopez and Burt Binger. (V: 61-62)

They demanded to know why Binger had hired a labor contractor's crew to plant grapes rather than recalling them. He told them the company was experiencing financial difficulties, that he did not have money to pay them and that he did not have authorization from George Howard to recall them. (IV: 45-46)

He attempted to explain to the employee crew that he did not have to pay the labor contractor immediately as he would the employee crew and that he had hired the contractor for only one

day. He assured them they would be recalled when the company had money. The employee crew, with Haul Espino, Atanacio Zuniga, and Ruben Allejandro acting as primary spokesmen,<sup>6</sup> argued that the work would keep them busy for several days because they were fewer in number than the contractor crew. They continued to demand to know why they had not been recalled and why their jobs had been given to the labor contractor.

Mr. Binger told the employee crew that they could go to work staking apples instead, but the employee crew did not react. They were focused on obtaining their jobs planting grapes, and it is not clear whether they actually heard Singer.<sup>7</sup>

The employee crew determined to convince the labor contractor's crew to leave. They drove to Ranch No. 3, a short distance away, where the contractor crew was working. The labor contractor appeared in the company yard. Mr. Binger apprised him of the situation, and they each drove out to Ranch No. 3.

When Mr. Binger and the labor contractor arrived at Ranch No. 3, the employee crew was already there. The crew had spoken

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<sup>6</sup>Although Respondent contends that the entire crew was equally involved in the incident, several of Respondent's own witnesses indicated that Mr. Espino and Mr. Zuniga did most of the talking and Ruben Allejandro translated. Jim Rogin was in the production yard about 100 feet from the employee crew when they first arrived. Primarily, he noticed Raul Espino who was yelling at Frank Lopez and Burt Binger. (V: 94-95) Similarly, Binger said there were about 6 people in the employee crew "but basically there was Raul, A. Z. and Ruben." (IV: 45, 47)

<sup>7</sup>Luis Gonzales testified he did not hear the offer to stake. (II: 74) Ruben Allejandro did not recall anyone responding when Binger said they could stake. (II: 39, et seq.) Mr. Espino denied they were offered a job staking apples. (I: 42) Glenn Foth, a supervisor and witness favorable to Respondent, also testified the

with the labor contractor's foreman and told him that the labor contractor did not belong there, that he was taking away their jobs. The labor contractor wanted to avoid a confrontation and told his employees that the immigration service was coming, whereupon all his employees ran out of the field.

Glen Foth had been supervising the labor contractor employees at Ranch 3. After they left the field, Foth went over to Singer and the employee crew. Scott Behm also was there having arrived shortly after Mr. Binger. Singer, Raul Espino, Atanacio Zuniga, and Ruben Allejandro were talking, the crew standing in a semi-circle some two to four feet from Binger. (IV: 59; V: 35, 39)

Thereupon, the same scene which had developed in the production yard recurred. The employee crew demanded of Binger

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(footnote 7 cont.)

crew did not respond "yes" or "no" to the offer of staking apples. (IV: 9)

I discount Singer's testimony that several of the employees made a move to go stake and that Allejandro, Zuniga and Espino refused. (IV: 48-49) First, if that had occurred, I believe Mr. Gonzales, Mr. Allejandro and Mr. Foth would have recalled the incident. Second, Mr. Singer's testimony is inconsistent. He first said the three leaders refused to stake, and later said he thought when the crew left the production yard they were going to stake apples, that he heard what he wanted to hear. (IV: 50, 55) Scott Behm, on the other hand, testified he saw Binger right after the employee crew left the yard, and Binger said there was going to be trouble. Binger left immediately to go to Ranch 3 where the labor contractor crew was working. His statement to Behm and his going to Ranch 3 are not consistent with his testimony that he thought the crew had left to do the staking job. Based on the inconsistencies in his testimony and the failure of Gonzales, Allejandro and Foth to recall the interchange about staking, I conclude that there was no response from the crew to the offer - either to accept or reject it.

over and over again why had he given away their jobs. Binger repeatedly attempted to explain the company's situation. The discussion grew heated as each side simply repeated itself, and no progress was made toward a resolution. Binger and the employee crew, especially Raul Espino, yelled back and forth at one another.

Binger was still faced with the need to get the grapes planted, and the contractor crew had gone. Frustrated, he told the employee crew, in effect, "All right, you want your jobs. You can have them. Go to work."

The employee crew started to the field to begin work when Mr. Zuniga asked whether he would be working in the field or back in the shop. Binger answered that he would be working in the field. Zuniga then asked if he would be earning his former mechanic's wage of \$5.75 an hour or a field worker's wage of \$4.25 an hour.<sup>8</sup> Zuniga indicated he understood that since he was returning from layoff he should get his previous wage.

Binger at first appeared to agree to paying Zuniga his mechanic's wages, then he became very angry, and said words to the effect: "There's no work today. The company is closed. Everybody go home. Tomorrow I'm going to have the sheriff out here, and I'll decide who works." Binger, Behm and Foth left, and

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<sup>8</sup>I credit Atanacio Zuniga's version of this event. As discussed, *infra*, it explains the subsequent conduct of Binger and the employee crew, and it is corroborated by external evidence. The payroll records (G.C. Ex. 6) for 4/11/85 reflect that Atanacio Zuniga was paid at \$5.75 for 9 hours. The check he received after he was fired reflects he was paid at the rate of \$4.25/hour for the week of 4/12 - 4/18. The check (G.C. Ex. 7) was issued on

the employee crew remained standing in the field.<sup>9</sup>

The employee crew then also left and went to the Sanger road area where other Agri-Sun employees were working. They solicited the other employees' support in their efforts to obtain their jobs. Several employees at Sanger evidenced their support by walking off the job and accompanying the employee crew to the shop where two other co-workers also walked off the job and joined

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(footnote 8 cont.)

4/23/85. G.C. Ex. 4, Mr. Zuniga's personnel file, contains a document titled "Memo" dated the next day, April 24, from George Howard to Mr. Singer to see him about Atanacio Zuniga's pay and the amount of \$5.75 is circled. (See p. 9 of G.C. Ex. 4) The bottom of the memo contains a note to "George" and is dated 4/26/85. From the context it appears to be Mr. Binger's response to the inquiry and states: "Lupe told me that he, A. Z., was hired back at \$4.25 per our instructions . . . We can pay him at \$5.75 but need to write a letter with the facts as we understand them." Mr. Zuniga's affidavit (Resp. Ex. 2) also reflects the pay dispute. Therein, he stated that Lupe Gonzales came to the field on the afternoon of April 11 and told Mr. Zuniga he would be paid \$4.25 per hour per Mr. Binger's instructions. There is no evidence to whom the "our" in the memo from Binger to Howard refers.

<sup>9</sup>Atanacio Zuniga's testimony that Binger told the employees that there would be no work that day because of Binger's anger and irritation over Zuniga's question is plausible. First, it fits with Zuniga's personality. He had insisted on a raise to \$5.75 per hour and would have been concerned that he receive that amount. (See discussion, *infra*, p. 20.) Second, it makes sense in the context of events. Otherwise, there is no reason given by anyone which satisfactorily explains why the encounter broke up. It makes no sense, as Binger testified, that with the crew ready to explode into violence at any minute, he simply walked away, and they also left. (IV: 61-62)

I also credit Zuniga's account because the subsequent actions of the employee crew are most plausible in that context. After the crew left Ranch No. 3, they went to enlist support from other employees at Agri-Sun. They also went to the Union to seek the Union's assistance. Had they already been offered jobs, there would have been no need for them to make further efforts.

Zuniga's description of events is further substantiated by the fact that Lupe Gonzales went to Zuniga's house to tell the employees that Binger said that they could come back to work the next day. This scenario fits both with Binger's personality and

them. (III: 3)<sup>10</sup>

All the employees then went to the UFW office. (III: 4) They described what had happened and asked for advice. They were told it could be a long process to regain their jobs. They therefore went to Mr. Zuniga's house to make signs to support their protest. Lupe Gonzales telephoned Mr. Zuniga at home and told him Mr. Binger said they should all come back to work. (II: 101) Somewhat later, Mr. Gonzales came by Zuniga's house and told all the workers that Binger said they could return to work. (I: 54)

After hearing from Mr. Gonzales, the employee crew returned to the UFW office and informed Union personnel they had their jobs back. They were given UFW buttons and were told they should make a big show of stopping work and putting on the buttons and then observe the looks on their supervisors' faces. (I: 14)

The employee crew, with the exception of Ruben Allejandro, who had injured his hand, appeared for work the following day. After working for awhile, the crew stopped and

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(footnote 9 cont.)

the actions of the employee crew. Binger had told the employees that he would decide who was going to be hired out of a combination of irritation and frustration with the situation in which he found himself and being blocked at the avenue he had orchestrated to extricate himself from his predicament. When his anger and frustration subsided, he realized that the grapes still needed planting and that he did not have any workers to do the job. So, he sent Mr. Gonzales to tell the workers to return to work.

<sup>10</sup>Lupe Gonzales described Espino as simply asking the employees for support. He was not especially agitated or mad and did not act in a threatening or intimidating manner. (IV: 124)

made a show of putting on their UFW buttons. There was no significant reaction from the supervisors. (III: 5) The crew worked without incident until April 18 when George Howard returned from his trip abroad.

The critical difference in the parties' versions of the April 10 incident is their description of the character of the incident. Respondent's witnesses (Binger, Behm and Foth) all stressed that they were concerned for their physical safety and painted the exchange with the employee crew as one which at any moment was likely to explode into a physical confrontation with an imminent threat of danger to each of them. Their testimony does not support this characterization.

Foth characterized the crew as having angry expressions and clenched fists. (IV: 8) He said he went over because he believed he had a good rapport with the crew and thought he could talk them out of a violent confrontation. Yet, he acknowledged that he did not in fact try to talk them out of anything. (V: 34) It was clear that he did not do so because the need did not arise, not because it would have been futile. Behm described the situation only as very tense. (V: 39)

Binger described the crew as angry because they were talking loudly at him, even more loudly amongst themselves, and they wouldn't accept his answers and explanations. (IV: 48.) He admitted that no one verbally threatened him; nor did anyone touch him. (IV: 73) The crew kept the same distance from him

throughout the discussion. No one made any threatening movement toward him.

At hearing, my distinct impression based on the demeanor of Behm, Binger and Foth was that they were exaggerating the events and greatly overstating their apprehension for their personal safety. Behm did not even remember that Foth was there. (V: 47) If he and Binger had been confronted with an angry group that at any second was ready to become violent, I have no doubt Behm would have known whether there were only two of them or three facing down the crew. Although Binger several times said he was alone out there, that statement reflects his feelings based on his overall responsibility, not the actual facts.

As a further indication that Respondent's witnesses did not actually view the incident as intimidating as they testified, I note that at least one of the supervisors had a truck with a two-way radio in it. (V: 45) No one made any effort to radio for assistance.

Several parts of Mr. Singer's testimony also indicate that he did not truly feel in any danger. When asked if the crew was potentially hostile, Mr. Binger responded:

You know, I really wasn't comfortable there. I had a lot of things on my mind besides what was - now I had another problem that was added to the fact that the grapes weren't going to be planted...

At that point I was frustrated and was not particularly happy to be out there at all." (IV: 60-61)

These remarks indicate the true tenor of the confrontation. Mr. Binger thought he had found a way out of his

predicament and was now confronted with an angry group of employees who demanded their jobs. The contractor crew had left, the grapes still needed to be planted, and his discussion with the crew was going nowhere as Behm so aptly put it. He was more upset with the bind he was in than he was afraid of the employee crew becoming violent.<sup>11</sup> Mr. Binger crystalized his situation saying: "George had left me in charge and here I was in the middle of a situation that if the sun hadn't come out it wouldn't have been there." (IV: 45.)

For their part, the employee crew was frustrated because they had been on layoff for several weeks, and a labor contractor was being hired to do work that they would normally perform. As a result of the frustration on both sides, there was tension, commotion and raised "angry voices. I am convinced that the incident amounted to no more than that and was not a confrontation fraught with the potential for physical violence as characterized by Respondent's witnesses.

As noted, the crew returned to work the next day and worked without any problems until Mr. Howard returned from abroad. On April 16, Mr. Binger went to San Francisco to pick up Mr. Howard at the airport. Driving back to the ranch, Binger told Howard what had happened since Howard left. Both Howard and Binger testified that Howard said that he did not care about the

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<sup>11</sup>His response to a subsequent question provides further insight into his true concern which was resolving the competing needs with which he was faced. Respondent's counsel asked if Mr. Binger was concerned for his personal safety. He responded:

rest of the employees, but that Raul Espino and Atanacio Zuniga had previously been terminated and did not belong there. Nonetheless, the next day Mr. Howard reviewed all the relevant paper work and fully discussed the events of April 10 with Binger. As late as July Mr. Howard was still checking into the events of April 10 since at that time he questioned Mr. Alejandro about what had happened. (III: 133-134) Mr. Howard and Mr. Binger discussed firing Espino and Zuniga and the causes for doing so. Howard told Binger to prepare termination slips. Binger did so. (III: 124-126; IV: 64, V: 129)

V. The Firings on April 18

At the end of the work day on April 18, Burt Binger and Lupe Gonzales sought out Mr. Zuniga and Mr. Espino. Mr. Gonzales handed them the termination slips which had been prepared by Mr.

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(footnote 11 cont.)

Yeah, when I - when I - Okay, yeah. Yes, basically, and I say basically because it had gone far enough I felt and we - I thought we'd brought it to an end when I said "go home," but I don't feel I was going to be pounced on right there. I think a little earlier I would have been but not right there.

I felt relieved at being able to just make a decision to, you know, get out of it because I was in a touch situation.  
- (IV: 62)

Similarly, Respondent's counsel asked a leading question whether there was any potential danger to the nursery. Mr. Binger responded by talking at length describing the potential financial harm to the nursery if the grapes were not planted. Despite the opportunity provided by counsel, he did not give the slightest indication that there was any potential or immediate threat of danger or vandalism to nursery property.

Binger, read the slips to them and told them they could talk to Mr. Howard if they had any questions. There was no prolonged discussion about the reasons they were fired. ( I: 15, 55; II: 102-103; IV: 65, 12)

G.C. Ex. 4 is the personnel file of Mr. Zuniga. Pages 35 and 37<sup>12</sup> are forms labelled "Employee Change in Status Report," and the box marked "Termination" is checked. The forms list the reasons for the termination. Reason number ( 1 ) is "walking off job on 4/10/85." Reason number ( 4 ) is "direct cause of work stoppage 4/10/85. (Illegal)."<sup>13</sup>

The handwritten and typed termination slips for Mr. Espino are found on pages 16 and 17 of G.C. Ex. 5 which is his personnel file. The reasons listed on the two slips are: " ( 1 ) Walking off job on 4/10/85. ( 2 ) Direct cause of work stoppage 4/10/85. (Illegal). ( 3 ) Refusing work offered 4/10/85." The typed slips for Mr. Espino and Mr. Zuniga are signed by both Mr. Binger and Mr. Howard.

Binger and Howard testified the reference to illegal work stoppage on the termination slips referred to the fact that they considered the events of April 10 a violent work stoppage. Both

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<sup>12</sup>Page 37 is handwritten and page 35 is a typewritten version with slightly more formalized wording.

<sup>13</sup>Number 2 states: "turning in false time on time card." Number 3 states: "Improper use of Spray-Rig (Running it while it was not running correctly.)" number 5 states: "Refusing work on April 10, 1985."

Howard and Singer testified that the unprotected work stoppage was one of the reasons why Zuniga and Espino were fired.<sup>14</sup> They each testified that Mr. Binger in particular felt very strongly that the reasons relating to the event (number 4 on Zuniga's slip and number 5 on Espino's slip) should be placed in the termination slips. Binger testified " . . . they caused me to do something I wouldn't have done without feeling directly threatened. That's why these are on. That's what these refer to. This is - they basically cause (sic) me to send the contractor home and put our operation in jeopardy because of that. And because of my personal safety, and I, you know, I feel that way." (IV: 66-67)

At the time of the exit interview, neither Mr. Gonzales nor Mr. Binger said anything to Espino and Zuniga to indicate they were being fired because they had previously been terminated. Nor do either of their termination slips list that as a reason, although several reasons are set forth on each slip.

#### VI. The Employee Status of Atanacio Zuniga and Haul Espino

Respondent contends that prior to April 10 Mr. Zuniga and Mr. Espino were not on layoff status but, rather, that they had been fired for cause. Both Mr. Howard and Mr. Binger testified that neither Atanacio Zuniga nor Mr. Espino was eligible for

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<sup>14</sup>Rubben Allejandro was not fired. He did not report for work on April 11 because of his injured hand. However, Mr. Allejandro testified that Lupe Gonzales, his cousin, told Ruben that he (Ruben) was going to be fired along with Atanacio Zuniga and Raul Espino for being a leader of the work stoppage. (II: 25)

rehire and were rehired by Mr. Singer only because of the threat of violence during the events of April 10. Each individual's situation will be examined separately.

A. Atanacio Zuniga

On March 22, Respondent had a large layoff because of its strapped financial circumstances. Mr. Zuniga was one of the workers laid off. His personnel file contains a copy of the layoff notice which was signed by Mr. Howard.<sup>15</sup> The box marked "Lay Off" is checked rather than the box marked "Termination." The form indicates Mr. Zuniga was eligible for rehire.<sup>16</sup> Respondent claims that Mr. Zuniga should have been fired not laid off. George Howard testified that Steve Ball was instructed to dismiss Mr. Zuniga because he arrived 15 minutes late for work three days in a row but indicated on his time cards that he had arrived on time. This incident occurred in February or possibly early March since it was soon after Jim Rogin was hired on February 8.

Mr. Howard explained his signature on the layoff notice by saying he simply signed all the layoff notices without looking at them. He had no explanation for how he could not have noticed that Mr. Zuniga was working from the time he should have been fired until nearly the end of March when Howard went abroad. Mr. Howard

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<sup>15</sup>See p. 31, G.C. Ex. 4, document titled "Employee Change in Status Report" which is dated 3-27-85.

<sup>16</sup>When he was rehired on April 11, his status form indicates his "present status" as "mechanic" with a wage rate of \$5.75 an hour and notes his rehire or new status as "crew member" with a wage rate of \$4.25 an hour. There is a "Remarks" section on the form,

lives on the Agri-Sun premises His house is only 30 feet from the shop where Mr. Zuniga worked,<sup>17</sup> and the shop is visible from Mr. Howard's house.

Steve Ball admitted he had marked Mr. Zuniga's slip as a layoff. He testified he recalled George Howard telling him to take "appropriate action" regarding the starting time incident. (IV: 89.) Initially, Mr. Howard also indicated he had told Mr. Ball to "take appropriate action", and only later did Howard say that he told Ball to dismiss Zuniga for cheating on his time. (III: 87.)

Although Ball characterized his marking the slip "layoff" as being too much of a nice guy (IV: 89), that explanation does not wash. After being told by Howard to take appropriate action, Mr. Ball docked Mr. Zuniga's pay and watched him for a few days. He observed that Mr. Zuniga was not arriving on time. He informed Howard but did not take any further disciplinary action, nor did he recall being directed to take any further action. (IV: 87-88.)

Further, Mr. Ball indicated he marked the slip a layoff since they had rehired Mr. Zuniga once, and they might want to

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(footnote 16 cont.)

and there is no indication that Mr. Zuniga 's status was not eligible for rehire. There is nothing to indicate his status was anything other than a returning worker. Similarly, p. 33 of G.C. Ex. 4 is a "Status/Payroll Charge Report" which notes Mr. Zuniga was rehired. Again, there is no mention of a previous dismissal or indication that he was not eligible for rehire in the section marked "Reasons."

<sup>17</sup>See R. Ex. 3 which is a drawing of the premises including the house and shop.

rehire him again. He went on to say, "I considered this in my own mind, although, to be a permanent layoff because of his prior dissatisfaction with working for Agri-Sun." (IV: 89.) There is no warning in Mr. Zuniga's personnel file regarding this timecard incident, and there was no exit interview with Mr. Zuniga.

All of these circumstances are more consistent with a true layoff than a dismissal. Also, supervisor Frank Lopez testified that Mr. Zuniga was part of the large layoff in March and said he called Zuniga to tell him he was laid off because the company was out of money. (V: 85.)

From the foregoing, it is clear that Mr. Zuniga's lateness was not such a serious incident that Mr. Howard directly ordered Ball to fire Zuniga. Ball thought the company might want to rehire Mr. Zuniga, he considered docking Zuniga's pay to be appropriate action, and he does not recall being told to take further disciplinary action. Ball thought of the layoff as permanent only because Mr. Zuniga was already unhappy with the company. These factors coupled with the fact that Zuniga remained at work until Howard left the country, which I do not believe Howard failed to notice, lead me to disbelieve the claim that Mr. Zuniga was fired.<sup>18</sup>

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<sup>18</sup>Further, firing Mr. Zuniga for this incident is not consistent with the action taken by Howard in disciplining workers for deliberately damaging more than 125 trees thus causing substantial financial loss to the company. In that instance, all the trees were in one row, more trees were damaged than could have happened accidentally and only a warning to the workers was issued. (III: 128-130; IV: 7.)

Respondent presented extensive testimony regarding numerous ways in which Mr. Zuniga failed to carry out his duties as shop mechanic. Nearly all of the events occurred prior to January. In early January, Mr. Zuniga voluntarily left Agri-Sun because the company hired Ricky George, an Anglo, to work in the shop. Mr. George was hired at \$6.00/hour. Whereas Mr. Zuniga was only earning \$5.00/hour when George was hired.

Mr. George left Agri-Sun shortly thereafter. The company was unable to find someone to take over the shop, and work piled up. Mr. Zuniga was asked to return. After several counter offers by Mr. Howard, his demand for a raise from \$5.00 to \$5.75 an hour was granted.

When Mr. Howard spoke to Mr. Ball and supposedly told Ball to dismiss Zuniga for cheating on his time cards, he did not say anything about dismissing Mr. Zuniga for failing to do his work properly. Ball does not even remember being told to fire Zuniga, and he gave no indication that he was directed to fire him for poor performance. Only Glen Foth indicated Mr. Zuniga was fired both because of the time cards and poor work performance. I discount his version since neither Ball nor Howard - the two directly involved - mentioned talking to Foth about the matter, and neither of them listed poor work as a reason.<sup>19</sup>

I find it unnecessary to discuss each of the alleged incidents of poor work since at least as of February 11, the date

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<sup>19</sup>Mr. Howard testified that he had told Zuniga when he rehired him that he needed to make improvements in the management of the shop. Mr. Howard indicated he told Zuniga that if he made one step out

of rehire, they were not only not so serious as to cause Respondent to fire Mr. Zuniga, they were not so significant as to prevent Mr. Howard from hiring Mr. Zuniga back at a substantial raise.<sup>20</sup>

The evidence does not support Respondent's claim that Mr. Zuniga was fired because of his work performance. My observation of the demeanor of Mr. Howard, Mr. Foth and Mr. Singer at hearing convinced me that they had simply dredged up every incident and complaint against Mr. Zuniga during his tenure with the company. The clear impression conveyed was that of an after the fact justification. Had Mr. Zuniga been nearly as incompetent as they described him, I do not believe they would have rehired him in February and certainly not with a substantial raise. Even with work accumulating, it makes no sense that they would rehire someone who would foul up repairs and defy supervisor's orders which is the thrust of Mr. Zuniga's purported deficiencies.

The only other reason given for firing Mr. Zuniga was an incident where he drove a high rise spray rig when it was not

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(footnote 19 cont.)

of line he would be terminated. (III: 81-82) Mr. Howard indicated that for approximately 3 weeks Mr. Zuniga's work improved. (III: 84.) Thereafter, Mr. Zuniga's performance was less consistent. Nonetheless, Mr. Howard said nothing about directing Mr. Zuniga's termination as a result of having made that "one step out of line."

<sup>20</sup>Raises were generally given in 25 cent per hour increments. From the time he was hired in September of 1983 until he left in January 1985, Mr. Zuniga had moved from \$4.00 an hour to \$4.50, then \$4.75 and finally \$5.00 per hour. (See pp. 25-28 of G.C. Ex. 4.) Thus a 75 cent increase was a large raise.

operating properly. Steve Ball issued an awareness warning to Zuniga regarding the incident. (See p. 8 of G.C. Ex. 4) However, Mr. Howard was not even aware of the incident until after he returned from Yemen in April. (III: 94.) Obviously, this incident was not a basis for Howard terminating Mr. Zuniga in March.

B. Haul Espino

Mr. Espino began work at Agri-Sun in October of 1983. Mr. Espino was promoted to crew leader. He received a 25 cent per hour raise in November 1983, March 1984 and December 1984. He was laid off on February 27, 1985. The reason on his layoff notice is "attitude lacking."

The layoff followed an incident two or three days previous when Mr. Espino refused Steve Ball's instructions to drive a van to a job away from the company premises. His refusal was based on a desire to be paid more if he was to assume the task of driving. Another employee drove the van, Mr. Espino did the work he was assigned and, as crew leader, was left in charge of the crew for the remainder of the day.

On February 25, Mr. Ball wrote a memo to Mr. Howard stating that Mr. Espino had a poor attitude towards work and that Ball would watch him closely and recommend termination if Espino did not improve. (See, G.C. Ex. 5, p. 25.) On February 27, he laid off Espino. Ruben Allejandro interpreted for Steve Ball, and he did not recall Ball saying anything other than words to

the effect that the company was not big enough for both Ball and Espino. The only reason Ball mentioned in the exit interview was Espino's attitude about wanting more money to do a specific job. He did not recall a discussion about Espino's racial attitude. (IV: 94-95.)

Ball laid off Espino rather than firing him because, in his words, Espino was a "good enough employee that [Ball] did not want to put a bad mark on his record, and that simply if he was dissatisfied with the company as I was dissatisfied with his attitude, that he could simply be laid off at this time."

(IV: 94.) Espino asked if he would be rehired, and Ball responded probably not. (IV: 95.) Espino corroborated that Ball told him he was being let go because the two of them did not fit in. (IV: 34.) Espino responded that he would leave and find work elsewhere. (IV: 34.)

George Howard, on the other hand, testified he directed Ball to terminate Espino because he received complaints from three supervisors in one week about Espino. Frank Lopez complained that Espino was continuing to say that the white employees were getting all the privileges. Lupe Gonzales complained that Espino was not taking orders, and Ball complained about the incident of Espino asking for more money. (IV: 122.)

Mr. Gonzales, however, testified that he recommended Espino be laid off, not dismissed. He indicated Espino was "getting on everybody's nerves. He would not listen to the other

supervisors or myself." (IV: 115.) When asked for specifics, Gonzales gave the example that he would tell Espino to take a particular worker and do a job, but Espino would take a different person. He then acknowledged he "never really had a lot of problems" with Espino. (IV: 116.)

Respondent dwelled extensively on Mr. Espino's attitude that the white employees received favorable treatment: they did less work and were paid more than the Mexican employees. The racial tension developed from two sources. Both Atanacio Zuniga and Espino were greatly offended that Ricky George was hired at a higher salary than Mr. Zuniga who had been with Agri-Sun for nearly a year and half. Mr. Espino told the crew that by hiring Ricky George the company had forced Zuniga to leave.

Second, a personal feud developed between Mr. Espino and a white employee from New Zealand named Simon Andrews. Mr. Howard, Mr. Foth and other witnesses for Respondent testified extensively to the hostility Mr. Espino bore toward Mr. Andrews. Lupe Gonzales accurately characterized the situation as a personal beef between the two men. Mr. Andrews was at least as much of an instigator as Mr. Espino. He began the feud by making an obscene gesture to Mr. Espino, and he infuriated the crew by telling them he had received a raise when they had not received one. He had not even actually received the raise according to Mr. Gonzales.

While the animosity between Mr. Espino and Mr. Andrews was a source of concern to Mr. Howard, I do not believe it or Espino's

general complaints about favoritism caused Howard to direct that Espino be fired. Ball did not even mention the issue in the exit interview.

Mr. Ball was irritated with Mr. Espino for refusing his directive to drive the van. If Mr. Howard had told Ball to fire Espino, I do not believe he had any reason to disobey such a directive and do Mr. Espino a favor by laying him off. He laid him off rather than fired him because his conduct was not so serious that it warranted dismissal.

My conclusion on this point is reinforced by Mr. Singer's testimony. In describing his conversation informing Mr. Howard that he had rehired Zuniga and Espino, Mr. Binger testified, ". . . I was concerned because we had terminated both - let me put it this way. I had mentally terminated them." [emphasis added] (IV: 64.)

Based on the foregoing, I do not credit Respondent's witnesses' testimony that Mr. Espino was fired for cause. Howard and Ball may not have intended to recall Mr. Espino as if he had been on a normal layoff, but they did not mandate that he could not be rehired.

#### ANALYSIS AND CONCLUSIONS

General Counsel has charged that Respondent violated sections 1153(a) and 1153(c) of the Act by discharging Mr. Zuniga and Mr. Espino on April 18.<sup>21</sup>

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<sup>21</sup>sections 1153(a) and (c) are analagous to sections 8(a)(1) and 8(a)(3), respectively, of the National Labor Relations Act. (hereafter "NLRA " or "the national act. ") ]

It is axiomatic that Mr. Zuniga, Mr. Espino and the other members of the employee crew were engaged in protected concerted activity when they jointly sought to obtain their jobs back unless their conduct was such as to remove the mantle of protection afforded by the Act. Respondent's defense rests on its claim that the protest was not protected because it was fraught with violence and the threat of physical harm.

In determining whether concerted activity has lost its protected status, the "National Labor Relations Board (hereafter "NLRB" or "national board").

... has long held that there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service. (United States Postal Service (1980) 250 NLRB 4 [104 LRRM 1300] .)

A recent NLRB case is instructive in analyzing the conduct herein. In that case,<sup>22</sup> an employee became angry at what he perceived as management's renegeing on a prior agreement. He "stood up and reddened in the face, shook his head and yelled with 'clenched fist' [ : ] 'I'm going to ... I'll see you fry.'<sup>1</sup>" (at p. 239.)

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<sup>22</sup>Southwestern Bell Telephone Company (hereafter Southwestern Bell) (1982) 260 NLRB 237 [109 LRRM 1231], aff'd (5th Cir. 1982) 694 F.2d 974 [112 LRRM 2526].

Respondent therein contended that this statement was made with such force that it caused the supervisor to whom it was directed (Sony) to back off, and another supervisor (Armstrong) who was present became afraid there might be violence. Armstrong stepped between the employee and supervisor Sony. Sony and the employee went into another room, the employee repeated the remark to Sony and then repeated it to Armstrong. The employee was suspended the next day.

The NLRB found the statements by the employee were not threats and did not remove his protest from the protection of the NLRA. The national board concluded the record did not support Respondent's characterization of a "tension - drawn confrontation" causing a fear of violence. (at. p. 240) It discounted the supervisor's self-serving statement that he was afraid and found the circumstances did not support his contention.

To the contrary, the NLRB determined he had no reason to fear for his immediate or future safety and found that the statement did not convey an intent to do physical harm to supervisor Sony. The warning notice issued because of the employee's conduct was held to be a violation of section 8 ( a ) ( 1 ) .

The conduct in Southwestern Bell is quite mild. As noted therein, there are

... numerous cases in which the parties have attacked the veracity, integrity, and good faith of each other as well as their respected parentage and in tones of voice which are not always calm, cool, collected, and unthreatening. In one, "for instance," Crown Central Petroleum Corporation v. N.L.R.B., 430 F.2d 724, 731 (5th Cir. 1970), enfg. 177 NLRB 322 (1969), the court stated "that passions run high in labor disputes and

that epithets and accusations are commonplace." (Ibid, at p. 240).

I have found that Respondent's characterization of the events of April 10 as a potentially violent confrontation is greatly exaggerated. There were no verbal threats made by any member of the employee crew. Thus, the conduct herein is even less susceptible to the argument it was not protected than that described in Southwestern Bell, supra. There were no obscenities uttered. (Compare NLRB v. Thor Power Tool Co. (7th Cir. 1965) 351 F.2d 584 [60 LRRM 2237] where the court found referring to a supervisor as "the horse's ass" did not place the employee's concerted activity "beyond the shield of the [NLRA]." (at p. 2238) .)

Here, no member of the employee crew made any move to touch, push or jostle Binger, Foth, Behm or any of the labor contractor's employees, Glen Foth joined Binger so he could talk the crew out of any physical confrontation and did not find it necessary to try to talk them out of anything.

The employee crew was upset, and the exchange between the crew and Binger was certainly tense. But the conduct of Mr. Zuniga and Mr. Espino falls far short of changing it from protected activity into unprotected conduct.<sup>23</sup> The worst

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<sup>23</sup>This Board recently found that a protest involving yelling between employees and supervisors was protected. (V.B. Zaninovich & Sons (1968) 12 ALRB No. 5.) The conduct in this case is even less confrontational than that in Zaninovich, supra.

Respondent's witnesses described was scowled faces, clenched fists and loud, angry voices. Such expressions were not "indefensible under the circumstances." (Zaninovich, supra, quoting from United States Postal Service v. National Labor Relations Board (hereafter Postal Service II) (1981) 652 F.2d 409 [107 LRRM 3249]). As this Board noted there, relying on NLRB precedent, a certain amount of leeway must be given to employees in such situations.

Both Burt Binger and George Howard acknowledge that Mr. Espino and Mr. Zuniga were fired in large part for their conduct on April 10.<sup>24</sup> since that conduct was not tainted by violence and therefore was not removed from the protection of the Act, it is uncontested that Mr. Zuniga and Mr. Espino were fired for engaging in protected concerted activity. Mr. Binger and Mr. Howard discussed firing Zuniga and Espino; Binger felt very strongly about including the reasons relating to the "work stoppage" on the termination slips. Mr. Howard concurred and directed Binger to prepare the termination slip.

This Board recently decided a similar case where Respondent cited a walkout as a ground for discharge. In such a case, the Board held,

" . . . the formal elements of a Wright Line (1980) 251 NLRB 1083 [105 LRRM 1169] approach are satisfied if the employees' actions are within the ambit of section 1152. As the national board stated in Wright Line; '[we] note that...when after all the evidence has been submitted...we will not seek to quantify the effect of

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<sup>24</sup>The termination slips also list as grounds for dismissal the refusal of Mr. Zuniga and Mr. Espino to take work which was offered on April 10. Respondent contends that they were required

the unlawful cause once it has been found. It is enough that the employees protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or the bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.' (251 NLRB at 1089, n. 14.) Accordingly, there is no need for us to consider the substantiality of the other alleged grounds of discharge." (Armstrong Nurseries, Inc. (1986) 12 ALRB 15 at pp.<sup>25</sup>

As in Armstrong, since Respondent has admitted that it fired Mr. Zuniga and Mr. Espino for their part in the events of April 10, and I have found that conduct protected, I find that Respondent has violated section 1153(a) of the Act.<sup>26</sup> Although I have found that Respondent has violated section 1153(a), I decline to find a violation of 1153(c).

At the time Mr. Zuniga and Mr. Espino were dismissed, the only union activity of which Respondent was aware was the crew's

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(footnote 24 cont.)

to take the job of staking apples and, apparently, argues that their failure to do so entitled Respondent to fire them.

In the first place, I have found the evidence does not establish that they refused the work. In the second place, Respondent has cited no authority for the proposition that it may dismiss employees who engage in a protected protest regarding working conditions by unilaterally offering what it deems is a suitable alternative. Such a rule would allow an employer to disband a work stoppage or other concerted activity at its own whim and to define the nature of protected activity. Such a policy goes against the entire purpose of the Act. (Postal Service II, supra, 107 LRRM 3249, 3251.)

<sup>25</sup>The other reasons cited in Armstrong, supra, were violations of various company rules by walking out and, regarding two workers, an additional reason of "willful or malicious misuse of company. . . property" resulting from slamming down their budwood prior to walking off the job. (See, Armstrong, supra, at p. . . 33 of decision of the Administrative Law Judge.

<sup>26</sup>In order to facilitate the Board's review, I will nonetheless briefly dispose of Respondent's other asserted reason for firing

show of putting on union buttons on their first day back at work, No causal connection has been established between the firing and this conduct. I recommend that this portion of the charge alleging a violation of 1153(c) be dismissed.

I recommend the following proposed:

ORDER

By the authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Agri-Sun Nursery, Inc. and its officers, agents, successors and assigns shall:

I. Cease and desist from:

A. Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of

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(footnote 26 cont.)

Mr. Zuniga and Mr. Espino. Respondent takes the position that Zuniga and Espino were terminated on April 18 because they had previously been terminated for cause, and George Howard did not want them back. In effect, it contends that this was the real reason they were terminated. I am convinced it was not.

Only the events of April 10 are listed on Mr. Espino's termination slip. Mr. Binger admitted he felt strongly that those reasons should be included. Mr. Howard carefully reviewed all the circumstances of that day, agreed with Binger and let him prepare the slips and effectuate the dismissals. It is crystal clear that Espino's and Zuniga's conduct on April 10 was a motivating factor in their discharge.

Further, the only reasons other than those relating to April 10 which are listed on Mr. Zuniga's slip are the time cards and spray rig incidents. I have found that these were not the reasons for Mr. Zuniga's departure from Agri-Sun in late March. Rather, he was part of the layoff due to the company's financial situation. The time cards, spray rig and poor performance claims were after the fact justifications to support Respondent's dismissal of Mr. Zuniga for his participation in the events on April 10.

employment in violation of section 1152 of the Agricultural Labor Relations Act (Act).

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

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

a. Offer to Atanacio Zuniga and Raul Espino reinstatement to their former or substantially equivalent positions and make them whole for losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

b. Preserve, and upon request, make available to this Board and its agents, for examination, photocopying, and otherwise all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount 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 purposes set forth hereinafter.

d. Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order, to all agricultural employees employed by Respondent from April 1985 to the present.

e. Post copies of the attached notice, in all appropriate languages, in conspicuous places on its property for 60 days, the times and places 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 read and distribute the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at times and places 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 non-hourly wage employees in order to compensate them for time lost at the reading and during the question and answer period.

g. Notify the Regional Director in writing, within thirty days after the date of issuance of its 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: November 12, 1986

A handwritten signature in cursive script, reading "Barbara D. Moore". The signature is written in black ink and is positioned above a horizontal line.

Barbara D. Moore  
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 issued a complaint that alleged that we, Agri-Sun Nursery, 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 Atanacio Zuniga and Raul Espino on or about April 18, 1985, because they protested not being recalled to work. 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 farm workers 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 to obtain a contract covering 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 or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT discharge or in any other way discriminate against, interfere with, or restrain or coerce you because of your exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to discharge Atanacio Zuniga and Raul Espino because they engaged in a protest and caused a work stoppage on April 10, 1985, to protest not being recalled to work. WE WILL NOT hereafter discharge any employee for engaging in such concerted activities.

WE WILL reinstate Atanacio Zuniga and Raul Espino to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their discharges, plus interest.

Dated:

AGRI-SUN NURSERY

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

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question, contact the Board at 627 Main Street, Delano, California, (805)725-5770.

DO NO REMOVE OR MUTILATE.