Salinas, California

STATE OF CALIFORNIA

ARICULTURAL LABOR RELATIONS BOARD

SPRINGFIELD MUSHROOMS, INC., Respondent, and VICENTE PIZANO, ROBERTO ALANIZ AND JOSE TAPIA, Charging Parties.	)	Case Nos. 84-CE-164-SAL 85-CE-129-SAL 86-CE-3-SAL
	)	14 ALRB No. 10

ERRATUM

An error exists in the Decision and Order on page 5, footnote 4 at (2). The date of the walkout should have appeared as June 15, 1985, instead of June 15, 1988.

Dated: September 2, 1988.

JOHN P. McCARTHY, Member[1/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[1/] 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. Chairman Davidian and Member Smith did not participate in the consideration of this matter.

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DECISION AND ORDER

On June 29, 1987, Administrative Law Judge (ALJ) Marvin J. Brenner issued the attached Decision and Order in this proceeding. Thereafter, Springfield Mushrooms, Inc., (Respondent or Employer) filed exceptions to the proposed Decision and Order, along with a supporting brief, and General Counsel filed a reply brief. Charging Party Vicente Pizano also filed exceptions to the proposed Decision and Order.

The Agricultural Labor Relations Board (ALR3 or Board) has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ as modified and to adopt his proposed Order with modifications.[1/]

[1/] By way of dictum in discussing the filing of a Cal-OSHA charge by Charging Party Vicente Pizano and a coworker, the ALJ stated:

> An individual's actions are protected and concerted in nature if they relate to conditions of employment that

(fn. 1 cont. on p. 2)

We have carefully considered the exceptions which Vicente Pizano filed pro se. However, neither Mr. Pizano's presentation to the Board nor our own independent review of the record on his behalf has persuaded us that the ALJ's findings and conclusions are in error.

Respondent has excepted to the ALJ's finding that the discharge of three employees who walked off the job on June 15, 1985, violated Labor Code section 1153(a).[2/] Respondent contends that the walkout was not concerted, inasmuch as each participant left for purely personal reasons unrelated to working conditions, and that it was unprotected, inasmuch as it constituted nothing more than an insubordinate refusal to comply with a direct order. We find no merit to this exception.

As described more fully by the ALJ, on June 15, 1985, foreman Garcia came into the picking room and announced the names of workers he had selected to remain at work after the picking was over for the purpose of cleaning the picking room. Each of the workers declined to stay because, according to the credited testimony of all worker witnesses at the hearing, cleanup work had

(fn. 1 cont.)

> are matters of mutual concern to all affected employees. This would include complaints made to administrative agencies dealing with labor or safety violations. (ALJD at p. 32, fn. 31.)

To the extent this statement may be construed as including constructive concerted activity, we specifically disavow it, as a misstatement of law, in light of applicable National Labor Relations Board (NLRB or national board) precedent, viz., Meyers Industries (1986) 281 NLRB No. 118.

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

always been voluntary. Confronted with this refusal, Garcia left. When he returned a short while later, he announced that the boss had ordered them to stay and to clean up. Garcia again left, and the workers, discussing the matter among themselves, expressed their displeasure with the order. Cleanup was considered to be undesirable work and making it a mandatory rather than voluntary task was perceived by them as an unfair and precipitous change of policy. Three employees, Jose Tapia, Roberto Alaniz, and Vicente Pizano, decided, therefore, not to stay for cleanup and punched out for the day. When they returned to work the next morning at the usual time, they were told they were fired.

It is well established that a work stoppage is protected, even if it is limited to overtime hours, provided it is neither partial, intermittent, nor recurrent. The NLR3 has long held, with court approval, that:

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

Respondent, therefore, bears the burden of showing that the one work stoppage in question marked the beginning of a series of intermittent job actions over the issue of overtime work. In view of that burden, an employer is free to question returning strikers about their future intentions. (See First National Bank of Omaha v. NLRB (8th Cir. 1969) 413 F.2d 921) [71 LRRM 3019]. In this case, the employer failed to do so; it simply discharged the

workers on the spot as soon as they returned to work. No evidence was presented to show that the work stoppage -– a protest over the functional equivalent of overtime work -- was anything other than a one-time event.

We also find no merit in Respondent's contention that the work stoppage, in which the three employees simultaneously walked off the job after a group discussion, was not concerted, because prior personal commitments may have motivated the workers to take action. As the national board observed in Smithfield Packing Co. (1981) 258 NLRB 261, 263 [108 LRRM 1125]:

> [T]hat the employees may have had individual reasons for desiring to leave the plant [after 8 hours' work] is beside the point. What is crucial is that they made common cause to protest what was, in the protesting employees' view, a commitment to limit work time for that day to 8 hours.

And, in Armstrong Nurseries (1986) 12 ALR3 No. 15, this Board, likewise, considered

> . . . whether, assuming that Rafael and Hortencia were primarily motivated to leave at noon because they had to pick up their child, that Villegas was partly motivated to leave in order to get a ride home, and that Maria and Antonio left in part because they had no lunch, that their common act of walking out must be seen as a "bundle" of "individual" actions. (Slip opn. at p. 13.)

The Board specifically rejected any such contention:

> We think it ill-comports with [the legislative] history [of the NLRA] to factor out individual motives in demonstrably group actions in order to see if some underlying unanimity of sentiment informs them. Men and women engaged in a common effort often act from a variety of motives, yet we do not ordinarily treat such actions as "individual" based upon an analysis of the differences between the actors. Indeed, we regularly speak of the will of the majority emerging from the

> common effort of casting ballots even if everyone who voted on the same side did so for a different reason. [Footnote omitted.]
> (Id., at p. 16.)

Since we conclude that the work stoppage was both protected and concerted, the ALJ's findings and conclusions are affirmed.[3/]

Respondent also contends that the entire complaint should be dismissed because of what it terms "Board agent misconduct." [4/] Even if Board agent misconduct were evident in this case, which it is not, Respondent has cited no authority, nor have we discovered

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[3/] We note that in cases of a single work stoppage to protest terms and conditions of employment, "it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." (NLRB v. Washington Aluminum Co. (1962) 370 U.S. 9 [50 LRRM 2235, 2238].) It is therefore immaterial whether the workers in this case were right or wrong in their belief that cleanup work was voluntary. Accordingly, we disavow any reliance on Jasta Mfg. Co., Inc. (1979) 246 NLRB 48 [102 LRRM 1610] and Dow Chemical Co. (1965) 152 NLRB 1150 [59 LRRM 1279], which were noted by the ALJ. (ALJD at p. 25.) Those cases involved intermittent refusals to perform overtime work. Intermittent refusals would be deemed unprotected if overtime were mandatory, but protected if overtime were found to be voluntary since it could not be said that employees were attempting unilaterally to set their own terms and conditions of employment. Because we are not confronted in this case with multiple refusals to work, we need not determine whether cleanup was voluntary or obligatory.

[4/] Specifically, Respondent cites (1) a Board agent's statement to Jean Skillicorn that Pizano's September 1985 discharge might be found unlawful and that laws prohibiting the employment of undocumented workers were not being enforced; (2) a Board agent's statement, with respect to the June 15, 1988 walkout, that "workers are entitled to a one-time work stoppage;" and (3) a Board agent's statement to Pizano that discrimination might be shown if Pizano, unlike other workers, were disciplined for showing up for work on a day he was not scheduled to do so. In the Employer's view, that statement, notwithstanding Pizano's contrary testimony, prompted Pizano to present himself at work on

(fn. 4 cont. on o. 6)

any, to show that misconduct by Board personnel in an unfair labor practice case should be remedied at employee expense. Rather, Respondent should have invoked the General Counsel's external complaint procedure, a course of action Respondent failed to pursue.

ORDER

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

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any of its agricultural employees because of their participation in a protected, concerted work stoppage or other protected activities;

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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

(a) Make whole Vicente Pizano, Jose Tapia, and Roberto Alaniz for all losses of pay and other economic losses

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(fn. 4 cont.)

November 26, 1985, even though he had been told not to, in order to test the "hypothesis." None of these statements amounts to a misstatement of law nor did they prejudice the Employer in any way. We, therefore, discern no misconduct.

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 in E.W. Merritt Farms (1988) 14 ALR3 No. 5.

(b) Preserve, and upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying all records relevant and necessary to a determination of the amounts of backpay and interest due to the affected employees under the terms of this Order.

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

(d) Post copies of the attached Notice in conspicuous places on its property for sixty 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.

(e) 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 between June 15, 1985 and June 15, 1986.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to the assembled employees of Respondent 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 employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(g) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

Dated: August 22, 1988

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[5/] 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. Chairman Davidian and Member Smith did not participate in the consideration of this matter.

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, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discriminating against employees for their protected concerted activity. 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 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 terminate or otherwise discriminate against any employee, previous employee, or applicant for employment because he or she has exercised any of the above-stated rights.

WE WILL pay Vicente Pizano, Jose Tapia, and Roberto Alaniz any money they lost because we terminated them.

Dated: SPRINGFIELD MUSHROOMS, INC.,

By: _____
(Representative) (Title)

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

CASE SUMMARY

Springfield Mushrooms, Inc. 14 A.LRB No. 10
Case Nos. 84-CE-164-SAL
85-CE-129-SAL
86-CE-3-SAL

ALJ DECISION

The complaint alleged that respondent violated section 1153(a) in September 1984 by refusing to permit Vicente Pizano to continue working unless he secured a valid social security number. The ALJ recommended that the charge be dismissed for failure to state a prima facie case. Although General Counsel established that Pizano and other employees had met with the employer to complain about working conditions, General Counsel failed to establish when the meetings occurred.

The complaint also alleged that the respondent violated section 1153(a) by discharging Pizano and two other employees because of a one-time refusal to work overtime to clean the picking rooms after the picking for the day was over. Respondent informed the three workers that they were discharged when they reported to work at the usual time on the next work day. The ALJ held that a protest over overtime work is a protected, concerted activity, and that the discharge on June 17, 1984 was unlawful.

Lastly, the complaint alleged that respondent unlawfully discharged Pizano (who had been reinstated in July 1984) in January 1986 because Pizano refused to cease working at the end of the day, but returned to the picking room after the foreman had announced that the day's picking was over. A few months earlier Pizano had appeared for work on a day when the foreman had not scheduled him to work and had been warned that a repetition of that incident—in effect, making up his own work schedule—would provoke his discharge. The ALJ concluded that General Counsel had established a prima facie case. Pizano had been a vocal participant in meetings with management at which employees presented complaints about terms and conditions of employment, particularly the foreman's rotation system of assigning work; he had filed a charge with the labor commissioner; and, he had filed charges with the ALR3. Respondent, however, rebutted the prima facie case by showing that it would have discharged Pizano even absent his protected concerted activity. Pizano's attempt to establish his own working hours was an act of insubordination and the discharge was, therefore, not unlawful.

BOARD DECISION

The Board adopted the ALJ's findings, conclusions and order, with modifications. With respect to the June 1984 walkout, the Board noted that a work stoppage is protected even if limited to overtime hours, provided it is neither partial, intermittent, nor recurrent. The Board also noted that it was immaterial whether the workers in

this case were correct in their belief that cleanup work had always been voluntary, since the reasonableness of a decision to engage in a work stoppage has no bearing on whether or not it is protected.

* * *

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

* * *

STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
SPRINGFIELD MUSHROOMS, INC., Respondent, and VICENTE PISANO, ROBERTO ALANIZ, and JOSE TAPIA, Charging Parties.	**Case** Nos. 84-CE-164-SAL 85-CE-129-SAL 86-CE-3-SAL

Appearances:

Steven Sutter
Helen Yee
112 Boronda Road
Salinas, California
for the General Counsel

Andrew Church 17 East
Gabilan Street Salinas,
California for the
Respondent

Before: Marvin J. Brenner
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

MARVIN J. BRENNER, ADMINISTRATIVE LAW JUDGE:

This case was heard by me on April 28, 29 and 30, 1987, in Salinas, California. The Complaint was based on charges filed by Vicente Pisano between September 25, 1984 and January 24, 1986, and it issued on December 9, 1986. Upon the entire record,[1] including my observation of the demeanor of the witnesses and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT I.

JURISDICTION

Respondent was and is engaged in agriculture in the State of California within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act (hereafter "Act"), as was admitted by Respondent in its Answer. Accordingly, I so find.

Respondent also admitted, and I so find, that Vicente Pisano, Roberto Alaniz, and Jose Tapia were agricultural workers within the meaning of Labor Code section 1140.4(b) and that the United Farm Workers of America, AFL-CIO (hereafter "Union" or "UFW") is a labor organization within the meaning of Labor Code section 1140.4(c).

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[1]Hereafter, General Counsel's exhibits will be identified as "G.C. _ ", and Respondent's exhibits as "Resp's__". References to the Reporter's Transcript will be noted as "__: " (volume:page).

Respondent admitted the supervisory status of Richard, John, Jean and Steve Skillicorn,2 and Eulogic Garcia.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Complaint alleges that Respondent violated sections 1153(a), (c) and (d) of the Act by discharging Vicente Pisano on September 24, 1984, for his union and protected concerted activities, that on June 17, 1985, it discharged Pisano, Roberto Alaniz, and Jose Tapia because of their union and protected concerted activities, and that on January 17, 1986, Respondent again discharged Pisano for his union and protected concerted activities and because he had previously filed ALRB charges against Respondent. Pisano was reinstated on October 5, 1984, and again, along with Alaniz and Tapia, on July 15, 1985.

III. THE BUSINESS OPERATIONS

The business is owned by Richard, Jean and John Skillicorn (husband and wife), and their son, John, and was started in 1979. It employs 8-10 full time mushroom pickers and 3-5 part time pickers who work only when there is a large amount of mushrooms to pick. The total number of employees working, including management, is 24. (I: 4-5, 9, 28; III: 97.)

2por the sake of clarity and easier readabiliy and with no disrespect intended, the Skillicorns will generally *be* referred to by their first names. The same format will be employed with respect to Jorge and Rodrigo Gutierrez.

IV. PISANO'S CONCERTED ACTIVITIES

Period Prior to September, 1984

It is clear that there were meetings from time to time between management and the workers to consider worker grievances and that some of these meetings predated September, 1984. Though there is no evidence of the precise dates of these meetings, Jorge testified that there were at least 4 or 5 of them prior to September, 1984. (I: 137-138.)

According to Pisano, ever since he started working for Respondent, he met often with Company representatives and voiced, on behalf of the others, protests against basket shortages, incorrect pay, dirty working conditions, and dangerous chemicals. (II: 112-113.) Jorge Gutierrez testified that Pisano spoke most of the time at these meetings , and that he (Jorge) often translated (I: 138). Rodrigo Rodriguez, Jorge's brother, testified that it was Pisano and Jorge who did most of the talking. (II: 28.)

On the other hand, others claimed that it was Jorge who was the main spokesman (as well as serving as translator) and not Pisano. (I: 70 [Jean]; I: 130 [Garcia].)

A more important question than who was the chief spokesman is whether this activity was concerted. When asked what the purpose of the meetings was, Jorge replied that "(w)e were trying to get some improvement in all the conditions or in all the kinds of work that we did there . . . . Because the lack of hours, sometimes lack of baskets, also better treatment from the

foreman towards the workers. And because of all the dirt that was there in the rooms." (sic) (I: 138.) (See also Rodrigo's corroborating testimony (II: 28).)

In contrast, Respondent's witnesses uniformly testified that all of Pisano's complaints at these meetings were about his individual grievances and not about those of the group. Garcia acknowledged that Pisano spoke up and complained more than others but that it was Jorge who spoke for the group. (I: 139.) Jean testified that at the meeting either on the 31st of December, 1985 or the 1st of January, 1986, Pisano complained about the fact that the Company intended to change its payroll ending date, resulting in less pay for him. (I: 76-77.) And of course, it is clear that the thing that Pisano complained about the most, and certainly more than others, was that his individual basket count was always on the short side.[3] (I: 69, 89, 91, 104, 124; III: 61-62.)

Period Subsequent to September, 1984

There was one particular item that Pisano frequently complained about that affected the entire group. The evidence is that Pisano played a prominent role in trying to improve the "rotation system," a working condition having to do with the

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3Workers pick mushrooms and place them in baskets which then go onto carts. The pickers are paid individually by the basket. The foreman keeps a tally of the baskets picked as do the workers. Sometimes there are disagreements on the total number of baskets picked. (1:90-91.)

selection of workers for weekend work that other workers were also complaining about. Pisano even kept track of the rotation schedule as it applied to all employees.4 (I: 141-142; II: 6, 12-14.) Jorge testified that there were complaints every weekend about who should be entitled to work. There was a meeting on this subject in January, 1986 in which the main issue was when the steadies would be taking their turns. With Pisano and Jorge as spokesmen, the grievances expressed were that the system was unfair. Pisano stated that he wasn't getting enough weekend work as Garcia was playing favorites in the selection process. (I: 141-142; II: 6, 12-14.)

The Filing of Charges with CAL OSHA

Pisano testified that he filed a complaint with the Department of Industrial Relations, Division of Occupational Safety and Health (hereafter CAL OSHA) in December of 1985. (Jorge went with him (I: 141).) Previous to this, Pisano testified he had complained to Jean and John about spraying, dirty picking rooms, and the need for better lighting in those rooms as his eyes had begun to become affected. He further testified that

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[4]Though John denied that Pisano was concerned about rotation for anyone but himself, he admitted that he knew Pisano was keeping track of when all the employees were working on weekends. John also admitted that this upset him because he felt this was not part of Pisano's job, and he (John) didn't want him touching other employees' time cards. (11:62.) Jean testified that some of the payroll cards had disappeared at one point and so Pisano was asked only to' handle his own. (1:71-73.)

in December, he told Jean and John that if nothing were done, particularly as regards his eye problem, he was going to complain to a governmental agency. (II: 119-120.)

Tom Miamber, a safety engineer at CAL OSHA, testified that a complaint was made to his department in approximately mid-December, 1985 and that he inspected Respondent's property on December 31, 1985. As a result of that inspection, a citation was issued and served on Richard Skillicorn on January 14, 1986 (II: 108-112), three days before Pisano's discharge.

Pisano testified that after the CAL OSHA inspector arrived at Respondent's property, at one point he (Pisano) spoke to him in the presence of Jorge, Richard and Garcia, outside one of the picking rooms. (II: 121.)

John denied that workers had complained about health problems immediately before the CAL OSHA inspection and could not recall any employees complaining about lighting or vision problems, including Pisano. He could only recall that one employee, a Mr. Villafuerte, had complained once about chemicals. (II: 65-66, 72-73.)

Richard testified that during the CAL OSHA inspection, he asked Miamber who had made the complaint but was informed that that information was not available.[5] Jean testified she did not

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5when asked if his foreman had ever found out that he had gone with Pisano to file the complaint, Jorge responded, "no". (1:141.)

know who filed the complaint. (I: 68.) Richard testified that he observed Miamber go around and speak to several people on the farm. Among these were Jorge (who asked Richard to leave as he wished to speak to the inspector alone), Pisano, and a couple of others (whom he could not recall) on the other side of the fence in the parking lot as Miamber was getting ready to leave. (I: 92-93.)

The Filing of Charges with the Labor Commissioner

Pisano, Jose Tapia and Roberto Alaniz filed a charge with the Labor Commissioner on June 7, 1985. (II: 118-119.) Both Jean and John became aware of this fact, but the record does not reflect when such knowledge was gained. (I: 74-75; II: 65.)

The Filing of Charges with the ALRB

Respondent was aware, of course, that Pisano had filed charges with the ALRB, the first of which was served on September 25, 1984 (G.C. 1A), alleging a threat to discharge for concerted activity and the second having been served on June 18, 1985 (G.C. IB), alleging an unlawful discharge for concerted activity. Though Respondent put him back to work both times (through the intervention of the ALRB), it is clear that it did so unwillingly, still convinced that its original discharges were proper. (II: 60-61.)

V. PISANO'S UNION ACTIVITIES

Meetings at Pisano's House

There were meetings at Pisano's house where presumably Union matters were discussed though there is no evidence as to how

frequently they occurred, exactly when they occurred,[6] or what their purpose was. General Counsel's witness, Jorge Gutierrez, testified that he had no idea if the foreman was aware of these meetings. Rodrigo, testified that at times Garcia asked him what he was doing at Pisano's house but that he wouldn't tell him, except to say that they had just been drinking beer together. Both John and Jean testified they knew nothing about these meetings. (II: 29, 63-64; I: 73-74.)

Pisano and Rodrigo both testified that Garcia drove by the house at times while these meetings were in progress, but that there was nothing out of the ordinary about this as, in Pisano's words, " . . . that's the way he goes when he is going home." (II: 113, 39.) Garcia acknowledged that once — he couldn't remember when — he drove by Pisano's house and saw that all the pickers were over there. (I: 133.)

Foreman Garcia's Observation of Pisano at UFW Hall

Jorge testified that he went with Pisano, Juan Cervantes and an Arturo to the UFW hall in Watsonville and that while there, he saw Garcia enter the office "where they . . . issue numbers for work" and that Garcia spoke to Roberto Alaniz. (I: 140; II: 5.) Jorge further testified that he never discussed this meeting or anything else about the Union with Garcia. (II: 5.) Garcia

[6]Rodrigo testified that at least two or three meetings were held during the years 1984 and 1985. (II:39.)

testified that though he couldn't recall if he saw Pisano there, he did observe Jose Tapia and Arturo de Leon but that he never told any higherups at the Company as he had no reason to. (I: 131.) Both John and Jean denied knowing anything about Garcia's having seen Pisano at the Union hall. (II: 63-64; I: 73-74.)

Handing Out Authorization Cards

Pisano and Jorge testified that they both handed out authorization cards in late 1984/early 1985. (I: 139; II: 113.) Pisano testified that he was observed by John and that he told John not to get nervous, that this was within the laws of California. (II: 113.) (Jorge did not mention this conversation in his testimony). John, Jean and Garcia denied any knowledge of Pisano's ever passing out cards. (II: 63-64; I: 73-74, 131.)

The Radio Station

Pisano testified that he was a broadcaster for a community radio station which had a pro-UFW slant, that he often expressed his pro-Union views on the air, and that on one occasion he even interviewed Cesar Chavez. (II: 115-117.)

VI. THE SOCIAL SECURITY NUMBER ISSUE

A. The Facts

Jean testified that Pisano came to work for Respondent in 1979 under the name of Jose Magana, and he provided a social security number. But in January of 1983, he provided her with a new social security number, reported that his real name was Vicente Pisano, and said that he was now legal. (I: 22-23, 30.)

Jean testified that around September of 1984 she and Joan Grellmann Evans the payroll clerk, received several calls over a two-week period concerning Pisano. According to Jean, the caller was very angry and said he needed to speak to Pisano because he wanted to start collecting social security. Jean told the caller that it was he who had the problem as Pisano was legal. The caller said "tell Vicente" and slammed the phone down; he never called again. As Jean didn't think it was important at the time, she did not inquire as to his name, and the caller did not leave a telephone number. (I: 21, 23, 15-16.)

Jean further testified that the conversation slipped her mind at first as she didn't regard it as suggesting any problem and only mentioned it to Pisano a few days later. Pisano then told her that he in fact was not legal, and he then asked for permission to use his son's social security number. (I: 25, 34.) Jean testified that she was quite surprised by this revelation as she had always assumed (at least since 1983) that Pisano was a legal resident. (I: 25, 34.) Jean denied knowing of any other employees who were using false social security numbers.[7] (I: 28.)

Around this time, Jean received what she referred to as an "audit slip" from the State Employment Development Department

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[7]John Skillicorn also testified he was not aware that any employees were working under false ID's. (II:53.)

listing Pisano's current social security number and asking that she send back to them information as to his quarterly earnings. Jean testified that she was familiar with these forms and that they were usually used whenever someone was applying for unemployment compensation. But in this case it appeared to be someone else's application. (I: 22-24, 81-82.)

Jean testified that she was concerned at this point that she may have perpetrated some kind of a fraud back in 1983 when she allowed Pisano to change his social security number.[8] As a consequence, she removed Pisano from his position on September 24, 1984, pending his bringing in a valid social security number; she testified she did not fire him. (I: 7, 32-34.)

The evidence suggests that foreman Garcia may have known that some of the workers had false social security numbers. Jorge Gutierrez, his brother-in-law, testified that Garcia knew he didn't have papers because he stayed with his sister and Garcia when he first came to the U.S. from Mexico. (II: 17, 20-21.) Jorge also testified, as did Jose Tapia, that Garcia had told workers he could get social security numbers for them.[9] (II: 12, 85.) Another brother-in-law, Rodrigo Gutierrez, testified Garcia

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[8]In fact, Jean testified that she was concerned enough to call the Social Security Administration to ask for assistance as to how in the future she could be sure that a given social security number was, in fact, valid. (I:32-34.)

[9]Garcia denied this. (I:109.) I credit Jorge as he made a very • good impression on me throughout his testimony and led me to believe that he was telling the truth. In addition, the circumstance of testifying while still in the employ of Respondent, and thus vulnerable to reprisal, may be regarded as

knew he was undocumented because Garcia was the one that helped bring him here from Mexico. (II: 23.)

Pisano was reinstated on October 5, 1984, and continued to use that same 1983 social security number until his discharge in January of 1986. Jean testified that Pisano was given his job back even without a proper social security number because an ALRB Board agent told her that failure to do so could result in extensive financial liability against the Company as the immigration law that was on the books was being ignored. (I: 39.)

B. Analysis and Conclusions of Law

In the present matter, there is no direct evidence that prior to September of 1984, Pisano was engaged in Union activity. There was no direct evidence that the meetings at Pisano's house, the distribution of authorization cards or Garcia's presence at the UFW hall occurred during this time frame either. And even if it had, there is no testimony that Respondent's owners knew about it, infra.

However, the General Counsel did present evidence that prior to September, 1984 Pisano attended meetings in which he, on behalf of himself and others, complained about wages and working conditions. Was this sufficient to bring this activity to the

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(Footnote 9 Continued)

lending added weight to an employee's testimony. (Georgia Rug (1961) 131 NLRB 1304, 1305, fn. 2, Gifford & Hill Co., Inc. (1971) 188 NLRB 337, 344, fn. 18; National Survey Service (7th Cir. 1966) 361 F.2d 199, 206.)

level of concerted and if so, has a violation of the Act been established?

The elements in proving a section 1153(a) discharge or other discriminatory act for engaging in concerted activity are the same as in proving a section 1153(c) discharge for engaging in union activity because they are essentially identical violations tried under separate sections of the Act. Both involve employer discrimination against one or more employees based on the employees' involvement in an activity protected by section 1152 of the Act. (Lawrence Scarrone (1981) 7 ALRB No. 13, rev. den. by Ct.App., 5th Dist., October 22, 1983.) In order to establish that an employer violated section 1153(a) of the Act by discharging or otherwise discriminating against one or more employees with respect to hire, tenure, or working conditions, the General Counsel must prove by a preponderance of the evidence that the employer knew, or at least believed, that the employee(s) had engaged in protected concerted activity and discharged or otherwise discriminated against the employee(s) for that reason. (Lawrence Scarrone, id.) Once a prima facie case has been established, the burden both of producing evidence and of persuasion to show it would have reached the same decision absent the employee's protected activity shifts to the respondent. (Wright Line Inc. (1980) 251 NLRB 150 [105 LRRM 1169]; Nishi Greenhouse (1981) 7 ALRB No. 18; Royal Packing Company (1982) 8 ALRB No. 74; Zurn Industries, Inc. v. N.L.R.B. (9th Cir. 1982) 680 F.2d 683 [110 LRRM 2944] at note 9.)

To begin, it will be recalled that the General Counsel did establish the fact of meetings from time to time between management and the workers prior to September, 1984. There was a dispute as to how prominent a role Pisano played at these meetings. In fact, whether or not Pisano was the main spokesman at these meetings, it is certainly clear that he made himself known as one of the more vociferous employees. This would certainly have been the case at a small, family run business, such as Respondent's.

I credit Jorge and Pisano[10] that the latter spoke for the group in presenting various gripes to Company representatives at meetings prior to September, 1984. I therefore find that Pisano was engaged in concerted activity at some point prior to his initial discharge and that Respondent had knowledge of it.[11]

The General Counsel, having shown that Pisano was engaged in concerted activity which Respondent was aware of must now show, as part of his prima facie case, a connection between that activity and the Respondent's decision to suspend him from service pending his bringing in a valid social security card. The General Counsel failed in that task and did not establish a prima facie case.

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[10]I credit Jorge for reasons previously stated. (See fn. 9) I credit Pisano here because his being spokesman was consistent with the way he conducted himself – he was not one to sit back while others did the talking for him.

[11]Even if I were to find, as Respondent's witnesses suggest, that each and every complaint expressed by Pisano was in connection with his own personal problems and not representative of the group, I would still find, in the context of these meetings, concerted activity. Were one individual or ten

One obvious defect, in the General Counsel's case is that it is not certain when these various meetings (4 or 5 according to Jorge's testimony) to discuss work related problems occurred. Thus, we do not know if they all occurred in 1979, for example, or 1984. We do not know if they were all bunched together or separated over a period of years. As we do not know how close in time the meetings were to "he date of the adverse action taken against Pisano, we can only guess as to whether there was any connection between the two events.

Moreover, I do not: find that Jean's actions in requiring a valid social security number show any discriminatory intent on the basis that, as Pisano argues, she knew all along that Pisano was undocumented and was just looking for an excuse to get rid of him. Instead, I find that Jean put her faith in Pisano's representations to her at the time of his 1983 name and social

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(Footnote 11 Continued)

individuals to each express personal gripes at meetings whose purpose, in whole or in part, was to air such gripes, would not each speaker at such an event be engaged in concerted activity? Would this not constitute collective action as if a bargaining representative had met with Company officials to express the views of ten different grievants? In V.B. Zaninovich & Sons (1986) 12 ALRB No. 5, the Board stated:

> . . . What had begun as a personal concern on the part of Sanchez became a group concern based on the tacit understanding that the mutual aid for the aggrieved worker might also be extended to any other member of the group who wanted assistance with a job-related problem in the future. . . . (12 ALRB No. 5 at p. 5.) (See also Armstrong Nurseries, Inc. (1986) 12 ALRB No. 15.)

security number change that he was he was legal, only to be surprised, and no doubt disappointed, to learn that he had been using someone else's valid number; and in addition, worried that she had done something wrong in accepting the changes in the first place[12]. Though there was no testimony of any formal policy of Respondent's not to hire illegals, it is clear that Jean, at least, strove ultimately for that result.[13] Granted that she allowed her employees, including Pisano, over the years to change their numbers, thereby indicating that she must have been aware (if she had thought about it at all)[14] of the possibility that some of her work force, at some point, contained undocumented workers, still she allowed these changes because she felt that her actions were thereby helping those employees to

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[12]Jean testified generally in a very credible manner. She seemed genuinely surprised to have heard Pisano was using a false number after having once changed it in 1983 and concerned that this was affecting the rightful owner of that number in some way.

[13]There is no testimony that Jean was aware of apparently a number of employees who hired on with false ID'S. Both Jorge and Rodrigo, for example, testified that they kept this information from the Company. (II:11-12, 16, 23, 30-31.)

[14]while there is evidence that foreman Garcia knew that members of his crew were using false social security numbers, including Jorge, Rodrigo, and Pisano, there is no evidence that he passed this information on to Jean nor is it to be imputed to her. (George Lucas & Sons (1985) 11 ALRB No. 11; Arco Seed Company (1985) 11 ALRB No. 1.) On the contrary, at least in the case of Jorge and Rodrigo, his brothers-in-law, he would have wanted to keep this information from higher-ups at the Company. I also credit Jean that she believed Pisano when he told her he was legal at the time of his name change and presentation of the new social security number in 1983.

become part of a permanent documented work force.15

Ultimately, the General Counsel's case fails because he cannot show the required connection between the concerted activity, which owing to the lack of specifics, might have been quite minimal prior to September, 1984, and Respondent's decision to suspend him from duty until he could provide a valid social security number.[16] Though there are those who would disagree with Respondent's conduct here and feel it was harsh or unreasonable, it was not unlawful unless motivated by a desire to discourage protected union or concerted activity. "In the absence of a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." (Borin Packing Co., Inc. (1974) 208 NLRB 280; see also, Lu-Ette Farms, Inc. (1977) 3 ALRB No. 38 and Hansen Farms (1977) 3 ALRB No. 43.)

I recommend that this allegation be dismissed.

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[15]Jean testified that Jorge changed his number as he was in the process of becoming legal and that she wrote a letter for him to assist in this effort. (I:29-30.) Besides Jorge and Pisano, Rodrigo was also allowed to change his number. (II:30-31.) Jean testified that Garcia had a problem with his social security number but it was the opposite of Pisano 's — some one was unlawfully using Garcia 's valid number. (I:31-32.)

[16]I find significance in the fact that Pisano was not discharged. The fact that he was suspended giving him time to clear up his immigration status is indicative of a good faith motiviation on the part of Respondent.

VII. THE JUNE 15, 1985 WALKOUT

A. The Facts

As the mushrooms are picked, some fall over or perhaps a butt will fall back onto the bed. Rather than picking up the debris immediately/ the average worker will leave it until the actual picking was over. As it was necessary to keep the beds free from this kind of debris, a general cleanup of all the beds in the whole picking room became necessary and was usually held on one day, usually a weekend. (II: 6-9; III: 51-52.) Whether this cleanup work was mandatory or voluntary is a matter of great dispute between the parties and was the reason for the walkout on June 15.

Respondent contends that when it first commenced its operation in 1979, the general cleanup was part of a picker's job; there was no additional pay for this work. Somewhere around 1980-81, however, in response to some of the pickers' complaints, Respondent began paying them for one hour of cleaning in addition to their regular piece rate wage. Later on some of the workers wanted even more than the one additional hour of pay while others didn't want to do this kind of work at all. (II: 42.) Faced with this problem Respondent, in July of 1985,[17] decided that if any

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[17]July 15, 1985, was the date Pisano, Jose Tapia and Roberto Alaniz were reinstated following their layoff on June 17 in a dispute over whether they were required to do cleanup work if they didn't want to, infra. (I:14-15, 116.) Jean's claim that there was no correlation between the two events seems highly improbable.

worker wanted extra cleanup work, not necessarily related to his picking duties, he would inform management, on a voluntary basis, that he was available for extra work. (I: 12-13 [Jean]; *II:* 42-43 [John]; I: 113-115 [Garcia]; III: 63-64, 54-55 [Steve].) If there were too few who wanted to clean, Garcia testified that he would bring in the irrigators to do it. (I: 114-116.)

According to Jean, the general cleanup was once a week -- often on weekends —- and who did it was decided by the foreman on the basis of rotating the work among all the crew members. (I: 10-11.) She denied that workers could just leave after they had finished their picking for the day without first checking with management. (I: 15.)

Both John and Steve acknowledged worker dissatisfaction with this job prior to June, 1985. John testified workers were unhappy with their pay (II: 41-43), and Steve testified that they clearly disliked the job of cleaning and that he had to tell them that it was part of their job. (III: 53.)

In contrast to Respondent's position, Jorge, hired in 1980, denied that cleanup was part of his job when he was hired and testified that it was always voluntary work. According to Jorge, the foreman or sometimes Jean would ask if anyone wanted to stay and clean; and if workers were not interested, they would leave. Jorge also testified that between 1980-85 he himself refused to stay and work on a few occasions. (I: 146-147; II: 8.)

In addition, four other worker witnesses supported the claim that Respondent's cleanup work was voluntary and that in the past workers not wanting to participate could just leave, Pisano (II: 100), Tapia (II: 84), Alaniz[18] (III: 28-29) and Rodrigo (II: 24.) Of these, the latter two are still employed by Respondent.

The three charging parties — Pisano, Jose Tapia, and Roberto Alaniz —- all basically told the same story as to what transpired on June 15. Typical was the testimony of Pisano. Pisano testified that shortly before the picking ended for the day, foreman Garcia made the statement, "I want you to help me do the cleaning." (III:9.) Some of the workers declined to work that day, and Garcia left only to return stating that "the boss" wanted the workers to stay, and he didn't care what reasons anybody had for not working. It was at that point that all three of the Charging Parties agreed that they would not be forced to stay as it was not their obligation to do so and besides, each had already made other individual plans. Later, after work had finished, John ordered them to do the cleanup. They protested that such work was supposed to be voluntary; John said it was part of the job. The three Charging Parties then left the work site, basically

[18]Alaniz testified that usually there were enough workers who volunteered to do the work but that if there weren't, part timers were used. Alaniz was not aware of any change of policy since June of 1985. (III:30-31.)

together. (II: 100; III: 9-10 (Pisano); III: 28-29, 33-35 (Alaniz); II: 83-84, 86, 88-90 (Tapia).)

John and Garcia testified that Charging Parties told him that they didn't want to do the cleanup or didn't feel like doing it and left. John testified that he had to instruct them that this was a mandatory part of their jobs. Garcia testified that they just left without checking with him and that this was the first time anything like this had ever happened. (I: 113-114.)

Pisano testified that on the following Monday, June 17, Jean told him that he was no longer an employee and that John and Garcia told him they all had been fired.[19] (II: 103.)

All three Charging Parties were reinstated on July 15, 1985, approximately one month later. Jean testified that the owners decided to do this even though they (she included) did not believe they had done anything wrong at the urging of ALRB Board agents who told her that the workers were entitled to a one-time work stoppage. (I: 40-41.)

B. Analysis and Conclusions of Law

This case is different (though not unusual) in the sense that here the workers were not engaged in a walkout to obtain for themselves greater pay or better working conditions but rather, at least from their standpoint, the enforcement of a working

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19Jean testified that they were not fired when they walked off their jobs but were replaced. (I:6-7.) I put little credence in this view. First, Respondent offered no evidence — names of replacements, payroll records — to support this naked assertion. And second, the ALRB has said that in order to determine whether there was a discharge, the test should be whether the alleged

condition they thought they already had.[20] Regardless of what Respondent thought it had established as a mandatory requirement, it is apparent from the quantity of credible testimony otherwise that it had failed to communicate precisely what it required of its workers in this area. No written directives were introduced, for example, despite the fact that over the years, according to Respondent's witnesses, the requirements were changed more than once. What more than likely happened here, assuming arguendo that there was always a mandatory work policy in effect, was that the foreman failed to make clear what that policy was in the strong

(Footnote 19 Continued)

discriminatee(s) reasonably believed he/she had been discharged based upon the company representatives' words and actions and in addition, whether said words and actions had the intended effect of discharging said discriminatee(s) . (Abatti Farms, Inc., et al. (1983) 9 ALRB No. 70, citing Ridqeway Trucking Company (1979) 243 NLRB 1048 [101 LRRM 1561], aff'd (5th Cir. 1980) 622 F.2d 1222 [105 LRRM 2152], and N.L.R.B. v. Hilton Mobile Homes (8th Cir. 1967) 387 F.2d 7, 9 [67 LRRM 2140].) As the Eight Circuit stated in N.L.R.B. v. Trumball Asphalt Company of Delaware (8th Cir. 1964) 327 F.2d 841 at 843 [55 LRRM 2435 at 2436], cited in Ridqeway, supra; " . . . discharge does not depend on the use of formal words of firing . . . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure has been terminated." Here, I credit Pisano that he was told they were discharged. In addition, Respondent did not treat Charging Parties as economic strikers entitled to reinstatement upon the departure of replacements. (See N.L.R.B. v. Mackay Radio (1939) 17 NLRB 974.) The only reason Charging Parties received their jobs back was because of the intervention of ALRB Board agents. To this day Respondent regards its conduct — meaning its decision to discharge - as proper.

[20]As any labor arbitrator will tell you, it is not unusual for employees and management to disagree as to what a company's past practice actually is .

and forceful way envisioned by the owners.[21] Instead, Garcia no doubt allowed individuals from time to time to avoid the duty by presenting personal excuses; evidently the exception soon became the rule. This was confirmed by Jean who testified that perhaps the Company had been too lenient in excusing work. (I: 15.) In addition, not all the picking crew was needed for cleanup so a worker could easily gain the impression that he could work this job or not as he pleased.

In any event, it is clear that this particular duty was immensely disliked by the workers. First they demanded extra pay for it, then wanted more and finally received-shortly after Charging Parties' termination — permission to avoid the work entirely, if desired, the very benefit which Charging Parties had maintained the work force already had and the pursuit of which had led to their termination.[22]

Thus, at the time of the walkout, considerable confusion and unhappiness abounded with respect to this working condition which then resulted in the workers' leaving their job sites

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[21]For example, Tapia testified that often no one even bothered to ask him to do cleanup because as soon as the picking stopped, he was off. On the other hand, sometimes he did the picking as a favor though he felt he was under no obligation to do so. (II:86.)

[22]I note that almost immediately following the reinstatement of the Charging Parties Respondent, according to its witnesses, apparently acknowledging the complaints of its workers, changed its rules and permitted cleanup on a voluntary basis.

in protest of their being ordered to do something they felt they had no obligation to do.

I conclude that the Charging Parties were engaged in protected concerted activity concerning the cleanup assignment which was a matter of mutual concern to all the members of the picking crew. It is well settled by the National Labor Relations Board that to discharge an employee for engaging in such concerted activities which are protected under Section 7 of the National Labor Relations Act is an unfair labor practice. (N.L.R.B. v. Washington Aluminum Co. (1962) 370 U.S. 9, 8 L.Ed2d 298, 82 S.Ct. 1099 [50 LRRM 2235]; N.L.R.B. v. Erie Resistor Corp., et al. (1963) 373 U.S. 221; Shelley & Anderson Furniture Mfg. Co., Inc. v. N.L.R.B. (9th Cir. 1974) 497 F.2d 1200 [86 LRRM 2619].) Under the ALRA, it is likewise a violation (of section 1153(a)) to suspend or otherwise discriminate against employees for walking off their jobs to protest working conditions. (Lawrence Scarrone, supra (1981) 7 ALRB No. 13, rev. den. by Ct.App., 5th Dist., October 22, 1983; Pappas and Company (1979) 5 ALRB No. 52; Anton Caratan S Sons (1982) 8 ALRB No. 83, citing NLRB v. Washington Aluminum Co., supra.

Protests over overtime work – thought by the employees to be voluntary – were held to be protected concerted activity. (Jasta Manufacturing Company, Inc. (1979) 246 NLRB 48; The Dow Chemical Company (1965) 152 NLRB 1150.)

For all the foregoing reasons, I recommend that Respondent be found to have violated section 1153(a) of the Act.

VIII. THE NOVEMBER 26, 1985 INCIDENT

On November 26, Pisano came to work despite being called at home by his foreman, Garcia, and told not to come in. On that day he checked the picking rooms, decided that there were sufficient mushrooms for him to work on, and proceeded to pick. However, he was not ordered to leave the premises. After he finished picking, he went home. (I: 116-119; II: 44, 98-99.) Pisano acknowledged that John was concerned that he had not followed his foreman's directive, had shown up for work and had in effect, made his own working schedule. According to Pisano, John told him that the next time he was told that there was no work yet showed up anyway, he would be fired.[23] (III: 24.) John testified that he told Pisano the following morning that if anything like this happened again, he would be discharged. (II: 46-47.) (G.C. 4.)[24]

IX. THE JANUARY 5, 1986 INCIDENT

The mushroom pickers pick the mushrooms from their beds, cutting away the stems and butts, and placing the mushrooms into a basket which rests on a picking tray holding several other baskets. Each basket is plastic and holds around 2i pounds. When the basket is full, it is placed on a six-tier cart where the

[23]Despite the fact that Pisano was in touch with Board agents during this time, no ALRB charge was filed specifically regarding this incident or the warning.

[24]There is a disagreement over whether the written disciplinary notice of this event was ever given to Pisano by Company personnel. Joan Grellmann Evans, the payroll clerk, testified *3he* prepared the notice herself while Pisano waited until she finished

baskets sit on top of each layer. Normally, there are 16 baskets on a cart but more if stacked on top of each other. When the cart is full, it is wheeled out of the picking room into the cooler. Steve testified, and there is no evidence to the contrary, that it was understood that in the event of the foreman's absence, the individual pickers were to get the cart, load it, and take it to the cooler. Otherwise, if the foreman were present, he would be the one to take the cart to the cooler. (III: 55-56, 67; II: 33.)

Steve testified that on January 5, he observed a full cart of mushrooms soaked in a steady rain which he later determined was the responsibility of Pisano. As water lowered the quality and price of the commodity and in this case had spoiled the mushrooms, he immediately pushed the mushrooms into the cooler and also, without success, tried to find Pisano. Either that day or the next he informed Richard, Jean, and John about the event. (III: 57-60, 70-72, 16-17.) Steve testified that he had never before seen a situation where carts had been left

(Footnote 24 Continued)

writing it out and then gave it to him on either November 26 or 27. Rachel Figueroa, the translator, recalled reading the notice to Pisano on November 27. (III:83-84, 94, 101; I:45-46.) According to Pisano, his first receipt of the disciplinary notice was when Board agent Jorge Vargas gave it to him after he was fired on January 17, 1986. (II:99-100; III:11-13.) I do not believe it is necessary to resolve this dispute as Pisano freely admits that the warning of future discharge contained in the notice was verbally conveyed to him by John following the incident.

outside for a period of time as occurred here.[25] (Hi: 69.) A disciplinary notice followed. (G.C. 8.)

For his part, Pisano admitted that he had left the cart in the rain rather than hauling it a distance of from 150-200 feet to the cooler because he was trying to make it easier on himself and then apparently forgot it was still out there. Though he claimed that he had left carts outside before, there was no evidence that on any of these occasions they were left out in the rain. In any event, Pisano testified that in leaving the cart in the rain, he did not have any bad intentions. (III: 17, 103-104.) Pisano also acknowledged receipt of the disciplinary notice on January 8, 1986.[26] (II: 105; G.C. 8,)

X. THE JANUARY 17, 1986 DISCHARGE

A. The Facts

Garcia testified that whenever workers were needed, he would advise his boss as to the number and individuals and would then receive approval. When there was lots of work, all the workers worked. However, when there was less work, Garcia would give some workers the day off. Garcia testified that he decided who worked and who didn't based upon the time cards, i.e., who had

[25]also testified that no one had ever left his cart outside in the rain before. (I:119.)

[26]Jean claims that Pisano also received a copy of another disciplinary notice at this time as well, G.C. 5.

already had more days off, and also after consultation with his boss. Garcia acknowledged that there were complaints about the rotation but testified it was not often. (I: 121-125.)

On Friday, January 17, 1986, Garcia testified that the work day had ended, and all the workers had finished their jobs when he told Pisano and others with him that the following day was to be their day off. As a Manuel Villafuerte and a Salvador Gutierrez had had more days off, he told them to come in and work. Pisano complained that it was not his turn to have a day off. Garcia testified that he explained that there wasn't going to be very much to pick anyway the following day and that the workers chat had been assigned the work were just going to pick a little and do some cleaning. (I: 120, 124-125.) According to Garcia, at that point, Pisano, in a "strong, loud voice" announced that he was coming back to work and he didn't want anybody to pick the mushrooms that he had left. Garcia testified he told him, "(N)o, that's all for today." (I: 120.)

Garcia testified that nevertheless, Pisano returned and went back to work and commenced picking. Garcia next went and told Jean. (I: 128-129.)

Jean testified that Garcia informed her that Pisano was not scheduled to work the next day because he had worked the

previous short day;[27] thus, it was not his turn. Jean and John, who had now joined the discussion, then fired Pisano for insubordination [28] because in their view he had worked, punched out, was told to leave, but still went back to work. And in addition, he had been previously warned in person and in writing that any repetition of the November 26 incident would result in his discharge. (G.C. 4; I: 82-85; II: 56-57.) As stated by John:

> He had been told prior to that if he decided when he was going to work on his own that he would be fired. He was . . . after being instructed by the foreman not to go back out in the room, because he was finished for the day, he proceeded to disobey the foreman, which is Vicente's boss. (sic) (II: 57.)

On direct Pisano testified that Saturday, January 18, was really his (and Rodrigo's) turn to work and that he had even left a few mushrooms for the following day. However, Garcia announced that it was Alaniz that had been assigned the work.[29]

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[27]jean testified that he had worked on Sunday, January 5 (the day of the cart in the rain incident) and would have worked on January 7, a light day, except he asked for the day off. (1:58-61.) (It was this day off that Jean claims she never received an excuse for and which Pisano claims he supposedly agreed to submit if he received the notice of the January 5 infraction which he says had not previously been given him, infra. (G.C. 5 and 10.)

[28]Jean made it clear that Pisano was fired for insubordination and not under Respondent's warning system which required 3 warnings within 2 years before discharge could be implemented. However, warnings were not necessary if, in the opinion of management, immediate dismissal was necessitated by a serious infraction such as insubordination. (I:47-48; II:58-59.)

29carcia denied he had said anything about Alaniz.

Alaniz then stated that indeed, it was his turn, and Pisano told Garcia that it would be okay with him if Alaniz worked that Saturday also but that he and Rodrigo should, as well. Garcia then told him, "(N)o, you're not going to work." Pisano testified he then told Garcia that "since I'm not working tomorrow, I better go and finish the mushrooms I left there" and that Garcia said, "what are you picking, there's nothing there" but did not order him not to go back and pick.[30] (II: 105-107.) (See also corroborating testimony of Jorge. (I: 144-145.)

On cross-examination, Pisano admitted that he had finished picking for the 17th, that he was told he wasn't to work on the 18th but that he took it upon himself to go back out to pick and that he felt his rotation schedule was fairer than the Company's. He also testified that he was told he was fired because he should not have set his own work schedule. (III: 18-20.)

B. Analysis and Conclusions of Law

As has been stated earlier, if it can be shown that Pisano was discharged not for picking his own working hours but because of his protected concerted activities, an unfair labor practice has been committed. (Lawrence Scarrone, supra, (1981) 7 ALRB No. 13, rev. den. by Ct. App., 5th Dist., October 22, 1983. To establish such an offense, the General Counsel had to show

[30]Totally unbelievable was Rodrigo's account that when Pisano stated he was going back out to pick the mushrooms he had left, Garcia stated: "You do it if you want to, if you please." (11:28.) This testimony was neither corroborated by Pisano, who had the most

protected concerted activity, company knowledge, and a connection between the activity and the adverse action, id.

I have already concluded that Pisano was known by Company personnel to have been engaged in concerted activities in presenting his views at meetings prior to September, 1984 and in walking off the job in June, 1985. In addition, sometime after June of 1985 it became known that he had filed a charge with the Labor Commissioner.[31] Charges with the ALRB were filed on September 25, 1984 and June 18, 1985.

Furthermore, Pisano's concern over the rotation, expressed many times throughout his work history and on the date of his final discharge was a group concern, and therefore his activity in pursuit of changing the procedure must be considered to have been concerted. What had begun as a purely personal concern on the part of Pisano became a group concern based on the tacit understanding that a fairer implementation of the rotational

(Footnote 30 Continued)

interest in the matter, nor by Jorge, his brother. Besides, I don't believe that Garcia, not a particularly strong foreman and already somewhat insecure about his image in front of workers, would have made such a statement, thereby undercutting his own authority.

[31]An individual's actions are protected and concerted in nature if they relate to conditions of employment that are matters of mutual concern to all affected employees. This would include complaints made to administrative agencies dealing with labor or safety violations. (Foster Poultry Farms (1980) 6 ALRB No. 15.) I do not believe, however, that the evidence supports the view that Respondent was aware that Pisano had filed charges with CAL OSHA in December of 1985.

system, thereby allowing all employees a more equitable distribution of work opportunities, would accrue to the benefit of all the members of the **work** force. (V.B. Zaninovich & Sons, supra, 12 ALRB No. 5.) See also N.L.R.B. v. Peter Cailler Kohler Swiss Choc. Co. (2d Cir. 1942) 130 F.2d 503 [10 LRRM 852].)

I also credit Rodrigo that his brother-in-law, Garcia, made remarks to him to the effect that the Company would take adverse actions against Pisano for his concerted and ALRB activities in 1984-85. (II: 31, 23.) Though I did not believe his testimony in its entirety, I felt he was truthful here.

Finally, I note Richard's reactions upon hearing of Pisano's discharge, "is this time for good?" (I: 97), and his reference to him as "bothersome at different times." (I: 99.)

The General Counsel could not show, however, that management was aware of Union meetings at Pisano's house, that he was observed at the UFW hall,32 that he was personally involved in broadcasting radio material favorable to the UFW,[33] that he was seen by Company representatives passing out authorization

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[32]Pisano made the conlusionary statement that Garcia had seen him but offered no facts to back this assertion up. (II:114.)

[33]several witnesses testified that they knew Pisano was a radio announcer at a local station, but they didn't know anything about the station or its political orientation (I:103 [Richard]; II:63-64 [John]) or that Pisano had interviewed Chavez (1:74 [Jean]; 11:63-64 [John]; 1:132 [Garcia]). As there is no evidence that the Skillicorns spoke Spanish (they frequently used Rachel Figueroa or Jorge Gutierrez as translators in communication with workers), it is unlikely they would have understood anything even had they listened to this station.

cards in late 1984 or early 1985[34] or that Company personnel knew that he was a Union supporter.[35]

But I do conclude, based upon Pisano's extensive concerted activities, that the General Counsel did carry his burden of showing a nexus between those activities and Pisano's discharge for insubordination on January 17. Thus, a prima facie case of discriminatory discharge was made out. Once such a case has been established, i.e., once the General Counsel has made a sufficient showing to support the inference that protected conduct was a motivating factor in the employer's decision, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. If the employer fails to carry his burden in this regard, the Board is entitled to find that the conduct was improper. (Wright Line Inc., supra (1980) 251 NLRB 150 [105 LRRM 1169, 1174-75]; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626]; Nishi Greenhouse, supra (1981) 7 ALRB No. 18.

By this standard, the activist who is guilty of misconduct can still be disciplined; yet, the employer has the

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[34]Garcia testified he was observed by John and that he told John not to get nervous, but the General Counsel failed to establish more facts regarding this incident, and I am not convinced that John knew what Pisano was doing. I also am somewhat skeptical in that Jorge, who passed out cards with Pisano, was not questioned by General Counsel about this event.

[35]pisano claims that Garcia knew he was a Union supporter at some point in time prior to September, 1984 because ". . . I told him you treat us the way you want here just because we don't have

burden of showing that this employee would have been disciplined anyway, regardless of his union or concerted activity. The question now becomes whether Respondent would have taken the same action it did against another employee if that employee had not engaged in concerted activity?

I find that it would have. Basically, what happened here was that an individual employee, Vicente Pisano, decided on his own that his rotation chart was better than the Company's and that as a result, this entitled him to a form of self-help -- continued picking to finish up what he felt was his. This attitude was not unlike that for which he was previously disciplined in November and forewarned that repetitions could result in discharge. But the General Counsel argues that Pisano's conduct was not a dischargeable offense because he was not actually ordered not to return to the picking; thus, it could not have been considered insubordination.

In my view, insubordination can consist of more than just a failure to comply with a direct order. Choosing to arrange one's own working hours by returning to the picking when it was clear it

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(Footnote 35 Continued)

a Union. And that's the way — you treat us that way, too, for the same reason." (II:118.) I cannot regard this conversation, which presumably could have occurred as early as 1979 when Pisano first started working for Respondent, as proof of employer knowledge of Pisano's Union activities at the time of his discharge in January, 1986. The General Counsel has developed virtually no factual context for this conversation which makes it difficult for me to give it much credit.

was over for the day (as he did on January 17, 1986} or showing up for work and picking when he was told not to come in in the first place (as he did on November 26, 1985) are both arguably acts and attitudes of disobedience or contumacy; a direct order does not add a magical ingredient. Thus, the conduct exhibited by Pisano on January 17 in taking it upon himself to again choose his own work schedule and go back and work after it was clear that work was over for the day was in and of itself a dischargeable offense regardless of whether he had been previously warned.

In fact, he was previously warned. There is no doubt that back in late November, 1985 Pisano was verbally warned that similar misconduct -— deciding his own work schedule -— would not be tolerated and could lead to discharge. Pisano also committed other infractions and was given written warnings, e.g., G.C. 5, and 10, of possible discharge if similar acts were repeated.[36] I credit Jean that Pisano was given two written notices on January 7, 1986, his first day back to work following the cart incident, one regarding the cart (G.C. 8) and the other a warning that repeated activity would result in discharge. (G.C. 5 and 10.)[37] In addition, the contents of that notice were verbally

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[36]pisano denied receiving these precautionary warnings until the date of his discharge. I do not credit this denial. Pisano was low key, articulate, decorous, and generally honest. I believe large portions of his testimony. Yet, at times, there was a certain tendency in him when addressing Company actions to exaggerate, overreact, and show a bias. I think he had something of a chip on his shoulder. Though he was no doubt convinced he was unfairly treated by management, I do believe this attitude sometimes colored his perception of events.

[37]lt is true that Jean's testimony on this was somewhat

communicated to him. (I: 51-56; III: 102, 111.)

The General Counsel argues that Respondent's policy concerning employees who reported to work when not scheduled was inconsistently applied with a discriminatory effect on Pisano. There was an attempt to show inconsistent treatment when Pisano testified about an incident involving Jose Tapia and him in 1982.

(Footnote 37 Continued)

confusing. At first she testified that G.C. 5 was given to Pisano on the day he returned to work after the cart incident. (I:51-52.) Next, she testified that the January 8 letter (meaning either G.C. 5 or 10) was waiting in the office for a number of days for Pisano to pick up and was not in fact delivered to him until the day of his discharge though he had already had the contents of this letter verbally communicated to him. (I:54-56.) Later in the hearing, after sitting through the presentation of virtually all the evidence as Respondent's representative, Jean testified that Pisano was given a copy of G.C. 5 (without the dates corrected) and G.C. 10 on January 7 and that it was a copy of G.C. 5 (with the dates corrected) that was waiting for him to pick up on the 17th. (III:111, 114-121, 125.) But any such confusion was occasioned by the bizarre situation of the corrected dates letter and the clarification typed on the right-hand corner of the letter. Though this matter could have been handled with more efficiency, it is to be borne in mind that Respondent is a small, family run business. Though the testimony is a bit bewildering, I do credit Jean Skillicorn that Pisano was indeed given a copy of G.C. 5 and 10 around January 7. I was impressed with her certitude on this point (III:127) and overall honesty. In addition, I credit Ms. Grellmann Evans that G.C. 5 (she incorrectly referred to it as G.C. 4) was given to Pisano on January 7 before the mistake had been caught and before the supplemental paragraph had been added. (III:85-91.) Ms. Grellman Evans testified in a very believable and forthright manner. And it should be added that even if G.C. 5 and/or 10 were not given to Pisano before January 17, I have no doubt that the contents of that disciplinary notice were at least read to him prior to his January 17 discharge. This makes the General Counsel's argument that Pisano never received any January written disciplinary notices warning him of possible discharge for similar acts, even if true, somewhat meaningless.

But that example is clearly not applicable as the foreman gave both of them permission to go return to work and pick. (III: 41-42.) In Pisano's other examples, there were either no facts produced to support the claim (II: 40) or the facts that were cited are inconclusive or irrelevant. (II: 41.) The General Counsel also finds significance in the fact that once Pisano showed up for work during the November incident, he was never ordered to leave the premises; and that this contravened Company policy. Putting aside the fact this might be indicative only of a non-assertive foreman, the fact is that Pisano was clearly aware of the fact his conduct was not acceptable to the owners, as he was verbally warned about it at that time.

In short, Pisano was fired for reasons having nothing to do with his concerted activity but rather because he had once again chosen when he wanted to work.

A large part of Pisano's problems were the lack of trust between him and his foreman, Garcia. Pisano was convinced that Garcia played favorites and that on many occasions Garcia would tell him there was no work when, in fact, other workers had been called. (III: 12, 24.) This was the reason he showed up for work on Tuesday, November 26, despite being told not to. Once there, he testified he saw two other workers arrive (one of them was Jorge) and then confronted Garcia with this information. According to Pisano, Garcia responded that the owners had told him to call these two workers and that they didn't want Pisano working there on that day. (II: 98-99.)

This favoritism then was corroborated by Jorge, Garcia's brother-in-law, who testified that Garcia only picked his friends for cleanup, assuming they were interested in staying. (I: 146-147.)

Jorge also testified that the other workers agreed on January 17 that it really was Pisano's rotational turn and that Garcia was wrong to determine otherwise. (I: 144.)

Still, this did not give Pisano the right to engage in self-help on January 17. There were alternatives, and Garcia's conduct was not the equivalent of a constructive discharge. Pisano still could have appealed to the owners in an attempt to convince them that he was being unfairly treated and presented them with a copy of his own rotation schedulers[38] or he could have just gone home (as Rodrigo apparently did) and later filed an ALRB charge.

I conclude that Respondent has" met its burden of showing that the same action against Pisano would have been taken in the absence of the protected conduct and that Respondent's overriding motivation was its concern about what it considered one of its employees' "gross insubordination". (G.C. 6.) I recommend that the allegation alleging discrimination against Vicente Pisano because of Union and/or concerted activities be dismissed.

38jorge testified that because of dissatisfaction with the way Garcia was treating the workers, the owners announced that complaints could henceforth be brought directly to them. (I: 138-139.)

XI. THE REMEDY

I shall recommend that Respondent be found to have violated section 1153(a) of the Act for discharging certain of its employees for engaging in protected concerted activities.

Upon the entire record, the findings of fact and conclusions of law set forth above, I issue the following:

RECOMMENDED ORDER

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

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any of its agricultural employees because of their participation in a protected concerted work protest or other protected activities;

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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

(a) Make whole Vicente Pisano, Jose Tapia, and Roberto Alaniz for all losses of pay and other economic losses they have suffered as a result of the discrimination against them,

such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the decision in Lu-Ette Farms, Inc. (1980) 8 ALJRB No. 55.

(b) Preserve, and upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying all records relevant and necessary to a determination of the amounts of backpay and interest due to the affected employees under the terms of this Order.

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

(d) Post copies of the attached Notice in conspicuous places on its property for sixty 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.

(e) 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 between June 15, 1985 and the date the Notice is mailed.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to the assembled employees of Respondent 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 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 to compensate them for time lost at this reading and the question-and-answer period.

(g) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

DATED: June 29, 1987

MARVIN J. BRENNER
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 had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discriminating against employees for their protected concerted activity. The Board has told up 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 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 terminate or otherwise discriminate against any employee, previous employee, or applicant for employment because he or she has exercised any of the above-stated rights.

WE WILL pay Vicente Pisano, Jose Tapia, and Roberto Alaniz any money they lost because we terminated them.

Dated: SPRINGFIELD MUSHROOMS, INC.

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations. Board. One office is located at 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.