

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

VALLEY-WIDE, dba MONA, INC.,)	
)	
Respondent,)	Case No. 87-CE-7-1-EC
)	
and)	
)	
UNITED FARM WORKERS)	15 ALRB No. 16
OF AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

On February 16, 1988, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision and recommended Order in this matter. Thereafter Valley-Wide, dba Mona, Inc. (Respondent, Employer, or Mona) timely filed exceptions to the ALJ's Decision along with a supporting brief, and General Counsel filed an answering brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions, as modified herein, and to issue the attached Order.

Facts

The alleged discriminatee, Francisco Gonzalez, was hired to work for Respondent by forewoman Maria Luisa Moreno on March 16, 1987. On March 23, 1987, he was discharged by Respondent's owner, Oscar Ortega.

Prior to his employment with Respondent, Gonzalez worked

for a number of years at E. T. Wall Company, which operates under a contract with the United Farm Workers of America, AFL-CIO (UFW or Union). From 1983 to 1986 he served as president of the ranch committee at Wall, in which capacity he represented employees in negotiations and grievance meetings and assisted in the processing of grievances. In April 1985, Gonzalez obtained a year's leave of absence from E. T. Wall to work as a volunteer organizer for the Union. Due to a work-related injury, he also obtained a medical leave for an indefinite period. During this leave, Gonzalez worked as a volunteer organizer in the Coachella Valley, taking access on behalf of the Union in citrus groves and grape fields, talking to workers, obtaining authorization card signatures, and becoming acquainted with supervisory personnel.

In the course of his organizing activities, Gonzalez participated in an organizing campaign directed at the employees of Oscar Ortega, then a custom harvester. While organizing in Ortega's citrus groves, Gonzalez wore an identification badge and identified himself to several foremen, as well as to Ortega's father, Manuel Ortega, who worked as a field supervisor for his son. Gonzalez testified that he also had visual contact with Oscar Ortega while organizing in the fields.

In early 1986, Oscar Ortega was hired by E. T. Wall to administer its contract with the Union. Gonzalez stated that he was present at a grievance meeting attended by Ortega, and that he (Gonzalez) spoke at the meeting. Ortega denied seeing Gonzalez at the meeting, but admitted having contact with him in relation to grievance matters at E. T. Wall. Ortega stated that on one

occasion Gonzalez presented a grievance involving a number of E. T. Wall workers who had requested a leave of absence; Ortega had denied the leave. After some discussion the group left, but they returned fifteen minutes later with Gonzalez, who began arguing on their behalf. Ortega responded that he had already explained the situation and had nothing to talk to him about. At that point, Ortega testified, Gonzalez said that the workers would be leaving anyway, and made an obscene gesture with his finger.

Gonzalez testified that in early 1986 he engaged in two demonstrations at Ortega's offices and one at Ortega's house. The incidents involved picketing and the chanting of slogans by demonstrators. Gonzalez claimed that Ortega observed him on both occasions. Ortega knew of the picketing at his home and office and admitted being angry about it, but he denied being present or seeing Gonzalez on either occasion.

On the day of Gonzalez¹ termination, March 23, 1987, Ortega arrived at the field where Gonzalez had been working for approximately one week. According to Gonzalez, Ortega was surprised to see him and asked who had given him work. When Gonzalez said he had been hired by Moreno, Ortega went to talk to the forewoman. When Ortega returned five or ten minutes later, he told Gonzalez he was fired. Gonzalez claimed that he asked Ortega if he was being fired because he had worked for the Union, and that Ortega replied, "Yes."

Ortega testified that he recognized Gonzalez because of contact they had had the previous year when Gonzalez was involved in grievance-related matters at E. T. Wall. Ortega stated that he

told Gonzalez, "Of all the names that you called me and my father last year, and now you want me to have you here, and now you're still working for me? ... I can't have you." Ortega denied saying anything about Gonzalez' union activity when he discharged him.^{1/}

Martin Mosqueda, another employee who was working in the field on the day of Gonzalez¹ discharge, also testified. He stated that he was working nine or ten rows away from Gonzalez, but was able to hear Ortega yelling, "After what you did in the grapefruit, you come back to work? ... I want you to leave."^{2/}

ALJ Decision

The ALJ found that Respondent was aware of Gonzalez¹ activities on behalf of the UFW. The ALJ discredited Ortega's testimony that he "did not see" Gonzalez, the president of the ranch committee, at the only grievance meeting held with E. T. Wall employees during 1986. Moreover, the ALJ noted that

^{1/}Regarding the alleged name-calling incident, Ortega testified that during 1986 an E. T. Wall crew supervised by his father, Manuel Ortega, was visited by Gonzalez. On that occasion, Gonzalez allegedly advised the crew that they did not have to fill out certain information cards which Ortega had requested from the employees, because they had already furnished the information to E. T. Wall. Ortega stated that he needed the information because state law required him to maintain it. He was ultimately able to obtain the information from the employees by withholding 25 percent of their wages until they complied, a procedure which, he stated, was authorized by state law. Ortega was told by his father that on that occasion, when Gonzalez was addressing the workers, he referred to the Ortegas as "importamadristas" (Ortega translated the term to mean, "I don't give a hell, I don't give a s..t, or . . . I don't care, per se") and a bunch of thieves.

^{2/}Mosqueda testified that he did not know Gonzalez prior to working at Mona and had become acquainted with him only a few days before the hearing.

Ortega admitted recognizing Gonzalez from encounters during grievance proceedings at E. T. Wall the previous year, and that Ortega's father, Manuel, admitted knowing that Gonzalez was a union worker.

The ALJ credited the testimony of Gonzalez' co-worker, Martin Mosqueda, who stated that he overheard part of the conversation between Gonzalez and Oscar Ortega in the field when Ortega discharged the discriminatee. Finding Mosqueda to be a totally disinterested witness, the ALJ credited his testimony that Ortega said to Gonzalez, "After what you did last year in the grapefruit you come back to work for me? I want you to leave." The ALJ construed Ortega's comment as meaning that he was disturbed about Gonzalez' union activities on behalf of E. T. Wall employees, and that Ortega would not employ such a vociferous union representative.

The ALJ did not credit Gonzalez' version of the discharge incident. Gonzalez claimed that Ortega admitted that he was firing Gonzalez because of his work for the Union, but the ALJ did not believe that Ortega, given his level of experience with union matters, would volunteer that he was violating the law.

The ALJ also discredited Ortega's assertion that he told Gonzalez he was being discharged because "of all the names [he] called me and my father last year." The ALJ did not credit the testimony of Manuel Ortega that the alleged incident involving Gonzalez¹ insults of the Ortegas did, in fact, occur. Manuel Ortega was a confused witness, the ALJ found, and his testimony was uncorroborated despite the presence of numerous witnesses

during the alleged incident. Moreover, the witness was unable to respond adequately without the benefit of leading questions from Respondent's counsel, could not remember the substance of his testimony minutes after it was initially stated, and provided no foundation or context for Gonzalez¹ alleged remarks.

Thus, the ALJ found that Respondent's defense, that Gonzalez was discharged because he had insulted the Ortegas the previous year, was a pretext. He concluded that Respondent had unlawfully discharged Gonzalez because of his connection with the UFW and his efforts for the Union on behalf of E. T. Wall workers .^{3/}

Analysis and Conclusions

Although the Employer has asserted that Gonzalez was only a union representative and not an employee during his leave of absence from E. T. Wall (April 1985 to April 1986), the ALJ noted that under certain circumstances an individual on leave of absence may well be considered as having retained his employee status. We find that the evidence is inconclusive regarding Gonzalez' status as an employee or non-employee during his leave of absence from E. T. Wall. Gonzalez obtained an indefinite medical leave, but was also granted a leave to conduct union business, with the understanding that he would return to work without a loss of

^{3/}The ALJ noted that even if he were to credit Manuel Ortega's testimony that Gonzalez called the Ortegas "importadristas" and thieves, the alleged remarks were made while Gonzalez was engaged in protected concerted activity (i.e., during the course of a union meeting with E. T. Wall workers) and were not so outrageous as to deny him the protections of the Agricultural Labor Relations Act (ALRA or Act). (Citing V. B. Zaninovich & Sons (1986) 12 ALRB No. 5.)

seniority. The evidence does not indicate whether E. T. Wall continued to carry Gonzalez on its payroll records as an employee during his leave of absence. However, as our analysis will make clear, the protected nature of Gonzalez¹ union-related activities at E. T. Wall does not depend upon his employment status at that time.

We agree with the ALJ's finding that the testimony of Manuel Ortega, Oscar's father, was confused. When asked by Respondent's counsel whether Gonzalez had ever said anything derogatory about him or his son, he answered, "He said importamadristas, and thieves." Later, on cross-examination, when asked whether Gonzalez ever called him names, Ortega replied, "No, that I know of." Shortly thereafter, Ortega stated that he could not remember what the bad words were, but could only remember that Gonzalez was angry.

However, we find that even if the name-calling incident occurred, it was part of Gonzalez' protected concerted activity in discussing work procedures with E. T. Wall employees, and thus could not provide a legitimate reason for Gonzalez¹ discharge by Oscar Ortega. Even if Gonzalez were considered an employee of E. T. Wall at the time of the incident, the circumstances are distinguishable from those in David Freedman & Co., Inc. (1989) 15 ALRB No. 9 and the line of cases cited therein. In Freedman, an employee repeatedly directed abusive profanity towards his supervisor, thus engaging in insubordinate conduct that tended to undermine his employer's legitimate need to maintain order and respect among employees. Here, however, Gonzalez' epithets were

not directed at the Employer but were merely overheard by him, and thus cannot be considered insubordinate.

Concerning Gonzalez' alleged use of derogatory terms to describe the Ortegas, we note that a line of National Labor Relations Board (NLRB) cases holds that an employee's public disparagement of management officials or the employer's business may exhibit such an excessive degree of disloyalty as to remove the employee's conduct from the protection of the Act. (NLRB v. Electrical Workers Local 1229 (1953) 346 U.S. 64 [33 LRRM 2183].) We find, however, that Gonzalez¹ alleged epithets were protected even if his status was that of an employee, since his conduct related to employee interests and his remarks about the Ortegas were not so egregious or harmful as to put his conduct outside the realm of protected activity. (Southern California Edison Co. (1985) 274 NLRB 1121 [119 LRRM 1051].)

We also find that the alleged name-calling incident would be entitled to statutory protection if Gonzalez were considered a non-employee at the time of the incident. National Labor Relations Act (NLRA) precedent holds that an employer cannot lawfully refuse to hire an ex-union official on the basis of his pre-employment activities on behalf of the union. (Peoples Cartage, Inc. (1977) 229 NLRB 1223 [95 LRRM 1356]. See, also, Boro Burglar Alarm Company (1978) 234 NLRB 389 [97 LRRM 1269] and The Firestone Tire & Rubber Company (1975) 220 NLRB 723 [90 LRRM

1443].)^{4/} Under the same reasoning, Ortega would not have been justified in terminating Gonzalez from Mona on the basis of his pre-employment protected activities at E. T. Wall, even if Gonzalez was not an employee of E. T. Wall at the time he engaged in those activities.

We note that the specific act of urging E. T. Wall employees to refrain from providing legally required information may not have been a form of protected activity. An employer does have the right to maintain order in the conduct of its business. (United States Postal Service (1983) 268 NLRB 274 [114 LRRM 1281].) However, the evidence herein indicates that Gonzalez' activity regarding the information cards did not play a significant role in the totality of conduct which caused Ortega to discharge Gonzalez. Work was not going on at the time Gonzalez spoke to the employees, and thus there was no disruption of operations which might have served as an embarrassment to Oscar Ortega as administrator of the E. T. Wall contract. Ortega apparently was not very concerned about Gonzalez¹ activity at the time, since he took no action to end Gonzalez' conversation with the employees. Moreover, as Ortega testified, he was easily able to get the employees to comply with the information request by temporarily withholding a portion of their wages.

^{4/}The recent case of H. B. Zachry Company (4th Cir. Sept. 20, 1989) — F.2d — [Dock. No. 88-2615(D)] is distinguishable; in Zachry the court found that the alleged discriminatee was not a bona fide applicant for employment since he would have continued to be a full-time, paid union organizer while working for the employer. No evidence herein suggests that Gonzalez was a paid union organizer while working at Mona.

We affirm the ALJ's finding that Oscar Ortega was aware not only of the alleged name-calling incident but of other union activity in which Gonzalez engaged. Ortega admitted recognizing Gonzalez from encounters they had concerning grievance matters at E. T. Wall. Ortega must also be deemed to have been aware of Gonzalez' organizing activities in citrus groves harvested by Ortega, during which activities Gonzalez wore an identification badge and informed the foremen of his presence. Moreover, Manuel Ortega, who worked as a supervisor for his son, admitted knowing that Gonzalez was a union worker.

Having found that Oscar Ortega was aware of Gonzalez¹ union activities, we now consider Respondent's motivation for discharging Gonzalez. We affirm the ALJ's crediting of the testimony of Martin Mosqueda, who stated that Ortega said he could not have Gonzalez working for him "after what you did in the grapefruit." From Mosqueda's testimony, as well as from Ortega's testimony that he fired Gonzalez for the name-calling and "[b]ecause of the way he treated me and he treated my father," we infer that Ortega discharged Gonzalez for his union activities at E. T. Wall and because of a concern that Gonzalez would engage in similar activities at Mona.

Respondent argues that some of Gonzalez¹ activities at E. T. Wall were illegal and thus should not be used to protect him from discharge by Ortega. For example, Respondent asserts that the picketing of Oscar Ortega's residence was unlawful, although it cites no case authority for its contention. We note also that Respondent apparently did not file an unfair labor practice charge

or seek an injunction to halt the picketing. Further, since Ortega denied any knowledge of Gonzalez' presence during the picketing, it is clear that Gonzalez¹ involvement in the residential picketing could not have provided any of the Employer's motivation for discharging Gonzalez. Therefore, we find it unnecessary to decide whether the picketing of Ortega's residence constituted protected activity.

Respondent also argues that Gonzalez' conduct in discussing the information cards with E. T. Wall employees violated a provision of the collective bargaining agreement for resolution of disputes through arbitration. We agree with the ALJ, however, that the existence of a grievance procedure does not preclude employees or their representatives from meeting to discuss working conditions or issues that might eventually ripen into formal grievances. Therefore, the Employer has not shown that we should regard Gonzalez¹ discussion with the employees as being outside the protection of the Act.

Since Respondent has failed to demonstrate that any of Gonzalez¹ cited union-related activities at E. T. Wall were unprotected, none of those activities can furnish a legitimate reason for Gonzalez¹ discharge from Mona. We conclude that Respondent unlawfully discharged Gonzalez because of his pre-employment protected concerted activities at E. T. Wall.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent Valley-Wide, dba Mona, Inc., its officers, agents,

successors, and assigns shall:

1. Cease and desist from:

(a) Discharging any agricultural employee because he or she has engaged in union activity protected by section 1152 of the Agricultural Labor Relations Act (ALRA or Act).

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

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

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

(b) Make whole Francisco Gonzalez for all losses of pay and other economic losses he suffered as a result of the discrimination against him, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in

E. W. Merrit Farms (1988) 14 ALRB No. 5.

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

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from March 23, 1987 to March 23, 1988.

(f) 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.

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

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps

Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved. DATED: October 27, 1989

GREGORY L. GONOT, Acting Chairman^{5/}

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, 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. There is currently one vacancy on the Board.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centre Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO (UFW or Union), the General Counsel of the ALRB issued a complaint which alleged that we, Valley-Wide, dba Mona, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging Francisco Gonzalez for exercising his rights under the Agricultural Labor Relations Act. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge any employee for engaging in union activity.

WE WILL offer reinstatement and reimburse Francisco Gonzalez for losses of pay and other economic losses he has suffered as a result of our discriminating against him, plus interest.

DATED:

VALLEY-WIDE, dba MONA, 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 319 Waterman Avenue, El Centre, California 92243. The telephone number is (619) 353-2130.

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

Valley-Wide, dba Mona, Inc.
(UFW)

15 ALRB No. 16
Case No. 87-CE-7-1-EC

Background

The complaint alleged that Francisco Gonzalez, who was hired by the Employer's forewoman Maria Luisa Moreno on March 16, 1987, was unlawfully discharged by the Employer's owner, Oscar Ortega, on March 23, 1987, because of Gonzalez' prior union activities at E. T. Wall Company. The complaint also alleged that on one occasion when Gonzalez asked Moreno to give work to some friends of his, Moreno unlawfully questioned him about their union affiliations and told him the boss did not want anybody who was pro-union.

ALJ Decision

The ALJ discredited Gonzalez¹ account of Moreno's alleged statements concerning his friends' union affiliations. He therefore recommended dismissal of that portion of the complaint. No party filed an exception to the recommended dismissal.

The ALJ found that Oscar Ortega was aware of Gonzalez' extensive union activities from 1985 to 1986, when Gonzalez was on a year's leave of absence from E. T. Wall to work as a volunteer union organizer. During his leave of absence, Gonzalez participated in an organizing campaign directed at employees working in citrus groves which were managed by Ortega as a custom harvester. In early 1986, Ortega was hired by E. T. Wall to administer its contract with the UFW. Ortega admitted having contact with Gonzalez in relation to grievance matters at Wall.

On the day of Gonzalez' discharge, Ortega came to the field and was surprised to see Gonzalez working. Ortega went to speak to the forewoman, returned five or ten minutes later and fired Gonzalez. The ALJ discredited Gonzalez' claim that Ortega admitted firing him because of his work for the Union. However, the ALJ also did not credit the testimony of Ortega's father that on one occasion during the prior year, when Gonzalez was discussing work procedures with E. T. Wall workers, Gonzalez told the employees that the Ortegases were "importamadristas" and thieves. Since he did not credit the testimony of Ortega's father that this incident had in fact occurred, the ALJ also discredited Oscar Ortega's claim that he told Gonzalez he was discharged for insulting Ortega and his father the previous year.

The ALJ credited the testimony of Gonzalez' co-worker, Martin Mosqueda, who stated that when Ortega discharged Gonzalez, he told him, "After what you did last year in the grapefruit you come back to work for me? I want you to leave." The ALJ construed Ortega's comment as meaning that he was disturbed about Gonzalez' union activities on behalf of E. T. Wall employees and that Ortega would

not employ such a vociferous union representative. The ALJ found that the Employer's defense, that Gonzalez was discharged for insulting the Ortegas the previous year, was a pretext. He concluded that the Employer had unlawfully discharged Gonzalez because of his connection with the UFW and his efforts for the Union on behalf of E. T. Wall workers.

Board Decision

The Board found that the evidence was inconclusive regarding Gonzalez¹ status as an employee or non-employee during his leave of absence from E. T. Wall. The Board concluded, however, that Gonzalez¹ union-related activities at E. T. Wall constituted protected activity regardless of his employment status at the time. The Board agreed with the ALJ's finding that the testimony of Manuel Ortega regarding Gonzalez¹ alleged insults was confusing. The Board concluded, however, that even if the name-calling incident occurred, it was part of Gonzalez' protected concerted activity in discussing work procedures with employees, and thus could not provide a legitimate reason for Gonzalez' discharge. The Board noted that Gonzalez¹ specific act of urging employees to refrain from providing legally required information may not have been protected activity, but found that the evidence indicated that the specific act was not a significant part of the totality of Gonzalez' protected conduct which caused the employer to discharge the discriminatee.

The Board affirmed the ALJ's crediting of the testimony of Mosqueda, who stated that Ortega said he could not have Gonzalez working for him "after what you did last year in the grapefruit," and affirmed the ALJ's construction of Ortega's comment as meaning that he was disturbed about Gonzalez' union activities at E. T. Wall and was concerned that Gonzalez would engage in similar activities at Mona. The Board determined that the Employer had failed to show that any of Gonzalez¹ union-related activities at Wall were unprotected, and therefore found that none of them could furnish a legitimate reason for Gonzalez' discharge from Mona. The Board concluded that the Employer had unlawfully discharged Gonzalez because of his pre-employment protected concerted activities at E. T. Wall.

* * *

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

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
)
VALLEY-WIDE, dba MONA, INC.,)
)
Respondent,)
)
and)
)
UNITED FARM WORKERS OF)
AMERICA, AFL-CIO,)
)
Charging Party.)

Case No. 87-CE-7-1-EC

Appearances:

Leonard G. Strom, Esq., for
the General Counsel

David E. Smith, Esq. for the
Respondent

David Serena, for the United
Farm Workers of America, AFL-
CIO

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Statement of the Case

On March 15, 1987, the United Farm Workers of America, AFL-CIO (referred to hereafter as "the Union") filed a charge in case number 87-CE-7-1-EC alleging that Mona, Inc. (hereafter variously referred to as the "company," the "Employer," or the "Respondent") violated sections 1153(a) and (c) of the Act by discharging Francisco Gonzalez. On July 3, 1987, the General Counsel for the Agricultural Labor Relations Board caused to be issued a complaint which incorporated the substance of this charge. Copies of the charge, the Complaint and Notice of Hearing were duly served on Respondent. It timely filed an Answer which, in essence, denied the commission of any unfair labor practices.

On September 22 and 23, a hearing in this matter was conducted before me in Indio, California. All parties were afforded the opportunity to present testimonial and documentary evidence, to examine and cross-examine witness, and to submit argument and post-hearing briefs. Based upon the entire record in the case, including my observations of the demeanor of each witness as he/she testified, and having read the briefs filed following the close of the hearing, I make the following:

II. Findings of Fact

A. Jurisdiction

1. Respondent is an agricultural employer doing business within the State of California.

2. Charging Party is and has been, at all times material, a labor organization within the meaning of

section 1140.4(c) of the Act.¹

B. The Facts Presented

The alleged discriminatee, Francisco Gonzalez, was hired by forewoman Maria Luisa Moreno to work for the Respondent on March 16, 1987. He was employed by it until March 23, 1987, when he was terminated by its owner, Oscar Ortega. (I: 64-72)²

In the years preceding his employment with Respondent, Gonzalez worked in the Coachella Valley for E. T. Wall Company, which operates under a contract with the Union. Gonzalez was elected president of the ranch committee by Wall employees, and served in that capacity from 1983 until 1986. (I: 50.) As ranch committee president, Gonzalez¹ duties included representing those workers in negotiations and grievance meetings, and assisting in the processing of grievances. (I: 7.)

In the early part of 1985, Gonzalez obtained a leave a absence from Wall in order to conduct Union business. Due to a work-related injury, he also obtained a medical leave for an indefinite period. (Resp. Exh. 1; G.C. Exh. 3.) During the course of his leave(s), Gonzalez worked as a volunteer organizer for the Union for approximately one year, from April, 1985 to April, 1986, at which time he resumed employment with E. T. Wall.

¹The jurisdictional facts were admitted by Respondent in its Answer

²References to the transcript will be made by citing the volume in Roman numerals, followed by a page number or numbers.

Gonzalez remained active as president of the ranch committee during this period as well. (I: 50.) While an organizer, Gonzalez worked under the supervision of David Serena, the field office director for the Union in the Coachella Valley.³ As a volunteer, Gonzalez organized in the citrus and grapes, and assisted Serena in administering contracts, including that with E. T. Wall. (I: 8.)

Serena noted that among the duties performed by volunteer organizers are taking access, talking to workers, obtaining authorization cards, and also becoming acquainted with the supervisory personnel at a given ranch so that these supervisors would learn the identities of the various Union representatives who might be on the property. Gonzalez performed these tasks in conjunction with an organizing campaign directed at the workers of Oscar Ortega, Custom Harvester,⁴ and with Serena, took access to his crews. (I: 11.)

Serena and Gonzalez took access to the Ortega crews in April and May 1985. While campaigning, Serena and Gonzalez wore

³In that capacity, Serena is responsible for contract administration and grievance processing in the area, as well as the supervision of Union staff and volunteer organizers, such as Gonzalez. (I: 5.)

⁴In addition to being the owner of the Respondent, Oscar Ortega is engaged generally in the business of farming grapes and citrus in the Coachella Valley. He also supplies work forces to various other growers, either in the capacity of a custom harvester or a labor contractor. (II: 83.)

identification badges bearing their names. Serena asserted that they identified themselves personally to a foreman named Avila, and a foreman named Felipe, at whose house several workers lived. (I: 14; 74.)⁵

While Serena testified that Oscar Ortega was not present during the campaign (I: 15), Gonzalez stated that he had made visual contact with him during the organizational effort, and that he, Gonzalez, identified himself to Oscar's father Manuel. (I: 55 & 56.)⁶

In early 1986, Oscar Ortega was hired by E. T. Wall to administer its contract with the Union. Ortega also supplied the foremen to supervise the E. T. Wall crews, and paid the workers with checks that bore his name as well as that of E. T. Wall. The Union protested Ortega's assumption of these duties, and filed a number of grievances on this matter and others involving working conditions. Serena stated that he and Gonzalez met with Manuel Ortega to discuss problems occurring in the fields at E. T. Wall, and also met with Oscar on two or three occasions to discuss E. T. Wall grievances. In addition, the Union picketed the offices of Oscar Ortega and his residence to protest his retention by E. T. Wall.

⁵Serena and Gonzalez also campaigned at the house itself. (I: 73.)

⁶The Union was unsuccessful in its efforts to obtain an election among the Ortega workers. (I: 15.) In fact, with the exception of one held at a nursery, there have been no Union elections in the Coachella Valley in the past five years. (I: 36.)

Serena specifically recalled two grievance meetings, attended by himself, Gonzalez, members of the ranch committee, and Oscar Ortega. One such meeting was held in the early part of 1986, and the other about a month and a half or two months later. Both were conducted at the Ortega offices. (I: 19.)

Serena stated that about thirty or so grievances had been filed. They involved what Serena felt were violations of the contract, including failure to properly record work hours, problems with equipment, and failure to make payments to the medical plan. Gonzalez spoke at the first grievance meeting referred to by Serena, as well as the second one, which basically involved the same issues, since, according to Serena, none of the grievances had been resolved. (I: 20 & 21.)

Contrary to Serena¹'s assertions, Gonzalez stated that he was present at only one grievance meeting attended by Oscar Ortega. Also present were Serena, one of Ortega's assistants, and some workers from E. T. Wall. Gonzalez stated that he spoke at this meeting.⁷ (I: 58; II: 31.)

Oscar Ortega denied attending any grievance meetings at which Gonzalez was present. (II: 93.) Ortega maintained that during the 1985-86 season, about thirteen to sixteen grievances

⁷Serena was uncertain whether he kept an attendance record of the grievance meetings he held with Ortega on the E. T. Wall matters. (I: 37-40.)

were filed regarding the workers at E. T. Wall. He met once with Serena and a group of workers to discuss them, but "didn't see" Gonzalez there. (II: 109.) I am somewhat skeptical about this denial, since it would appear unusual that the president of the ranch committee failed to attend the only grievance meeting which, according to Ortega, was held that year.

Oscar Ortega admitted that he did have contact with Gonzalez in that period in the course of two grievance-related matters, however. During the first of these, a number of workers under the E. T. Wall contract had requested a leave of absence, which Ortega denied. The group left. About fifteen minutes later, they returned with Gonzalez. Gonzalez began arguing on their behalf. Ortega responded by telling him "Look, I understand Spanish, I talk Spanish," that he had already explained the situation to the workers, and had nothing to talk to him about. Gonzalez, according to Ortega, then stated that the workers would be leaving anyway, and made an obscene gesture with his finger.

The only other contact that Ortega remembered having with Gonzalez was when the worker brought a grievance to him. Ortega told him that the grievance was no good, since it was not signed. Gonzalez returned later with the grievance signed, and Ortega accepted it.⁸ (II: 92, 93 & 100.)

As noted, according to Serena, during the early part of 1986 there were two demonstrations at the Ortega offices, and one

⁸Gonzalez testified that after he went back to work at E. T. Wall in 1986, as ranch president, he delivered some grievances to

at his home. Gonzalez organized the picketing at the Ortega residence, which Serena placed in late January or early February. In addition to picketing, the demonstrators chanted slogans, such as "Long live the Union," and "Down with Oscar Ortega." Serena claimed that as the picketing of the Ortega residence was concluding, he saw a car drive up. Serena believed that it was Oscar Ortega who was driving. Serena also stated that he saw one of Oscar's sons at the residence, who called the demonstrators names. (I: 22-25.)

Gonzalez testified that he picketed the offices of Oscar Ortega on two occasions. The first of these was in January of 1986. Gonzalez claimed that Ortega was present on this occasion, and that he had eye contact with him.

Gonzalez further stated that he picketed Ortega¹'s house twice. Gonzalez stated that he was seen by Ortega during the first picketing incident, as Ortega went around the line and entered his house. (I: 60-62.) The parties stipulated that if witnesses Juan and Angel Lopez were called to testify, they would state that they saw Oscar Ortega at his residence while it was being picketed in January of 1986. (II: 134.)

Ortega, "and he would throw them back to me." (II: 31 & 32.) Gonzalez later added that he presented grievances to Ortega "several times" before and after he returned to E. T. Wall. On one occasion, Gonzalez testified, Ortega explained that he would not accept the grievances because they were written in Spanish. Each time Gonzalez presented grievances, he stated, he made it clear that he was doing so as president of the ranch committee. (II: 38.)

Oscar Ortega denied being present when his offices were picketed in 1986. Consequently, he denied ever seeing Gonzalez performing picket duty at that location. Ortega initially stated that he was made aware of the picketing at his office when he arrived there one unspecified day, and was told by office personnel that the pickets had just left. Ortega also denied being present while his home was picketed, and likewise denied seeing Gonzalez on those occasions.⁹ Ortega initially stated that he found out that his home was being picketed when he got to his office one day and was informed that his wife had called and "told the office that they were there." Ortega called the police in response. (II: 89.)

When discussing the picketing, Ortega's testimony on cross-examination was inconsistent with that he preferred on direct. Ortega denied therein that anyone had informed him of picketing at his office. (II: 101.) He stated, incredibly, that office personnel would not, necessarily, let him know if picketing took place there.

As concerns the picketing at his residence, Ortega's recitation on cross made little sense:

A: (By Mr. Strom): Did your wife call you at the office the day that your house was being picketed?

⁹The parties stipulated that Oscar's son Omar, if called to testify, would state that he was at the residence in January 1986 while it was being picketed, and that his father was not home at that time. (II: 135.)

A: (By Oscar Ortega): Yes.

Q: Did you go home immediately after the telephone call?

A: No.

Q: Approximately what time did you get that telephone call?

A: It was dark already, and I was informed that they had left.

Q: Why did your wife call you at the office regarding the picketing?

A: She was afraid.

Q: But had the picketing already subsided then, when she called you?

A: When she called me?

Q: Um-hmm.

A: If there was a reason, I imagine she would.

Q: Had it already ended?

A: Yes, already had.

Q: When she called you?

A: No.

Q: It was still going on when you were at the office.

A: Yes.

Q: Your wife telephoned you because of fear, and yet you still didn't go home immediately?

A: Yes, that's correct.

Q: What time approximately did you leave the office to go home?

A: I don't remember. I remember getting home when it was dark.

Q:What time was the picketing at your home? A: I don't know the time.

Q: Did your wife tell you approximately when it started?

A: It was never discussed. (II: 103-105.)

As should be obvious from the foregoing, Ortega's account was unclear whether he had actually spoken to his wife on the telephone that day, contradicting his previous assertion that someone in his office had told him that his wife had called to tell him about the picketing. Additionally, Ortega changed his testimony regarding whether the pickets had already left his home by the time he was told about the incident. It would make little sense for him to call the police, as he originally maintained on direct, if the picketing was over when he learned of it.¹⁰ Ortega did admit, however, that he was angry with the people who had picketed his house and his office.¹¹

As noted, Gonzalez was hired to work for the Respondent by forewoman Maria Luisa Moreno on March 16, 1987. On the second day of his employ, the crew was moved to another location, where they were informed that they would be receiving five cents per vine less than they had received the previous day. At the end of the day, there was a discussion among some of the workers that

¹⁰Ortega stated that he had been advised by his attorney when faced with a picket line he should not confront it himself but should immediately call the sheriff. (II: 114-115.)

¹¹In fact, the Sheriff's Department conducted an investigation into an incident involving an individual Miguel Quintero which arose as a result of his house being picketed. (II: 111 & 112.)

that they were dissatisfied with the rate of pay. Gonzalez testified that he commented to the workers that they should get organized in order to do something about it, and that when he made these remarks he noticed the "second lady in charge" was standing next to him. (I: 68.)

The following day, Gonzalez worked for approximately four hours. When work ended, he was told by the forewoman to contact her at her home to see if there would be work that following week. (I: 69.)

Gonzalez contacted forewoman Moreno that Sunday as ordered and was told to report to work at another location on Monday. Gonzalez testified that during the course of this conversation, he asked Moreno whether she could give work to some friends of his. Gonzalez had also requested work from Moreno for these other workers in days previous. He was then told by her that it was possible, but that they would have to wait. When he spoke with Moreno that Sunday, Gonzalez stated that she asked him whether his friends were "Union workers." When Gonzalez answered that he did not know, Moreno allegedly responded: "I ask you because the boss doesn't want anybody to be Union." (I: 72.)

Maria Luisa Moreno denied telling anybody who telephoned her asking for a work location that she did not hire people who belonged to the Union. She stated that there are certain people in her crew that are Union members, and that they leave work with her to work in the harvest at a Union company in the area. (II: 117, 118.)

On cross-examination, counsel for Respondent asked Gonzalez to repeat the substance of each conversation that he had with Moreno from the time that he was initially hired. Gonzalez testified that he first asked her to work for his friends on the 17th of March, his second day on the job. She responded solely that she would hire them as soon as openings became available. No mention of the Union was made in that conversation. Moreno did not mention the Union when she later offered him work in the "re-packing." In fact, there was no reference to the Union by Moreno in any of the conversations that she had with him from the date he was hired until he was terminated, save for the purported exchange which took place on the Sunday before his last day of work. (II: 15-18.)

On the day of his termination, Oscar Ortega arrived at the field where Gonzalez was working. Gonzalez stated that Ortega was surprised to see him working there, and asked him, "What are you doing here?" When Gonzalez answered "Working," he was asked by Ortega who had given him the work. Gonzalez replied that it was Ms. Moreno. Ortega asked Moreno if she had in fact hired Gonzalez, and after receiving an affirmative reply, Ortega went off to talk with the forewoman. Gonzalez testified that the following exchange took place when Ortega returned about five or ten minutes later:

Ortega: "After which (sic) you did to me last year in the grapefruit, now you want to work with me?"

Gonzalez: "Why should I go unless you fire me?"

Ortega: "Yes, I'm firing you."¹²

Gonzalez: "Why do you want to fire me? Is it because you know I work for the Union?"

Ortega: "Yes."

Thereupon, according to Gonzalez, Ortega grabbed his arm and pulled him out of the field. (I: 72.)

Gonzalez stated that he never received a warning or reprimand while working for Respondent, and that, to the contrary, Moreno complimented his work by offering him a job "repacking" when the harvest was concluded. (I: 69.)¹³

Ortega's description of his encounter on March 23 with Gonzalez differs somewhat from that provided by the alleged discriminatee. Ortega stated that he recognized Gonzalez that day because of the contact they had had the previous year, described above, when Gonzalez became involved with grievance-related matters concerning the workers at E. T. Wall. (II: 92.)¹⁴

As the owner testified, when he first saw Gonzalez, he admitted being surprised, and asked the worker what he was doing

¹²Martin Mosqueda, who worked in the same field for Respondent on that day, corroborated that Ortega told Gonzalez: "After what you did in the grapefruit, you come back to work.... I want you to leave." (II: 70)

¹³Gonzalez admitted on cross-examination, however, that no one gets a job which consists solely of "repacking," an operation performed at the packing shed after harvested grapes do not pass inspection. (II: 21.)

¹⁴Ortega testified that the last time he had seen Gonzalez prior to March 23 was the occasion when he requested leaves of absence on behalf of certain E. T. Wall workers. (II: 100.)

there. Gonzalez answered that he was working. Ortega then called over to the forewoman Moreno and asked her if she had given Gonzalez work. After going to talk to Moreno, Ortega came back to where Gonzalez was working and asked him to come out of the field. When Gonzalez would not, Ortega went in to speak with him. Ortega told him: "Of all the names that you called me and my father last year, and now you want me to have you here, and now you're still working for me?....I can't have you." Ortega then told Gonzalez to leave the field, that he was fired. Ortega denied saying anything to Gonzalez at that time about firing him for his Union activity.¹⁵ (II: 964)

Workers employed by Ortega are requested to fill out information cards. They contain data which the company is required by state law to maintain. Ortega testified that he had difficulty obtaining these cards from a group of workers employed under his arrangement with E. T. Wall the previous year. A crew being supervised by his father Manuel was visited by Gonzalez and David Serena. Ortega was told by his father that on that occasion, Gonzalez had called them "importamadristas"¹⁶ and a

¹⁵Ortega testified that he supplies crews to ranches under Union contract, and that he uses these same crews in non-Union operations with which he is connected. (II: 86.) He further stated that a number of his workers are UFW supporters, although there had been no Union activity at Mona, Inc. during 1987 (II: 96), and that he has no policy against hiring anyone because they might be affiliated with a labor organization. (II: 100.)

¹⁶Ortega translated the term to mean that "I don't give a hell, I don't give a shit, or....I don't care, per se."

bunch of thieves. Ortega's father also allegedly reported that Gonzalez told the workers that they did not have to fill the cards out, "that they were not working for me, that I was nobody, that they had already done it for E. T. Wall, and therefore not to do it." (II: 99.)

It is this incident which Respondent seizes upon to justify Gonzalez¹ termination. In other words, Respondent asserts that Gonzalez was fired because he had insulted the proprietor of Mona and his father the previous year when Gonzalez allegedly advised workers at E. T. Wall not to fill out Ortega's information cards. As Ortega himself put it, he fired Gonzalez "because of the way he treated me and he treated my father, and for the way that he—the names that he called us, thieves and all that sort of stuff." (II: 99.)¹⁷

The testimony of Manuel Ortega regarding this purported encounter with Gonzalez was shifting and confused. Manuel works for his son as a field supervisor. When first asked if he knew Francisco Gonzalez, Manuel replied "I didn't know him."

Q (By Mr. Smith): Did he work for E. T. Wall while you were a supervisor for your son?

A (By Manuel Ortega): Yes.

*
*

¹⁷Interestingly, although he had stated these reasons for firing Gonzalez, Ortega denied on cross-examination that Gonzalez had ever called him a name, or insulted him personally. (II: 106.)

*

Q In 1986, did you know Francisco Gonzalez?

A In 1986 is when I got to know him.

Q At one time did you work with the E. T. Wall Company?

A No.

Manuel Ortega, despite his not working with E. T. Wall, claimed, in response to a leading question, to have been present on an unspecified occasion when Francisco Gonzalez told workers not to sign application forms. After another leading question ("Did Mr. Francisco ever call your son and you a thief?"), an objection to which was sustained, Manuel Ortega testified:

Q (By Mr. Smith): Did Mr. Gonzalez ever say anything derogatory about you or your son?

A (By Manuel Ortega): He said importamadristas, and thieves.
(II: 128.)

On cross-examination, Manuel Ortega's confusion became even more apparent. He could not remember the date when the foregoing incident occurred, although he stated it was the "day that they had the meeting at DPS." (II: 129,¹⁸ II: 98 & 109.)

Manuel Ortega then denied that Francisco Gonzalez called him any names. When counsel for the General Counsel rephrased the question as "disparaging names or bad words, bad names," Manuel

¹⁸Oscar Ortega stated that the problem with filling out the employment forms occurred at the E. T. Wall DPS ranch.

Ortega responded "Yes, bad words, yes." When asked to state exactly what "bad words" Gonzalez used, the senior Ortega stated that he could not remember them. He admitted that he only knew Francisco Gonzalez as a Union worker, and the only time he had ever "spoken" to him was on this day in question. (II: 130 & 131.)¹⁸

III. Analysis and Conclusions

A. The Alleged Unlawful Statements

Inartful pleading makes this allegation difficult to characterize. Under the wording of the complaint, General Counsel alleges that "[o]n or about March 22, 1987, Respondent, through its agent forewoman Maria Luisa Moreno, advised employees by telephone that because of company policy she would not hire pro-union workers." The allegation is obviously based on the purported statements by Moreno to Gonzalez inquiring whether the people on whose behalf he asked for work were "Union workers," and her explanation for the query that "the boss doesn't want anybody to be Union." While the complaint does not explicitly so state, General Counsel argues in his brief that Moreno's question constituted an unlawful interrogation in violation of 1153(a) of the Act, and/or was conduct which coerced, interfered with or

¹⁹Manuel Ortega previously testified on direct that Gonzalez made his remarks in front of a group of E. T. Wall workers (II: 128), not that Gonzalez spoke to him.

restrained employees in the exercise of their 1152 rights, also violative of 1153(a).

For purposes of this discussion, I am assuming that Moreno's alleged statements on this occasion, if proven to have been made, would have a reasonable tendency to restrain, interfere with, or coerce employees in the exercise of their statutory rights, and thus violate the Act. (Karahadian Ranches, Inc. v. ALRB (1985) 38 Cal.3d 1; Carian v. ALRB (1984) 36 Cal.3d 654; M.B. Zaninovich, Inc. v. ALRB (1981) 114 Cal.App. 3d.)²⁰ Accordingly, the issue turns on whether the testimony of Francisco Gonzalez is to be believed, or conversely, whether Moreno's denial is to be credited. In short, credibility is the determinant.

I find that Gonzalez' account is inherently unbelievable. As argued by the Respondent in its brief, despite a number of conversations between the two, this was the sole occasion that Moreno broached the subject of Union affiliation. Moreno hired Gonzalez and a companion without any such qualification; she also promised work for Gonzalez¹ friends as soon as it became available, again without qualification. It stains credulity that Moreno would, seemingly out of the blue, impose an impediment to employment based on Union membership, especially after the die had been cast insofar as Gonzalez and a companion were concerned.

²⁰Respondent does not dispute this assertion in his brief

Further, Moreno herself admitted that she knew that a number of the workers in her crew had Union affiliations, as they left her employ to work at Union ranches where they had seniority. Lastly, the contention that Ortega had an alleged "policy" not to hire Union workers is controverted by his practice of shifting crews and workers between non-Union and Union ranches.

General Counsel asserts that Gonzalez¹ version is to be accepted because Ortega demonstrated Union animus by providing strike-breaking crews in years previous as a labor contractor, that he wished to forestall any attempts at organizing Mona (which, General Counsel admits, had a complement of approximately 20 percent Union-affiliated employees), and that Moreno should be disbelieved because of her bias as one of Respondent's supervisors. General Counsel neglects to explain why Moreno, all of a sudden, should make Union affiliation an issue when six days previous she had no such concerns.

The bias sword cuts both ways. Gonzalez was not an unsophisticated witness. As a former organizer and ranch committee president, he was undoubtedly aware of the types of conduct which create problems for employers under the Act. A blatantly coercive statement from one of Respondent's supervisors would certainly assist in bolstering his own discriminatory discharge case. Given all the circumstances, I am not convinced that Moreno uttered the anti-Union remarks. General Counsel has therefore not demonstrated, by a preponderance of the evidence, the alleged objectionable statement was in fact made.

Accordingly, it is recommended that this allegation be dismissed.

B. The Discharge

Despite some serious reservations, some of which were manifest above, regarding the credibility of the alleged discriminatee, I find that Respondent violated the Act by discharging Francisco Gonzalez because of his having engaged in protected, concerted activity.

The rule has been repeated so often that citations are unnecessary. In order to establish a prima facie case of discrimination based on Union activities, the General Counsel must show that the employee engaged in Union activity, that the employer was aware of this fact, and discharged him as a result. In other words, it must be demonstrated that there was a causal connection between an employees' engaging in protected, concerted activity, and an adverse action taken by the employer affecting that employee's work status.

It is clear that Respondent was aware that Gonzalez was connected to the Union. At minimum, the owner admitted that he recognized Gonzalez from encounters he had with him the previous year concerning grievance matters at E. T. Wall. Whether he also knew that Gonzalez was involved in the picketing at his house and at his office, as Gonzalez claimed, or whether he did not see him or the picketing, as maintained by Oscar Ortega, does not detract from the foregoing. Further, as discussed above, I do not credit

Ortega's denial that he did not "see" Gonzalez, the president of the ranch committee, at the sole grievance meeting that he claimed was held with the E. T. Wall workers during 1986. Lastly, Manuel Ortega, one of respondent's supervisors, admitted that he knew Gonzalez was a Union worker.

Union activity and awareness thus demonstrated, the question remains as to whether there was a causal connection between Gonzalez¹ Union activity and his termination. This issue is resolved in General Counsel's favor. The requisite element is established by a comment made by Ortega himself.

I credit the testimony of Martin Mosqueda, corroborating that of the alleged discriminatee, concerning the substance of what Ortega said when he fired Gonzalez.²¹ As may be recalled, Ortega stated that he could not tolerate Gonzalez' presence in his work force "after what you did in the grapefruit."²² This

²¹Mosqueda was a totally disinterested witness. Ortega's credibility, overall, was somewhat suspect, as, admittedly, was that of the discriminatee. There were too many inconsistencies or statements which were inherently incredible in the testimony of either witness to enable me to rely wholesale on their accounts. I discount Gonzalez¹ assertion that Ortega admitted to him that he was being fired because Ortega knew he worked for the Union. The self-serving nature of this statement to one side, I do not believe that Ortega, given the level of his experience with Union matters, would volunteer that he was violating the law. Nevertheless, I similarly cannot credit Ortega's assertion that he told Gonzalez that he was being fired because "of all the names [he] called me and my father last year." Ortega denied on cross-examination that Gonzalez ever called him a name, or insulted him personally.

²²E.T. Wall harvests grapefruit.

comment can be construed as meaning that Ortega was disturbed about Gonzalez' Union activities on behalf of the E.T. Wall workers, and that Ortega would not employ the vociferous Union representative. Although he claimed not to have been present while it was taking place, Ortega knew of the picketing at his home and his office, and also admitted to being angered by it. Thus, Ortega fired Gonzalez because of his connection with the Union, and his efforts for the Union on behalf of the workers at E.T. Wall.

Respondent's defense, that Gonzalez was being fired because he had insulted the owner the previous year, I find to be a pretext. Despite the lack of a denial from Gonzalez, I cannot credit the testimony of Manuel Ortega that the incident utilized as the basis for the termination did, in fact, occur. As noted above, Manuel was a confused witness. The testimony he proffered was wholly uncorroborated, despite the presence of numerous witnesses. He was unable to respond adequately without the benefit of leading questions, and could not remember the substance of his testimony minutes after it was initially stated. He provided little or no foundation for the damaging remarks; nor did he supply any of their context.²³

²³The question arises as to what supervisors were doing listening to remarks made at a meeting between Union representatives and employees. If Manuel Ortega is to be believed, he might only have obtained knowledge of Gonzalez' purported statements by engaging in unlawful surveillance.

Even if I were to fully credit Manuel Ortega's account that Gonzalez called the Ortegas "importamadristas" and thieves, these remarks were made while Gonzalez was engaged in protected, concerted activity: he allegedly made them during the course of a Union meeting he held with E. T. Wall workers. In the lexicon of insults and profanities, these comments, while not innocuous, are not so outrageous as to deny the Act's protections to one who has uttered them.

This Board has recognized that employees are permitted a certain leeway for impulsive behavior when they present work-related complaints or grievances to representatives of management. Implicit in this doctrine is the notion that within the context of organizational matters, collective bargaining and grievance processing, "'tempers of all parties flare and comments and accusations are made which would not be acceptable on the shop floor." (V.B. Zaninovich & Sons (1986) 12 ALRB No. 5 at p. 12, quoting United States Postal Service (1983) 268 NLRB 274, 275.) A balance must be struck between an employee's right to engage in protected concerted activity and the Employer's right to maintain order and respect...." (Id.) It is only when misconduct during the course of such activity is "so violent or of such serious nature as to render the employee unfit for further service" that the activity ceases to enjoy the protections of the Act. (Giannini & Del Chiaro (1980) 6 ALRB No. 38, p. 4; see also D'Arrigo Brothers Co. of California (1987) 13 ALRB No. 1.)

As noted, I did not find Gonzalez' remarks, even if made, to have been so abusive, flagrant, or objectionable as to deny him the insulation that the Act provides against discrimination for having engaged in Union activities.²⁴ In attempting to garner worker support to oppose Ortega's administration of the Wall Union contract, Gonzalez may have resorted to strong language in referring to the then-recent change. Such language was, though insulting, not beyond the limits which the Act allows in the course of discussing employment-related matters. Consequently, I do not treat this case as involving a "dual motive" discharge, wherein the employer must demonstrate that it would have taken the same action regardless of the protected activity, or that it had a "substantial business justification" for the termination. Under the current state of the law, a discharge for intemperate remarks uttered during the course of protected, concerted activity cannot be deemed substantially justifiable.

I do not find that the holdings in Zaninovich et al. should be distinguished²⁵ on the grounds that Gonzalez was not

²⁴It should not be subject to dispute that when Gonzalez, as a Union representative and ranch committee president, was protesting Ortega's directive to the E.T. Wall workers to fill out information cards, and attempting to prevent workers from doing so, he was engaging in protected, concerted activity. The Union was opposed from the beginning to the assumption of administrative duties at E.T. Wall by Ortega. The objection to the execution of the Ortega information cards may be viewed as a plan in furtherance of this opposition.

²⁵The Respondent maintains these cases are inapplicable for some of the reasons stated.

an employee at the time, that he was not then engaged in a grievance-type discussion with management, and that the Wall contract had a sanctioned grievance procedure.²⁶ Gonzalez was on leave of absence from Wall at that time; under certain circumstances, he may well have been considered to retain his employee status. (See Comite 83, Sindicato de Trabajadores Campesinos Libres 13 ALRB No. 16; Rod McClellan Co. (1977) 3 ALRB No. 6.) The fact that a grievance procedure exists does not preclude employees or their representatives from meeting and discussing working conditions, and/or ascertaining issues which might eventually ripen into formal grievances. To hold otherwise would be to inhibit or foreclose any discussion or protest, in whatever form, of work-related issues where a contractually provided grievance mechanism is in place. To hold further that employees or Union representatives during the course of such discussions may not refer to management in less than complimentary terms would likewise inhibit the frank exchange of ideas which the Act encourages.

Finally, even if Gonzalez could not be considered an employee at the time when the alleged conduct occurred, his pre-employment Union activities are still entitled to the

²⁶Arguably objectionable conduct in those cases was committed by an employee during the course of an informal grievance-type discussion.

protections against discrimination which the Act provides. (Firestone Tire and Rubber Company (1975) 220 NLRB No. 111.)

In sum, Respondent asks the Board to uphold a discharge because a worker said some disparaging things about his boss during a Union meeting. Although the facts here do not conform on all fours to Giannini and its progeny, the policy enunciated by the Board in those cases applies to the instant situation with equal force. To wit, employees or Union representatives are to be given comparatively free rein and free expression in discussing Union matters. It is only when the remarks they made in this context are so abusive, or acts become violent, that an employee may be penalized for such conduct. I do not find these elements present here.

It is accordingly recommended that the Respondent be found to have violated the Act by discharging Francisco Gonzalez.

Pursuant to section 1160.3 of the Act, we hereby issue the attached Order.

ORDER

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

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against any agricultural employee in regard to hire or tenure of

employment because he or she has engaged in union activity protected by section 1152 of the Agricultural Labor Relations Act (ALRA or Act).

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

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

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

(b) Make whole Francisco Gonzalez for all losses of pay and other economic losses he suffered as a result of the discrimination against him, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from January 1, 1987 to January 1, 1988.

(f) 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.

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

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

DATED: February 16, 1988

A handwritten signature in cursive script, reading "Matthew Godlberg", written in black ink.

MATHEW GODLBERG

Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Regional office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO (UFW or Union), the General Counsel of the ALRB issued a complaint which alleged that we, Mona, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging Francisco Gonzalez for exercising his rights under the Agricultural Labor Relations Act.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge any employee for engaging in protests over working conditions.

WE WILL offer reinstatement and reimburse Francisco Gonzalez losses of pay and other economic losses he has suffered as a result of our discriminating against him, plus interest.

DATED:

MONA, INC.

By:

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 319 Waterman Avenue, El Centre, CA 92243. The telephone number is (619)353-2130.

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

DO NOT REMOVE OR MUTILATE