

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DAVID FREEDMAN & CO., INC.,)	
)	
Respondent,)	Case No. 86-CE-49-EC
)	
and)	
)	
UNITED FARM WORKERS OF)	15 ALRB No. 9
AMERICA, AFL-CIO,)	
)	
Charging Party.)	
)	

DECISION AND ORDER

On February 8, 1988, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision in this matter. Thereafter, Respondent **timely** filed exceptions and a supporting brief, and General Counsel filed an answering brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to overrule the ALJ's rulings, findings and conclusions, except to the extent consistent herewith, and to issue the attached Order.

This case involves the alleged discriminatory discharge of a single employee, Jesus **Canedo**, because of his protected concerted and union activities. General Counsel's complaint alleged that on June 14, 1986, Respondent David Freedman & Co., Inc.'s (Respondent or Employer) foreman Vidal Garcia discharged **Canedo** because of his participation that day in a work stoppage called by the United Farm Workers of America, AFL-CIO (**UFW** or Union). Respondent stipulated that the work stoppage constituted

protected concerted activity, but contended that it had just cause to discharge **Canedo** because he engaged in insubordination, which is not protected by the Agricultural Labor Relations Act (**ALRA** or Act).

Facts

Respondent, under the direction of the company's president Lionel Steinberg, voluntarily recognized the UFW and signed the industry's first table grape contract with the Union in 1970. From then until June 1986, the Employer always had contracts with the UFW. When negotiations for a new contract ended in failure on June 10, 1986, the Union notified the Employer of its intention to call a strike. Thereafter, in response to threats of violence to its nonstriking workers, the Employer posted guards in the field and armed some of them with cans of mace. On the day of the incident in question, these guards were posted in the field.

Canedo had worked in Respondent's vineyards for approximately five years deleafing, pruning, and picking grapes. During the 1984 pruning season, **Canedo** acted as union steward.^{1/}

On the day of **Canedo's** discharge, he and most of the rest

////////////////

^{1/}As steward, **Canedo** was responsible for ensuring that all employees were hired through the union hiring hall. During the 1984 pruning season, **Canedo** observed that foreman Garcia's wife, who had been a UFW member since 1970, started working without going through the hiring hall. After **Canedo** discussed the problem with Garcia and suggested they go to the union office about it, Garcia stopped his wife from working. The ALJ found that General Counsel failed to prove that **Canedo's** role in the 1984 hiring hall incident played any part in Garcia's decision to discharge **Canedo**. No party filed any exception on that point.

of the workers^{2/} took part in a work stoppage intended to put pressure on the Employer to reach a contract with the Union and to protest the presence of guards in the field. The work stoppage occurred at the end of the workers' regular ten-minute morning break when, instead of returning to work, the workers stayed out for another half hour. By that time the workers had completed a half day's work.

Canedo testified that toward the end of the stoppage, company supervisor Don Paxton drove by in his truck and yelled at the workers to return to work or go home. Canedo claims that when he shouted back that he wanted to explain why the workers had stopped working, Paxton told him he was fired. A while later, Paxton and foreman Garcia approached Canedo in the field and Garcia asked him to repeat what he had said to Paxton. However, Canedo testified, when he tried to do so, Garcia interrupted him and told him he was fired.

Paxton's account of the incident is very different. He testified that as he was driving his truck by the workers gathered at Block 8^{3/} to inform them that if they did not return to work the Employer might stop work for the remainder of the day, he heard someone yell "F--k you" three separate times. He backed up his truck, got out and went looking for that individual.

^{2/}In June of 1986, the Company had employed approximately 1,200 workers, and it was estimated that the majority of these workers were participating in the work stoppage.

^{3/}Respondent's vineyards are subdivided into smaller blocks of area that are sequentially identified by block numbers. On the day of the work stoppage, Canedo and a few other workers were gathered at Block 8.

He found **Canedo** and confronted him, asking him what he had said. **Canedo** told him to go to hell and again said "F--k you." **Paxton** testified that there was then a lot of exchange about the **Union**.^{4/} **Paxton** then left Block 8 and returned a short while later when foreman Garcia was present. **Paxton** continued telling the workers to go back to work. At that time he heard **Canedo** yell "F--k you, go to hell." He again asked **Canedo** to repeat what he had said, and **Canedo** said "go to hell" in front of Garcia. Garcia thereupon suspended **Canedo**.

Garcia's testimony largely corroborated **Paxton's** account of the incident. Garcia testified that he was at Block 4 when the work stoppage began, at which time he instructed one of the guards to go "get hold of somebody because the people didn't want to go back to work." **Paxton** then arrived telling Garcia and the other foremen to tell their workers to return to work. Since Garcia was with the workers in Block 4, he did not hear the initial exchange between **Paxton** and **Canedo** in Block 8. However, after **Paxton** described the incident to him, Garcia drove his truck down to Block 8 to speak to **Canedo** about the incident. As Garcia was walking up to **Canedo**, he saw **Paxton** circling the area in his pickup truck telling the workers gathered at Block 8 to go back to work. Garcia then heard **Canedo** tell **Paxton** "F--k you, go to hell." He saw **Paxton** get out of his truck and tell **Canedo** to repeat what he had said, and **Canedo** said "go to hell." **Paxton** again asked **Canedo** to repeat what he had said, and again **Canedo**

^{4/} **Paxton** later denied during his cross-examination that there had ever been any exchange between him and **Canedo** about the Union.

told **Paxton** to go to hell. By this time, Garcia saw that both **Canedo** and **Paxton** were angry, and interceded by telling **Canedo** that he was suspended until further notice and told him to leave the field.

Fredrico **Lua**, one of **Canedo's** co-workers, testified that he heard the first exchange between **Paxton** and **Canedo**. **Lua** testified that when **Paxton** drove by yelling at the crew to return to work, **Canedo** replied that they were engaged in a work stoppage. **Paxton** responded that the crew should go back to work or else go home. **Lua** stated that he did not hear **Canedo** swear at **Paxton** and that **Paxton** did not say anything about firing **Canedo**.

Artessima **Canedo**, **Canedo's** wife, testified that she was with the rest of the workers in Block 4 during the work stoppage. While she was in the field informing the workers of the reasons for the stoppage, she saw **Paxton** driving along the path by where she and the others were gathered and heard him loudly and forcefully tell the workers to go back to work or the company would send them home. A while later Garcia told Mrs. **Canedo** that her husband was fired for using bad language. She did not respond.

That afternoon, Garcia and **Paxton** described the incident at a meeting of company management personnel. At the meeting, the company president, Lionel Steinberg, upon the urging of those present, concurred with the decision to discharge **Canedo** because of his vulgar language. Steinberg testified that, in the past 17 years, only 6 or 8 employees had been discharged (from among approximately 2,000 persons employed each year), half of which

were fired for theft, one for sleeping on the job and another for the destruction of company property. Steinberg believed that although this was **Canedo's** first indiscretion, his discharge was necessary. He believed that to permit **Canedo** to continue working would be destructive of company morale and leadership and, most importantly, the company's viability. Steinberg explained that if the company did not take a strong position, outbursts similar to **Canedo's** would have continued on a daily basis, thereby jeopardizing completion of the year's harvest.

ALJ Decision

The ALJ concluded that this case came down to the question of whose version of the events is most believable. Although he found **Canedo** to be a "guarded" witness and thought elements of his story did not make sense, the ALJ credited **Canedo's** testimony, which he found supported by the testimony of the "presumably disinterested" co-worker, Lua. The ALJ found **Paxton** to be "totally untrustworthy," in part because of his appearance of being indifferent to the proceedings. Moreover, the ALJ found that **Paxton** projected an "air of hostility and physical menace" which made it unlikely that **Canedo**, a smaller and much older man, would repeatedly curse him in the fields. The ALJ found Garcia to be an "impressionable" witness who was not sufficiently credible to overcome the **ALJ's** mistrust of **Paxton**.

Accordingly, the ALJ found that **Canedo** had not uttered the language attributed to him, and that the stated ground for his discharge was pretextual. Thus, the ALJ concluded that Respondent violated the Act by discharging **Canedo** for his participation in

the work stoppage.

Respondent's Exceptions

Respondent argues that **Canedo** cannot have been discharged for his remarks to **Paxton**, because Garcia was the one who suspended **Canedo**. Since the ALJ found that the layoff of Garcia's wife was not a motivating factor in **Canedo's** discharge, Respondent asserts, there was no proof of discriminatory animus in Garcia's action.

That particular argument is not persuasive, however. The real issue in any case of alleged unlawful discharge for participation in protected concerted activity is causation. That is, if the discharge is causally related to the protected activity of the employee, the Act has been violated regardless of whether the evidence also demonstrates "antiunion animus" or another improper subjective state of mind. (Superior Farming Co. v. ALRB (1984) 151 Cal.App.3d 100, 115, citing National Labor Relations Act (NLRA) precedent.)

Respondent's most persuasive argument is that the ALJ erred in crediting the testimony of **Canedo** and Lua over that of **Paxton** and Garcia. We agree.

Credibility

We note initially that the **ALJ's** credibility determinations against **Paxton** were based, in part, on **Paxton's** demeanor while testifying. However, the ALJ's credibility resolutions against Garcia, as well as those in favor of **Canedo** and Lua, were not demeanor-based. To the extent that an ALJ's credibility resolutions are based on demeanor, the Board will not

disturb them unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect. (Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 15311, enforced (3d Cir. 1951) 188 F.2d 362 [27 LRRM 26311].)

As Respondent correctly points out, **Lua's** testimony was inconsistent with **Canedo's** on several important points. For example, **Canedo** testified that **Paxton**, as he was driving by in his truck, responded to **Canedo's** comments by firing him; Lua, however, stated that **Paxton** did not tell **Canedo** he was fired. **Canedo** testified that Lua was very close to him when Garcia discharged him, but Lua said he was not present when **Paxton** returned with Garcia and did not hear any of that conversation. Moreover, Lua testified that **Paxton** was yelling from his truck in English, while **Canedo** and **Paxton** both stated that **Paxton's** shouts from the truck were in Spanish.

Respondent further argues that **Canedo's** testimony is unreliable because of **Canedo's** lack of veracity. Respondent noted that when **Canedo** attempted to file a claim for unemployment insurance benefits a month after his discharge, he stated in his application that he had been laid off due to lack of work on July 3, 1986 (rather than being discharged on June 18, 1986). Moreover, Respondent asserts, **Canedo's** testimony about his conversations with Employment Development Department personnel was confusing and full of inconsistencies.

Respondent argues that the ALJ improperly discredited **Paxton** for his apparent disinterest in the proceedings, when **Paxton** was in fact disinterested because he no longer worked for

Respondent and is now employed by an insurance company, thus having nothing to gain or lose by his testimony. As to the **ALJ's** disbelief that **Canedo** would hurl insults at **Paxton**, a larger and younger man, Respondent argues that the ALJ failed to consider that there were several families close to **Canedo** at that time and their presence lessened any potential threat to his physical safety.

Respondent further states that the ALJ improperly discredited Garcia, and argues that Garcia's testimony regarding "cussing" between foremen and employees in the field was insufficient reason to discredit Garcia. On cross-examination, Garcia was asked whether he could say that no worker ever cusses at a foreman. Respondent's attorney objected that the question was vague as to whether the questioner was talking only about Freedman or about all companies in general. When the questioner said he meant at Freedman, Garcia replied that foremen and other people occasionally cuss at each other but not in anger. On redirect, Garcia testified that he had never heard a foreman cuss at a Freedman employee, nor vice versa. Respondent states that the transcript demonstrates that more than one person was talking when Garcia answered the first, ambiguous question. Moreover, Lua testified that swearing did not occur in the fields. The ALJ gave too much significance to Garcia's vague answer to an ambiguous question, Respondent argues, and should not have discredited all of Garcia's testimony on that slim basis.

For the reasons that follow, we find that the **ALJ's** credibility resolutions regarding all of the principal witnesses

in this matter were erroneous.

The ALJ erred in discrediting **Paxton** for his appearance of disinterest in the proceedings, since **Paxton** had good reason to be disinterested. Not only was **Paxton** no longer working for the Employer when he testified, but he was no longer even engaged in agricultural employment. To the extent that **Paxton** projected an "air of hostility and menace," we believe that is easily attributable to the hostile line of questioning he underwent on cross-examination.

The ALJ attached too much significance to his conjecture that **Canedo** would not have sworn at a man so much younger and larger than himself. We note that people commonly utter words in anger that they might refrain from uttering in cooler, more rational **moments**. Moreover, the presence of families with whom **Canedo** worked would likely have provided him with a feeling of safety from any potentially violent reaction from the other man.

On the other hand, the ALJ attached too little significance to the serious contradictions between **Canedo** and **Lua's** testimony. The most important discrepancies were that **Canedo** said **Paxton** fired him as he drove by in his truck and **Lua** said **Paxton** did not tell **Canedo** he was fired; and that **Canedo** said **Lua** was standing close to him when Garcia discharged him, but **Lua** denied being present or hearing the conversation. These important discrepancies cause us to disbelieve both witnesses.

Further, we find that the ALJ had insufficient reasons to discredit Garcia. Garcia's initial confusion regarding questions posed to him about "cussing" in the fields provides inadequate

grounds for finding him an "impressionable" witness. Moreover, the testimony of **Canedo's** wife -- that Garcia spoke to her in the field and said her husband had been discharged for using bad language -- tends to corroborate Garcia's testimony that that was the reason for the discharge. Of further significance are the failure of **Canedo's** wife to testify that her husband never swore, and her apparent failure to question Garcia about the claimed reason for **Canedo's** discharge.

The credibility of **Canedo** himself is seriously undermined by his account of what occurred when he applied for unemployment insurance benefits. **Canedo** evidently lied in stating to Employment Development Department personnel that he was laid off rather than fired from his job (thereby entitling him to benefits). **Canedo** never explained why his unemployment application form stated that his last day of work was July 3, 1986, rather than the actual date of his discharge, June 18, 1986. The discrepancy is significant because all of Freedman's employees -- approximately 1500 -- were laid off at the end of the season on July 2 or 3, 1986. Virtually all of those employees filed claims for unemployment insurance benefits following their layoff. The obvious inference we draw from these facts is that **Canedo** deliberately waited to file his claim until two weeks after his discharge, in hopes that his "layoff" claim would go unnoticed by Freedman among the 1500 other

////////////////////

////////////////////

applicants.^{5/}

We conclude that the **ALJ's** credibility resolutions regarding **Canedo** and **Lua's** testimony were erroneous, and we hereby overrule them. We further conclude that the clear preponderance of all the relevant evidence demonstrates that **Paxton** and Garcia's accounts of the discharge incident were credible and accurate.

(Standard Dry Wall Products, supra, 188 F.2d 362 [27 LRRM 2631].)

Therefore, we find that **Canedo** did in fact utter the words which his supervisors attributed to him.

Insubordination Issue

Having found that **Canedo** did utter profanity to his supervisor, we now proceed to an analysis of whether his profanity constituted legitimate grounds for discharge and whether Respondent would have terminated **Canedo** for his use of profanity even in the absence of his protected concerted activity.

Under NLRA precedent, an employee's use of profane or obscene language during the course of concerted or union activity does not necessarily take the activity outside the realm of protection of the NLRA, since the employee's right to engage in such activity requires some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order

////////////////

^{5/}Union representative David Serena testified that he and the Ranch Committee met two to three times between June 18 and July 3, 1986, in a effort to get **Canedo** reinstated, and that he told **Canedo** to wait and see what happened. However, as the ALJ himself noted, Serena did not testify that he told **Canedo** to delay in filing his unemployment application. Moreover, **Canedo** himself never explained his delay in filing.

and respect. (NLRB v. Thor Power Tool Co. (7th Cir. 1965) 351 F.2d 584 [60 LRRM 22371; NLRB v. Illinois Tool Works (7th Cir. 1946) 153 F.2d 811 [17 LRRM 8411.]) However,

[E]ven an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act. The decision as to whether the employee has crossed the line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way provoked by an employer's unfair labor practice.

(Atlantic Steel Company (1979) 245 NLRB 814, 816 [102 LRRM 12471, as quoted in Marico Enterprises, Inc. (1987) 283 NLRB No. 112 [125 LRRM 10441.]

Where, as here, an employee's protected concerted activity is asserted to have interfered with management's right to maintain order and respect, the NLRB engages in a balancing process whereby the employees' rights are weighed against the interests of management. (NLRB v. Prescott Industrial Products Company (8th Cir. 1974) 500 F.2d 6, 10 [86 LRRM 29631, citing McDonnell Douglas Corp. v. NLRB (8th Cir. 1973) 472 F.2d 539, 545 [82 LRRM 23931.]) As noted in NLRB v. Illinois Tool Works, supra, 17 LRRM 841, 844:

[C]ourts have recognized that a distinction is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a "moment of animal exuberance" (cases cited) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service (cases cited), and that it is only in the latter type of cases that the courts find that the protection of the right of employees to full freedom in self-organizational activities should be subordinated to the vindication of the interests of society as a whole.

In reconciling these two equally important but conflicting rights, the Board must look to the record as a whole

to determine whether the employee's misconduct was "indefensible under the circumstances", and if so, the employer may indeed discipline the employee without violating the Act. United States Postal Service v. NLRB (5th Cir. 1981) 652 F.2d 409, 411 [107 LRRM 32491; Giannini & Del Chairo Co. (1980) 6 ALRB No. 38, p. 4.

In evaluating **Canedo's** conduct herein, we find it appropriate to apply the four-factor analysis established in Atlantic Steel, supra. Applying that analysis, we note initially that the conduct at issue occurred in the midst of a thirty-minute strike in the fields, and thus on company property. We find that the Employer herein had a greater interest in controlling **Canedo's** conduct because it occurred on the work site rather than off the Employer's property. This case does not involve conduct on a picket line, to which the NLRB has accorded protection for the use of epithets, vulgar words, or even profanity by a striker.

(General Chemical Corp. (1988) 290 NLRB No. 13; NLRB v. McQuaide, Inc. (3rd Cir. 1977) 552 F.2d 519 [94 LRRM 29501.]) Vulgar language which is directed at a supervisor "on the plant floor" can have a negative effect on the supervisor's status in the eyes of the employees, and thus is generally unprotected under the Act. (Firch Baking Company (1977) 232 NLRB 772 [97 LRRM 11921.]) Here, a majority of workers apparently honored the brief work stoppage herein, and they remained in or about the work area. Since production was already halted herein, **Canedo's** outburst did not result in the disruption of Freedman's operations. Nevertheless, we find that the Employer had a legitimate interest in maintaining order and respect among the workers while they were present on the

Employer's property, and that **Canedo's** use of profanity tended to interfere with that legitimate interest.

Concerning the second Atlantic Steel factor (subject matter of the discussion) we find that the record is unclear as to whether **Canedo** and **Paxton's** verbal exchange continued to center upon union or work stoppage issues. **Paxton** initially testified that after **Canedo's** first outburst, there was a lot of discussion about the Union. He later denied during his cross-examination that there had been any exchange between him and **Canedo** about the Union. We find it significant, in any case, that **Canedo** made no claim that **Paxton** directed any comments toward him that were derogatory of the Union or of **Canedo** himself.

Regarding the third and fourth Atlantic Steel factors (the nature of the employee's outburst and whether the outburst was provoked), we note that the initial exchange between **Canedo** and **Paxton** was apparently prompted by **Paxton's** conduct in angrily yelling at the work stoppage participants to return to work. **Canedo's** immediate response served to affirm **Canedo's** defiance of management's attempt to convince the workers to return to work. Significantly, though **Paxton** was greatly upset by **Canedo's** use of profane language, he did not respond in like fashion and did not take any disciplinary action against him. When **Paxton** returned a second time, **Canedo** again unleashed a string of epithets reflecting an apparent desire to engage **Paxton** in a verbal sparring match. **Paxton**, again, though visibly upset, did not respond to **Canedo's** words and, again, did not discipline **Canedo**. Only after **Canedo** repeated his offensive remarks to **Paxton** did

Garcia, after two incidents involving at least five separate occasions where **Canedo** had used profane language, take any action. At no time did **Paxton** or Garcia, or any other supervisory personnel, give **Canedo** any reason to continue his opprobrious conduct after the first incident.

We conclude that **Canedo's** abusive use of profanity towards supervisor **Paxton** was unprovoked and demonstrated a lack of respect for the Employer which was not germane to carrying out his legitimate concerted activity. Because **Canedo's** conduct occurred on the work site and in the presence of other employees, it constituted insubordinate conduct that tended to undermine the Employer's legitimate need to maintain order and respect among employees on his property. **Canedo's** abusive language was not provoked by any management personnel, and was not uttered during the heat of contract negotiations, in a formal grievance proceeding, or on a picket line. In light of all the the circumstances, we find that his language amounted to opprobrious conduct exceeding the bounds of protected activity under the ALRA. (Atlantic Steel Company, supra 245 NLRB 814; NLRB v. Thor. Power Tool Co., supra, 351 F.2d 584; NLRB v. Illinois Tool Works, supra, 153 F.2d 811.)

Application of Wright Line

Because the ALJ credited **Canedo's** version of the incident herein, he viewed the Employer's justification as pretextual, therefore making a dual motive analysis unnecessary. (Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enforced, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 25131, cert. den. (1982) 455 U.S. 989 [109 LRRM 27791 (Wright Line).) However, as

previously indicated, we find that the Employer's stated reason for **Canedo's** discharge was not pretextual. Further, the evidence shows that **Canedo's** profanity was uttered during the course of protected concerted activity and that Respondent had a dual motive for discharging **Canedo**. Therefore, we find that a Wright Line analysis is appropriate herein.

Under the reasoning of Wright Line, once the General Counsel has established a prima facie case showing that union or other concerted activity was a motivating factor in the employer's disciplinary action, the burden shifts to the employer to demonstrate that it had a legitimate business justification for its action. If the evidence shows that the employer had a dual motive, then the employer must demonstrate that it would have taken the same action even in the absence of the employee's protected activity.

The most telling testimony regarding the Employer's motivation for discharging **Canedo** is that of the company's president, Lionel Steinberg. Steinberg stated that, under his leadership, Freedman and Company had voluntarily recognized the UFW and signed the first table grape contract with the Union in 1970. The Employer had contracts continuously with the UFW from 1970 to June 1986. Steinberg could recall only 6 or 7 employees who had been discharged during the past 17 years (from among approximately 2,000 persons employed each year), none for

////////////////////
////////////////////

allegedly protected activities.^{6/}

Steinberg regarded **Canedo's** conduct as a flagrant abuse of management personnel. During **Paxton's** account of the incident at the manager's meeting, **Paxton** argued that if he was not upheld, then no supervisor would ever be upheld. Steinberg agreed that to permit **Canedo** to continue working would be destructive of company morale and company leadership. "[W]hen you're abuse[d] and your leadership is abused," Steinberg stated, "there's a point where you must take a stand." The Employer's reputation had been built upon good will, and in his opinion **Canedo** had abused that good will. Not to have upheld **Paxton** and Garcia would have encouraged others to emulate **Canedo's** abusive conduct, Steinberg believed, and would have been damaging to the Union and the workers as well as to the company.^{7/}

On the basis of Steinberg's testimony, as well as the other evidence in this case, we find that the Employer discharged **Canedo** because of **Canedo's** abusive, disrespectful use of profanity toward a supervisor. We conclude that **Canedo** would have been

^{6/}The employees were discharged for offenses such as theft and sleeping on the job. One was discharged for removing every bunch of grapes from every row he worked on and dropping them on the ground, thus destroying a significant portion of the crop.

^{7/}On cross-examination, Steinberg testified that when work stoppages were called the company lost orders to its non-union competitors, and that "outbreaks" [like **Canedo's**] would possibly have continued daily, jeopardizing completion of the year's harvest if the company had not taken a strong position. We disagree with the General Counsel's characterization of this testimony as a demonstration of the Employer's anti-union animus. The clear import of Steinberg's testimony was in reference to the Employer's need to control **Canedo's** abusive conduct and the possibility that others would emulate that type of conduct, as opposed to his mere participation in the protected work stoppage.

discharged for his abusive language even if he had been engaged in activity on his own behalf rather than in concerted activity.

(Wright Line, supra, 251 NLRB 1083.) Therefore, we conclude that the Employer has committed no violation of the Act, and the complaint herein must be dismissed.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: August 4, 1989

BEN DAVIDIAN, Chairman^{8/}

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

^{8/}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.

discussion, 3) the nature of the employee's outburst, and 4) whether the outburst was in any way provoked by an employer's unfair labor practice. Applying the Atlantic Steel factors, the Board found that the Employer had a greater interest in controlling **Canedo's** conduct because it occurred on the work site rather than off the Employer's property, since the Employer had a legitimate interest in maintaining order and respect among the workers while they were present on the Employer's property. Considering the subject matter of the discussion, the Board found it significant that **Canedo** made no claim that the supervisor made any comments that were derogatory towards him or towards the Union. The Board also found that **Canedo** had repeated his profanity several times although the supervisor never responded in like fashion. The Board thus conclude³ that **Canedo's** abusive use of profanity was unprovoked and demonstrated a lack of respect for the Employer which was not germane to carrying out his legitimate concerted activity. The Board concluded that because **Canedo's** conduct occurred on the work site and in the presence of other employees, it constituted insubordinate conduct that tended to undermine the Employer's legitimate need to maintain order and respect among employees on his property. In light of all the **circumstances**, the Board found that **Canedo's** profanity amounted to opprobrious conduct exceeding the bounds of protected activity under the ALRA, and thus constituted insubordination.

The Board also found that the Employer had a dual motive for discharging **Canedo**. However, in applying a Wright Line analysis, the Board concluded that the Employer's primary motive for discharging **Canedo** was his abusive, disrespectful use of profanity toward a supervisor. The Board concluded that **Canedo** would have been discharged for his abusive language even if he had been engaged in activity merely on his own behalf rather than in concerted activity. Therefore, the Board concluded that the Employer had not committed a violation of the ALRA, and it dismissed the complaint.

* * * *

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

CASE SUMMARY

David Freedman & Co, Inc.
(UFW)

15 ALRB No. 9
Case No. 86-CE-49-EC

Background

This case involved the alleged discriminatory discharge of a single employee, Jesus **Canedo**, because of his protected concerted and union activities. The complaint alleged that **Canedo** was discharged because of his participation in a work stoppage called by the UFW. The Employer stipulated that the work stoppage was protected activity, but contended that it discharged **Canedo** because of his insubordinate use of profane, abusive language to a company supervisor.

ALJ Decision

The ALJ credited the testimony of **Canedo** and a co-worker that **Canedo** did not utter the abusive language attributed to him, and concluded that the Employer's stated reason for the discharge was pretextual. The ALJ concluded that the Employer had violated the ALRA by discharging **Canedo** for his participation in the work stoppage.

Board Decision

The Board found that **Canedo's** testimony was inconsistent with the testimony of his co-worker on several important points. The Board further found that **Canedo's** credibility was seriously undermined by his inconsistent and contradictory testimony concerning his application for unemployment benefits. After also finding that the ALJ erred in discrediting the testimony of two supervisors who testified that **Canedo** had uttered the language attributed to him, the Board concluded that the clear preponderance of all the relevant evidence demonstrated that the **ALJ's** credibility resolutions were incorrect. The Board therefore overruled the **ALJ's** credibility resolutions and found that **Canedo** did in fact utter the words attributed to him.

The Board then examined **Canedo's** conduct under NLRA precedent, under which an employee's use of profanity during the course of concerted activity does not necessarily take the activity outside the protection of the NLRA. Rather, the employee's right to engage in such activity requires some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. The Board analyzed **Canedo's** conduct under the standards of Atlantic Steel Company (1979) 245 NLRB 814 [102 LRRM 12471, which held that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the NLRA. Determining whether an employee has crossed the line involves consideration of several factors: 1) the place of the discussion, 2) the subject matter of the

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
DAVID FREEDMAN AND COMPANY,)	Case No. 86-CE-49-EC
)	
Respondent,)	
)	
and)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Charging Party.)	

Appearances:

Leonard Strom
319 Waterman Avenue
El Centro, California
for the General Counsel

Thomas M. Giovacchini
5108 E. Clinton Way, Suite 122
Fresno, California
for the Respondent

David Serena
1639 - 6th Street
Coachella, California
for the Charging Party

Before: Thomas Sobel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:¹

This case was heard by me in December, 1987 in Indio, California. General Counsel alleged that Respondent, David Freedman & Company, an admitted agricultural employer, discharged Jesus **Canedo**, an admitted agricultural employee, on account of his union activities. In view of Respondent's admissions, I find the Board has jurisdiction. Respondent contends that it discharged **Canedo** for just cause, specifically for cursing supervisor Dan **Paxton** and that such invective as it contends **Canedo** directed at **Paxton** is not protected by the Act. Since **Canedo** has denied cursing at **Paxton**, the primary question to be decided is what happened between **Canedo** and **Paxton** on the day of **Canedo's discharge**;² only if I were to determine that **Canedo** cursed **Paxton** would I need to determine whether **Canedo's** language, in context, exceeded the scope of protected activity.

¹**Counsel** for General Counsel has filed a motion to correct the transcript to identify him as appearing on behalf of General Counsel and to identify David Serena as appearing on behalf of Intervenor-Charging Party. The transcript is hereby corrected in these respects.

²**Because** I do not credit Respondent's version of events, I do not need to reach the question whether **Canedo's** alleged language would have justified his discharge. In other words, I am viewing this case simply as a pretext case in which my finding that the stated ground of discharge is false ends the inquiry. I am not viewing it as either a dual motive or a striker misconduct case.

I. FACTS

A. Background

Prior to his discharge in June 1986, Jesus **Canedo** worked in Respondent's vineyards for approximately five years deleafing, pruning and picking grapes. His picking foreman, and his foreman at the time of his discharge, was Vidal Garcia. Since General Counsel contends that at least part of the reason Garcia discharged **Canedo** was **Canedo's** role in forcing Garcia to lay-off Garcia's wife, before relating the events leading up to **Canedo's** discharge, I will adumbrate this background.

In the season prior to his discharge, **Canedo** served as union steward and, as such, was responsible for ensuring that all employees came through the union hiring hall. Sometime during the pruning season, Vidal Garcia's wife started working without a union dispatch. **Canedo** testified that he spoke to Garcia about the latter's wife not being properly dispatched and that Garcia did not want to stop her. However, after he suggested they go to the union office to straighten the matter out, Garcia's stopped his wife from working.

Garcia recalled having to stop his wife from working **because** she had not been properly dispatched. According to Garcia, shortly before the incident with his wife, he had been forced to lay-off the children of another worker, Alfonso Sanchez, after he had given them jobs in accordance with the company's past practice of providing summer employment to the

children of its employees. Although the union and the company had formerly agreed upon the practice, in the negotiations just prior to Garcia's hiring the Sanchez children, they had been unable to again agree to it. As a result, after he put the boys to work, he received a complaint pursuant to which he let them go.

Garcia testified that at the time of the controversy about his wife's not being properly hired, he suspected Alfonso Sanchez as the initial source of complaints because the latter was upset that his two boys had been laid-off. Garcia further testified that it was not **Canedo** who told him to lay-off his wife, but Manuel Aguilar (Garcia's superior). On the basis of this testimony, Respondent argues that the incident with Garcia's wife could not have played any role in Garcia's treatment of **Canedo**, first, because **Canedo** played no role in the lay-off of Garcia's wife and, second, because if Garcia had a motive to retaliate against anyone, he had as much reason to retaliate against Sanchez as General Counsel claims he had to retaliate against **Canedo** and, therefore, he had no special reason to discriminate against **Canedo**. Garcia did admit, however, that **Canedo** was the union steward when the incident took place and that it was the steward's job to police hiring under the contract. **Canedo** further testified that he thought Garcia's attitude toward him had changed after the incident.

I credit **Canedo** that the incident took place as he testified. Since even Garcia admitted that **Canedo** was union

steward at the time, and that it was the steward's job to enforce the contract, it seems more likely than not that **Canedo** would have been the one to bring the matter up.

B. THE FIRING

The preceding incident took place in 1984; **Canedo** was fired in 1986. Respondent concedes that on the day of his discharge, **Canedo** took part, with everyone else in his crew, in a protected work stoppage in order to pressure Respondent to reach agreement with the union.³

According to **Canedo**, as the crews were preparing to go back to work, Don **Paxton**,⁴ one of the company's supervisor, drove by and, yelling from his truck, told the employees to either go back to work or to go home. Upon hearing this, **Canedo** shouted back at **Paxton** that he (**Canedo**) wanted to explain why the crew had gone out. **Paxton** thereupon told **Canedo** he was fired. **As Canedo** was preparing to go back to work, **Paxton** and Garcia came up to him and Garcia asked him to repeat what he said to **Paxton**. **As Canedo** attempted to do so, Garcia interrupted him and told him he was fired. **Paxton** said nothing.

3Ordinarily the crew takes a ten minute break at **8:30** in the morning: on the day of the stoppage, the crew did not return to work after break, but remained out for another half-hour.

⁴Although **Canedo** indicated he was not aware that **Paxton** was a supervisor, **Paxton's** status is not reasonably subject to dispute. Moreover, neither version of the events leading up to **Canedo's** discharge is made more or less likely by **Canedo's** purported ignorance of **Paxton's** status.

Although he did not hear what **Canedo** and Garcia talked about, another employee, **Frederico** Lua, testified that he heard the initial exchange between **Canedo** and **Paxton**. Lua testified:

Q Were you working for David Freedman on June 14, 1986?

A If it was the day of the discharge from work, yes.

Q Thank you. Were you working in the vicinity of Jesus **Canedo**?

A Yes.

* * * * *

Q Did you hear Mr. **Paxton** drive by hollering out of his truck?

A He went by yelling at everybody to work.

Q Do you recall hearing Mr. **Canedo** respond to him?

A What he told him it was that we were in the process of a work stoppage after we had had a break at 8:30 in the morning. We had to make a stoppage in order to force the company to make a contract.

* * * * *

Q Did you hear Mr. **Canedo** swear at Mr. **Paxton**?

A What he said is that we were in a stoppage of work in the same place we were in the field.

* * * * *

Q Did you hear Mr. **Paxton** respond to Mr. **Canedo**?

A Only that we should get back to work and if we don't want to we should go home.

Q Was that the total of the discussion between the two of them?

A Yes, it's everything that they said only talking in a loud manner.

RT: 79-80

Lua's version differs from that of **Canedo's** in that he did not hear **Paxton** say anything about firing **Canedo** during the initial exchange; he supports **Canedo's** testimony that **Canedo's** remarks to **Paxton** were not provocative.

Paxton and Garcia tell a different story.

Paxton testified that after he shouted at **Canedo's** crew to either go back to work or go home, he heard "this individual"

yell "**Fuck** you" three times. **Paxton** wanted to see who did this and why. He got out of his truck and, going up to **Canedo**, asked him what "**he**" said.⁵ **Canedo** first told him to go to hell, before he repeated, "**Fuck** you." **Paxton** took no action but left the fields, resentful about the incident. He returned a short time later:

Q Did you come back at any later time during the day to the same area where Mr. **Canedo** was working?

A I came back after some time had gone by to tell them to go work, keep working. In other words, that was part of my job to have to inform the crews exactly where --

* * * * *

Q You came back. Did you find him again?

A Yeah.

Q All right. Did you talk to him?

A No, he yelled at me again.

* * * * *

It was almost a repeat performance when I came back the next time --

* * * * *

Q All right. Walk us through that. What happened?

A Well, he yelled, **fuck** you go to hell. Then I got out of the truck. This time I was pretty mad, And then at this time the crew foreman was there and some other people were there.

Q Who was the crew foreman at that time?

A Vidal Garcia.

⁵**Paxton's** choice of language is quite interesting: he initially does not identify **Canedo** by name as the one who cursed at him, but refers to him as "this individual." Now it may be that he simply did not know his name, but it also may be that he did not really see whoever cursed at him. A few lines later he plainly identifies **Canedo** as the one who spoke: how he made the specific linkage between **Canedo** and the one who cursed at him was not explored.

Q All right.

A And he was yelling. And he repeated a couple of **times**. And then I asked him to repeat it just like **I'm** saying to you right now, I want you to repeat what you said or could you repeat it to me so I could understand fully what you're saying. And he --

Q Why did you need him to repeat it?

A Because I wanted to make sure that he was saying what he was saying. I couldn't believe it, you know. And in **my** opinion that behavior is unacceptable; union, no union; work no work; not matter what.

Q All right. Did he repeat it then again?

A Yes, he did.

Q And Vidal was, Vidal Garcia was present and heard the repetition of this comment?

A Right. Vidal, when I said repeat it the phrase that he was you know hanging on to at that time as go to hell.

Q Okay. What else was said between you, Vidal and Mr. **Canedo**?

A Well, at this time I think Vidal was worried that there was going to be some kind of a confrontation. And he wanted to calm things down. And he did. And he suspended him right then.

Garcia recalled **Paxton's** driving by and telling the crew to go back to work; however, he did not hear what **Paxton** described as his initial exchange with **Canedo**. He did recall **Paxton** telling him that **Canedo** had said something to him which made him want to talk to **Canedo**. Garcia testified:

So I got on my truck. I drove all the way down to block 8, that's about five blocks down. It's a long way to walk. So I got on my truck and I parked my truck on the side of the road. I was walking towards where Jesus **Canedo** was. At this time I was about to talk to him when Don **came** with his pickup going around in circles. I don't know what he was doing but he was telling the people to go back to work. Now, at this time Don told the people was telling the people from his pickup to go back to work. Okay? So Jesus **Canedo** he heard Don say that and he said these words to him he said, **fuck** you, go to hell. So at that time Don's truck was not going very fast. But by the **time** he stopped the truck it was about three or four rows. So he backed up his truck, got out of his truck and told Mr. Jesus **Canedo** in front of **me** to repeat what he had just said. And then he said, 'go to hell. And Don again repeat him repeat to him to repeat what he said. And Mr. Jesus told him to

to to hell. He did the third time to repeat that what you just told me. At this time I saw Don that he was you know real mad. And I also saw Mr. Jesus that they were real mad. And Jesus **Canedo** told him again to go to hell. At that time I stepped between them and I said, okay hold it. So Don got on the truck, he took off. At that time I told Jesus **Canedo** that he was laid off until further notice.

Later, Garcia and **Paxton** brought the matter up at a meeting with other foremen and company management, including company President Lionel Steinberg. According to Steinberg, it was decided to fire **Canedo** because of the abusive language he directed at **Paxton**.⁶

LEGAL ANALYSIS

General Counsel contends that a mix of illegal motives prompted **Canedo's** discharge: one was Garcia's personal hostility towards **Canedo** which stemmed from **Canedo's** complaints about Garcia's wife, and the second was Respondent's desire to "single [**Canedo**] out as the only voice opposition to the employer's intimidation of workers engaged in a protected thirty minute work stoppage...by threatening the workers with loss of their day's employment if they continue to observe the union called work stoppage." Post-Hearing Brief, p. 2. By imputing to Garcia a

⁶I credit Steinberg that the decision to "fire" **Canedo** was made as he related based upon **Paxton's** and Garcia's representation about what happened in the fields but this does not change the focus of my inquiry into what "really" happened between **Canedo** and **Paxton**.

quantum of **animus**⁷ against **Canedo** and further, by characterizing **Canedo's** remarks to **Paxton** as "opposition" to **Paxton's** telling the employees to go back to work or to go home, General Counsel has made a serious attempt to grapple with the most puzzling element of this case which is, of all the people engaging in the work **stoppage**, why was **Canedo** singled out for discharge? Although I have credited **Canedo's** version of the "hiring hall" incident with Garcia's wife, I am not persuaded that Garcia nursed his wounds for so long before taking his revenge. Although it is possible that he did so, I have no sense that it is more likely than not that he did so. Accordingly, General Counsel has failed to meet his initial burden of proving that the lay-off of Garcia's wife was "a motivating factor" in **Canedo's** discharge.⁸ Wright Line (1983) 251 NLRB 1083. More likely to me is the theory that **Paxton** took

⁷Garcia's "animus" on this score would be "discriminatory" as opposed to "personal" since it arose in connection with **Canedo's** policing of the contract. NLRB v. City Disposal Systems (1984) 456 U.S. 8-22, 115 LRRM 3193. Therefore, retaliation against **Canedo** for policing the contract would be unlawful.

⁸In disregarding the evidence, I have also considered **Canedo's** testimony that Garcia's attitude towards him changed after the incident. While such impressions are not only common enough, but also typically inform our attitudes toward other people, it is equally common for participants in any sort of unpleasant situation to be self-conscious after it and to interpret each other's behavior in light of the incident. Without more evidence, I couldn't say whether **Canedo** was accurately reading Garcia's mood after the incident or, reading something into it.

offense at **Canedo's** remarks.⁹

To my mind, this case simply comes down to a contest between Canedo's, or of **Paxton's** and Garcia's, version of events. Both **Canedo** and Lua testified that all **Canedo** initially said to **Paxton** was that he wanted to explain why the crew had gone out. Against this **Paxton** claims someone whom he identified as **Canedo** screamed expletives at him from the fields. He further claims that he got out of his truck to confront "this individual" (who turned out to be **Canedo**) whereupon **Canedo** repeated the same language. Garcia testified **Canedo** used the same language when he was present a short time later. While there are elements of **Canedo's** story that do not make sense -- such as his testimony that **Paxton** initially told him he was fired -- and while **Canedo** showed himself to be a guarded witness -- as in his testimony about his unemployment application -- his version of what he initially said to **Paxton** is supported by the presumably disinterested Lua. Accordingly, I find **Canedo** was engaged in protected activity, **Paxton** knew of it, **Canedo** said something to **Paxton** in the course of it, and **Canedo** was discharged shortly afterwards because of what he said.

⁹I decline to find as General Counsel urges me to do in his post-hearing brief, that **Paxton's** statements to the crew "to go back to work or to go home" constituted "threats." No such independent violation of the Act was alleged and while General Counsel argues that the matter was fully litigated, I do not believe it was. Although **Paxton's** remarks were ambiguous, they did not clearly threaten discharge (which would have violated the act), but rather lockout. Since General Counsel has not briefed this issue, I decline to pursue it.

The trouble I have with **Paxton's** and Garcia's story is that **Paxton** struck me as totally untrustworthy: part of the time he leaned back in his chair, his feet stretched out in front of him, hands clasped behind his head so that he appeared to be indifferent to the proceeding. Harder to convey to anyone not present at the hearing was the air of hostility and physical menace which he projected which made it seem all the more unlikely to me that **Canedo**, a smaller, older man, would repeatedly hurl curses at him in the fields. Whatever my doubts about **Canedo's** story they simply do not make up for the severity of my mistrust of **Paxton** as a witness.

Although I had no similarly strong impression of Garcia as a witness, Garcia did reveal himself to be impressionable when, in the space of a few moments, he testified under cross-examination by Counsel for Intervenor that "there's foreman that cuss at people." (RT: 155) and under re-direct examination by Counsel for Respondent that he never "heard a foreman cuss at one of the employees." (RT: 156) I simply do not have sufficient confidence in Garcia's credibility to overcome my doubts about Paxton's. Accordingly, I find that Respondent violated the Act when it discharged Jesus **Canedo**.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (**ALRB** or Board) hereby orders that Respondent David Freedman Co., 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 Jesus **Canedo** 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 Jesus **Canedo** 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 out 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, 1986 to January 1, 1987.

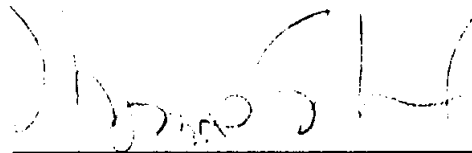
(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined for the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(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 is achieved.

DATED: February 8, 1988



THOMAS SOBEL
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro 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, David Freedman and Company, 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 Jesus **Canedo** 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 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 Jesus **Canedo** for all losses of pay and other economic losses he has suffered as a result of our discriminating against him, plus interest.

Dated: DAVID FREEDMAN AND COMPANY

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 Centro, 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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

DAVID FREE1)	
)	
R <i>Master</i>)	Case No. 86-CE-49-EC
)	
and <i>OLL</i>)	
)	
UNITED FA <i>15 April 89</i>)	15 ALRB No. 9
AMERICA, AFL-CIO,)	
)	
Charging Party.)	
)	

DECISION AND ORDER

On February 8, 1988, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions and a supporting brief, and General Counsel filed an answering brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to overrule the ALJ's rulings, findings and conclusions, except to the extent consistent herewith, and to issue the attached Order.

This case involves the alleged discriminatory discharge of a single employee, Jesus **Canedo**, because of his protected concerted and union activities. General Counsel's complaint alleged that on June 14, 1986, Respondent David Freedman & Co., Inc.'s (Respondent or Employer) foreman Vidal Garcia discharged **Canedo** because of his participation that day in a work stoppage called by the United Farm Workers of America, AFL-CIO (UFW or Union). Respondent stipulated that the work stoppage constituted

protected concerted activity, but contended that it had just cause to discharge **Canedo** because he engaged in insubordination, which is not protected by the Agricultural Labor Relations Act (**ALRA** or Act).

Facts

Respondent, under the direction of the company's president Lionel Steinberg, voluntarily recognized the UFW and signed the industry's first table grape contract with the Union in 1970. From then until June 1986, the Employer always had contracts with the UFW. When negotiations for a new contract ended in failure on June 10, 1986, the Union notified the Employer of its intention to call a strike. Thereafter, in response to threats of violence to its nonstriking workers, the Employer posted guards in the field and armed some of them with cans of mace. On the day of the incident in question, these guards were posted in the field.

Canedo had worked in Respondent's vineyards for approximately five years deleafing, pruning, and picking grapes. During the 1984 pruning season, **Canedo** acted as union steward.^{1/}

On the day of **Canedo's** discharge, he and most of the rest

////////////////

^{1/}As steward, **Canedo** was responsible for ensuring that all employees were hired through the union hiring hall. During the 1984 pruning season, **Canedo** observed that foreman Garcia's wife, who had been a UFW member since 1970, started working without going through the hiring hall. After **Canedo** discussed the problem with Garcia and suggested they go to the union office about it, Garcia stopped his wife from working. The ALJ found that General Counsel failed to prove that **Canedo's** role in the 1984 hiring hall incident played any part in Garcia's decision to discharge **Canedo**. No party filed any exception on that point.

of the **workers**^{2/} took part in a work stoppage intended to put pressure on the Employer to reach a contract with the Union and to protest the presence of guards in the field. The work stoppage occurred at the end of the workers' regular ten-minute morning break when, instead of returning to work, the workers stayed out for another half hour. By that time the workers had completed a half day's work.

Canedo testified that toward the end of the stoppage, company supervisor Don **Paxton** drove by in his truck and yelled at the workers to return to work or go home. **Canedo** claims that when he shouted back that he wanted to explain why the workers had stopped working, **Paxton** told him he was fired. A while later, **Paxton** and foreman Garcia approached **Canedo** in the field and Garcia asked him to repeat what he had said to **Paxton**. However, **Canedo** testified, when he tried to do so, Garcia interrupted him and told him he was fired.

Paxton's account of the incident is very different. He testified that as he was driving his truck by the workers gathered at Block **8**^{3/} to inform them that if they did not return to work the Employer might stop work for the remainder of the day, he heard someone yell "**F--k** you" three separate times. He backed up his truck, got out and went looking for that individual.

^{2/}In June of 1986, the Company had employed approximately 1,200 workers, and it was estimated that the majority of these workers were participating in the work stoppage.

^{3/}**Respondent's** vineyards are subdivided into smaller blocks of area that are sequentially identified by block numbers. On the day of the work stoppage, **Canedo** and a few other workers were gathered at Block 8.

He found **Canedo** and confronted him, asking him what he had said. **Canedo** told him to **go** to hell and again said "F--k you." **Paxton** testified that there was then a lot of exchange about the **Union.**^{4/} **Paxton** then left Block 8 and returned a short while later when foreman Garcia was present. **Paxton** continued telling the workers to **go** back to work. At that time he heard **Canedo** yell "F--k you, **go** to hell." He again asked **Canedo** to repeat what he had said, and **Canedo** said "go to hell" in front of Garcia. Garcia thereupon suspended **Canedo**.

Garcia's testimony largely corroborated **Paxton's** account of the incident. Garcia testified that he was at Block 4 when the work stoppage began, at which time he instructed one of the guards to **go** "get hold of somebody because the people didn't want to go back to work." **Paxton** then arrived telling Garcia and the other foremen to tell their workers to return to work. Since Garcia was with the workers in Block 4, he did not hear the initial exchange between **Paxton** and **Canedo** in Block 8. However, after **Paxton** described the incident to him, Garcia drove his truck down to Block 8 to speak to **Canedo** about the incident. As Garcia was walking up to **Canedo**, he saw **Paxton** circling the area in his pickup truck telling the workers gathered at Block 8 to **go** back to work. Garcia then heard **Canedo** tell **Paxton** "F--k you, **go** to hell." He saw **Paxton** get out of his truck and tell **Canedo** to repeat what he had said, and **Canedo** said "go to hell." **Paxton** again asked **Canedo** to repeat what he had said, and again **Canedo**

^{4/} **Paxton** later denied during his cross-examination that there had ever been any exchange between him and **Canedo** about the Union.

told **Paxton** to go to hell. By this time, Garcia saw that both **Canedo** and **Paxton** were angry, and interceded by telling **Canedo** that he was suspended until further notice and told him to leave the field.

Fredrico Lua, one of **Canedo's** co-workers, testified that he heard the first exchange between **Paxton** and **Canedo**. Lua testified that when **Paxton** drove by yelling at the crew to return to work, **Canedo** replied that they were engaged in a work stoppage. **Paxton** responded that the crew should go back to work or else go home. Lua stated that he did not hear **Canedo** swear at **Paxton** and that **Paxton** did not say anything about firing **Canedo**.

Artessima **Canedo**, **Canedo's** wife, testified that she was with the rest of the workers in Block 4 during the work stoppage. While she was in the field informing the workers of the reasons for the stoppage, she saw **Paxton** driving along the path by where she and the others were gathered and heard him loudly and forcefully tell the workers to go back to work or the company would send them home. A while later Garcia told **Mrs. Canedo** that her husband was fired for using bad language. She did not respond.

That afternoon, Garcia and **Paxton** described the incident at a meeting of company management personnel. At the meeting, the company president, Lionel Steinberg, upon the urging of those present, concurred with the decision to discharge **Canedo** because of his vulgar language. Steinberg testified that, in the past 17 years, only 6 or 8 employees had been discharged (from among approximately 2,000 persons employed each year), half of which

were fired for theft, one for sleeping on the job and another for the destruction of company property. Steinberg believed that although this was **Canedo's** first indiscretion, his discharge was necessary. He believed that to permit **Canedo** to continue working would be destructive of company morale and leadership and, most importantly, the company's viability. Steinberg explained that if the company did not take a strong position, outbursts similar to **Canedo's** would have continued on a daily basis, thereby jeopardizing completion of the year's harvest.

ALJ Decision

The ALJ concluded that this case came down to the question of whose version of the events is most believable. Although he found **Canedo** to be a "guarded" witness and thought elements of his story did not make sense, the ALJ credited **Canedo's** testimony, which he found supported by the testimony of the "presumably disinterested" co-worker, Lua. The ALJ found **Paxton** to be "totally untrustworthy," in part because of his appearance of being indifferent to the proceedings. Moreover, the ALJ found that **Paxton** projected an "air of hostility and physical menace" which made it unlikely that **Canedo**, a smaller and much older man, would repeatedly curse him in the fields. The ALJ found Garcia to be an "impressionable" witness who was not sufficiently credible to overcome the **ALJ's** mistrust of **Paxton**.

Accordingly, the ALJ found that **Canedo** had not uttered the language attributed to him, and that the stated ground for his discharge was pretextual. Thus, the ALJ concluded that Respondent violated the Act by discharging **Canedo** for his participation in

the work stoppage.

Respondent's Exceptions

Respondent argues that **Canedo** cannot have been discharged for his remarks to **Paxton**, because Garcia was the one who suspended **Canedo**. Since the ALJ found that the layoff of Garcia's wife was not a motivating factor in **Canedo's** discharge, Respondent asserts, there was no proof of discriminatory animus in Garcia's action.

That particular argument is not persuasive, however. The **real** issue in any case of alleged unlawful discharge for participation in protected concerted activity is causation. That is, if the discharge is causally related to the protected activity of the employee, the Act has been violated regardless of whether the evidence also demonstrates "antiunion animus" or another improper subjective state of mind. (Superior Farming Co. v. ALRB (1984) 151 Cal.App.3d 100, 115, citing National Labor Relations Act (NLRA) precedent.)

Respondent's **most** persuasive argument is that the ALJ erred in crediting the testimony of **Canedo** and Lua over that of **Paxton** and Garcia. We agree.

Credibility

We note initially that the ALJ's credibility determinations against **Paxton** were based, in part, on **Paxton's** demeanor while testifying. However, the ALJ's credibility resolutions against Garcia, as well as those in favor of **Canedo** and Lua, were not demeanor-based. To the extent that an **ALJ's** credibility resolutions are based on demeanor, the Board will not

disturb them unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect. (Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 15311, enforced (3d Cir. 1951) 188 F.2d 362 [27 LRRM 26311.]

As Respondent correctly points out, **Lua's** testimony was inconsistent with **Canedo's** on several important points. For example, **Canedo** testified that **Paxton**, as he was driving by in his truck, responded to **Canedo's** comments by firing him; Lua, however, stated that **Paxton** did not tell **Canedo** he was fired. **Canedo** testified that Lua was very close to him when Garcia discharged him, but Lua said he was not present when **Paxton** returned with Garcia and did not hear any of that conversation. Moreover, Lua testified that **Paxton** was yelling from his truck in English, while **Canedo** and **Paxton** both stated that **Paxton's** shouts from the truck were in Spanish.

Respondent further argues that **Canedo's** testimony is unreliable because of **Canedo's** lack of veracity. Respondent noted that when **Canedo** attempted to file a claim for unemployment insurance benefits a month after his discharge, he stated in his application that he had been laid off due to lack of work on July 3, 1986 (rather than being discharged on June 18, 1986). Moreover, Respondent asserts, **Canedo's** testimony about his conversations with Employment Development Department personnel was confusing and full of inconsistencies.

Respondent argues that the ALJ improperly discredited **Paxton** for his apparent disinterest in the proceedings, when **Paxton** was in fact disinterested because he no longer worked for

Respondent and is now employed by an insurance company, thus having nothing to gain or lose by his testimony. As to the **ALJ's** disbelief that **Canedo** would hurl insults at **Paxton**, a larger and younger man, Respondent argues that the ALJ failed to consider that there were several families close to **Canedo** at that time and their presence lessened any potential threat to his physical safety.

Respondent further states that the ALJ improperly discredited Garcia, and argues that Garcia's testimony regarding "cussing" between foremen and employees in the field was insufficient reason to discredit Garcia. On cross-examination, Garcia was asked whether he could say that no worker ever cusses at a foreman. Respondent's attorney objected that the question was vague as to whether the questioner was talking only about Freedman or about all companies in general. When the questioner said he meant at Freedman, Garcia replied **that foremen and other** people occasionally cuss at each other but not in anger. On redirect, Garcia testified that he had never heard a foreman cuss at a Freedman employee, nor vice versa. Respondent states that the transcript demonstrates that more than one person was talking when Garcia answered the first, ambiguous question. Moreover, Lua testified that swearing did not occur in the fields. The ALJ gave too much significance to Garcia's vague answer to an ambiguous question, Respondent argues, and should not have discredited all of Garcia's testimony on that slim basis.

For the reasons that follow, we find that the **ALJ's** credibility resolutions regarding all of the principal witnesses

in this matter were erroneous.

The ALJ erred in discrediting **Paxton** for his appearance of disinterest in the proceedings, since **Paxton** had good reason to be disinterested. Not only was **Paxton** no longer working for the Employer when he testified, but he was no longer even engaged in agricultural employment. To the extent that **Paxton** projected an "air of hostility and menace," we believe that is easily attributable to the hostile line of questioning he underwent on cross-examination.

The ALJ attached too much significance to his conjecture that **Canedo** would not have sworn at a man so much younger and larger than himself. We note that people commonly utter words in anger that they might refrain from uttering in cooler, more rational moments. Moreover, the presence of families with whom **Canedo** worked would likely have provided him with a feeling of safety from any potentially violent reaction from the other man.

On the other hand, the ALJ attached too little significance to the serious contradictions between **Canedo** and **Lua's** testimony. The most important discrepancies were that **Canedo** said **Paxton** fired him as he drove by in his truck and **Lua** said **Paxton** did not tell **Canedo** he was fired; and that **Canedo** said **Lua** was standing close to him when Garcia discharged him, but **Lua** denied being present or hearing the conversation. These important discrepancies cause us to disbelieve both witnesses.

Further, we find that the ALJ had insufficient reasons to discredit Garcia. Garcia's initial confusion regarding questions posed to him about "cussing" in the fields provides inadequate

grounds for finding him an "impressionable" witness. Moreover, the testimony of **Canedo's** wife -- that Garcia spoke to her in the field and said her husband had been discharged for using bad language -- tends to corroborate Garcia's testimony that that was the reason for the discharge. Of further significance are the failure of **Canedo's** wife to testify that her husband never swore, and her apparent failure to question Garcia about the claimed reason for **Canedo's** discharge.

The credibility of **Canedo** himself is seriously undermined by his account of what occurred when he applied for unemployment insurance benefits. **Canedo** evidently lied in stating to Employment Development Department personnel that he was laid off rather than fired from his job (thereby entitling him to benefits). **Canedo** never explained why his unemployment application form stated that his last day of work was July 3, 1986, rather than the actual date of his discharge, June 18, 1986. The discrepancy is significant because all of Freedman's employees -- approximately 1500 -- were laid off at the end of the season on July 2 or 3, 1986. Virtually all of those employees filed claims for unemployment insurance benefits following their layoff. The obvious inference we draw from these facts is that **Canedo** deliberately waited to file his claim until two weeks after his discharge, in hopes that his "layoff" claim would go unnoticed by Freedman among the 1500 other

//////////

//////////

applicants.^{5/}

We conclude that the **ALJ's** credibility resolutions regarding **Canedo** and **Lua's** testimony were erroneous, and we hereby overrule them. We further conclude that the clear preponderance of all the relevant evidence demonstrates that **Paxton** and Garcia's accounts of the discharge incident were credible and accurate.

(Standard Dry Wall Products, supra, 188 F.2d 362 [27 LRRM 2631].)

Therefore, we find that **Canedo** did in fact utter the words which his supervisors attributed to him.

Insubordination Issue

Having found that **Canedo** did utter profanity to his supervisor, we now proceed to an analysis of whether his profanity constituted legitimate grounds for discharge and whether Respondent would have terminated **Canedo** for his use of profanity even in the absence of his protected concerted activity.

Under NLRA precedent, an employee's use of profane or obscene language during the course of concerted or union activity does not necessarily take the activity outside the realm of protection of the NLRA, since the employee's right to engage in such activity requires some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order

////////////////

^{5/}**Union** representative David Serena testified that he and the Ranch Committee met two to three times between June 18 and July 3, 1986, in a effort to get **Canedo** reinstated, and that he told **Canedo** to wait and see what happened. However, as the ALJ himself noted, Serena did not testify that he told **Canedo** to delay in filing his unemployment application. Moreover, **Canedo** himself never explained his delay in filing.

and respect. (NLRB v. Thor Power Tool Co. (7th Cir. 1965) 351 F.2d 584 [60 LRRM 22371; NLRB v. Illinois Tool Works (7th Cir. 1946) 153 F.2d 811 [17 LRRM 841].) However,

[E]ven an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act. The decision as to whether the employee has crossed the line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way provoked by an employer's unfair labor practice.

(Atlantic Steel Company (1979) 245 NLRB 814, 816 [102 LRRM 12471, as quoted in Marico Enterprises, Inc. (1987) 283 NLRB No. 112 [125 LRRM 10441].)

Where, as here, an employee's protected concerted activity is asserted to have interfered with management's right to maintain order and respect, the NLRB engages in a balancing process whereby the employees' rights are weighed against the interests of management. (NLRB v. Prescott Industrial Products Company (8th Cir. 1974) 500 F.2d 6, 10 [86 LRRM 2963], citing McDonnell Douglas Corp. v. NLRB (8th Cir. 1973) 472 F.2d 539, 545 [82 LRRM 23931.]) As noted in NLRB v. Illinois Tool Works, supra, 17 LRRM 841, 844:

[C]ourts have recognized that a distinction is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a "moment of animal exuberance" (cases cited) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service (cases cited), and that it is only in the latter type of cases that the courts find that the protection of the right of employees to full freedom in self-organizational activities should be subordinated to the vindication of the interests of society as a whole.

In reconciling these two equally important but conflicting rights, the Board must look to the record as a whole

to determine whether the employee's misconduct was "indefensible under the circumstances", and if so, the employer may indeed discipline the employee without violating the Act. United States Postal Service v. NLRB (5th Cir. 1981) 652 F.2d 409, 411 [107 LRRM 3249]; Giannini & Del Chairo Co. (1980) 6 ALRB No. 38, p. 4.

In evaluating **Canedo's** conduct herein, we find it appropriate to apply the four-factor analysis established in Atlantic Steel, supra. Applying that analysis, we note initially that the conduct at issue occurred in the midst of a thirty-minute strike in the fields, and thus on company property. We find that the Employer herein had a greater interest in controlling **Canedo's** conduct because it occurred on the work site rather than off the Employer's property. This case does not involve conduct on a picket line, to which the NLRB has accorded protection for the use of epithets, vulgar words, or even profanity by a striker. (General Chemical Corp. (1988) 290 NLRB No. 13; NLRB v. McQuaide, Inc. (3rd Cir. 1977) 552 F.2d 519 [94 LRRM 2950].) Vulgar language which is directed at a supervisor "on the plant floor" can have a negative effect on the supervisor's status in the eyes of the employees, and thus is generally unprotected under the Act. (Firch Baking Company (1977) 232 NLRB 772 [97 LRRM 1192].) Here, a majority of workers apparently honored the brief work stoppage herein, and they remained in or about the work area. Since production was already halted herein, **Canedo's** outburst did not result in the disruption of Freedman's operations. Nevertheless, we find that the Employer had a legitimate interest in maintaining order and respect among the workers while they were present on the

Employer's property, and that **Canedo's** use of profanity tended to interfere with that legitimate interest.

Concerning the second Atlantic Steel factor (subject matter of the discussion) we find that the record is unclear as to whether **Canedo** and **Paxton's** verbal exchange continued to center upon union or work stoppage issues. **Paxton** initially testified that after **Canedo's** first outburst, there was a lot of discussion about the Union. He later denied during his cross-examination that there had been any exchange between him and **Canedo** about the Union. We find it significant, in any case, that **Canedo** made no claim that **Paxton** directed any comments toward him that were derogatory of the Union or of **Canedo** himself.

Regarding the third and fourth Atlantic Steel factors (the nature of the employee's outburst and whether the outburst was provoked), we note that the initial exchange between **Canedo** and **Paxton** was apparently prompted by **Paxton's** conduct in angrily yelling at the work stoppage participants to return to work. **Canedo's** immediate response served to affirm **Canedo's** defiance of management's attempt to convince the workers to return to work. Significantly, though **Paxton** was greatly upset by **Canedo's** use of profane language, he did not respond in like fashion and did not take any disciplinary action against him. When **Paxton** returned a second time, **Canedo** again unleashed a string of epithets reflecting an apparent desire to engage **Paxton** in a verbal sparring match. **Paxton**, again, though visibly upset, did not respond to **Canedo's** words and, again, did not discipline **Canedo**. Only after **Canedo** repeated his offensive remarks to **Paxton** did

Garcia, after two incidents involving at least five separate occasions where **Canedo** had used profane language, take any action. At no time did **Paxton** or Garcia, or any other supervisory personnel, give **Canedo** any reason to continue his opprobrious conduct after the first incident.

We conclude that **Canedo's** abusive use of profanity towards supervisor **Paxton** was unprovoked and demonstrated a lack of respect for the Employer which was not germane to carrying out his legitimate concerted activity. Because **Canedo's** conduct occurred on the work site and in the presence of other employees, it constituted insubordinate conduct that tended to undermine the Employer's legitimate need to maintain order and respect among employees on his property. **Canedo's** abusive language was not provoked by any management personnel, and was not uttered during the heat of contract negotiations, in a formal grievance proceeding, or on a picket line. In light of all the the circumstances, we find that his language amounted to opprobrious conduct exceeding the bounds of protected activity under the ALRA. (Atlantic Steel Company, supra 245 NLRB 814; NLRB v. Thor. Power Tool Co., supra, 351 F.2d 584; NLRB v. Illinois Tool Works, supra, 153 F.2d 811.)

Application of Wright Line

Because the ALJ credited **Canedo's** version of the incident herein, he viewed the Employer's justification as pretextual, therefore making a dual motive analysis unnecessary. (Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 11691, enforced, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 25131, cert. den. (1982) 455 U.S. 989 [109 LRRM 27791 (Wright Line).) However, as

previously indicated, we find that the Employer's stated reason for **Canedo's** discharge was not pretextual. Further, the evidence shows that **Canedo's** profanity was uttered during the course of protected concerted activity and that Respondent had a dual **motive** for discharging **Canedo**. Therefore, we find that a Wright Line analysis is appropriate herein.

Under the reasoning of Wright Line, once the General Counsel has established a prima facie case showing that union or other concerted activity was a motivating factor in the employer's disciplinary action, the burden shifts to the employer to demonstrate that it had a legitimate business justification for its action. If the evidence shows that the employer had a dual **motive**, then the employer must demonstrate that it would have taken the same action even in the absence of the employee's protected activity.

The most telling testimony regarding the Employer's motivation for discharging **Canedo** is that of the company's president, Lionel Steinberg. Steinberg stated that, under his leadership, Freedman and Company had voluntarily recognized the UFW and signed the first **table** grape contract with the Union in 1970. The Employer had contracts continuously with the UFW from 1970 to June 1986. Steinberg could recall only 6 or 7 employees who had been discharged during the past 17 years (from among approximately 2,000 persons employed each year), none for

////////////////////

////////////////////

allegedly protected activities.^{6/}

Steinberg regarded **Canedo's** conduct as a flagrant abuse of management personnel. During **Paxton's** account of the incident at the manager's meeting, **Paxton** argued that if he was not upheld, then no supervisor would ever be upheld. Steinberg agreed that to permit **Canedo** to continue working would be destructive of company morale and company leadership. "[W]hen you're abuse[d] and your leadership is abused," Steinberg stated, "there's a point where you must take a stand." The Employer's reputation had been built upon good will, and in his opinion **Canedo** had abused that good will. Not to have upheld **Paxton** and Garcia would have encouraged others to emulate **Canedo's** abusive conduct, Steinberg believed, and would have been damaging to the Union and the workers as well as to the company.^{7/}

On the basis of Steinberg's testimony, as well as the other evidence in this case, we find that the Employer discharged **Canedo** because of **Canedo's** abusive, disrespectful use of profanity toward a supervisor. We conclude that **Canedo** would have been

^{6/}The employees were discharged for offenses such as theft and sleeping on the job. One was discharged for removing every bunch of grapes from every row he worked on and dropping them on the ground, thus destroying a significant portion of the crop.

^{7/}On cross-examination, Steinberg testified that when work stoppages were called the company lost orders to its non-union competitors, and that "outbreaks" [like **Canedo's**] would possibly have continued daily, jeopardizing completion of the year's harvest if the company had not taken a strong position. We disagree with the General Counsel's characterization of this testimony as a demonstration of the Employer's anti-union animus. The clear import of Steinberg's testimony was in reference to the Employer's need to control **Canedo's** abusive conduct and the possibility that others would emulate that type of conduct, as opposed to his mere participation in the protected work stoppage.

discharged for his abusive language even if he had been engaged in activity on his own behalf rather than in concerted activity.

(Wright Line, supra, 251 NLRB **1083**.) Therefore, we conclude that the Employer has committed no violation of the Act, and the complaint herein must be dismissed.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: August 4, 1989

BEN DAVIDIAN, Chairman^{8/}

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

^{8/} **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.

CASE SUMMARY

David Freedman & Co, Inc.
(UFW)

15 ALRB No. 9
Case No. 86-CE-49-EC

Background

This case involved the alleged discriminatory discharge of a single employee, Jesus **Canedo**, because of his protected concerted and union activities. The complaint alleged that **Canedo** was discharged because of his participation in a work stoppage called by the UFW. The Employer stipulated that the work stoppage was protected activity, but contended that it discharged **Canedo** because of his insubordinate use of profane, abusive language to a company supervisor.

ALJ Decision

The ALJ credited the testimony of **Canedo** and a co-worker that **Canedo** did not utter the abusive language attributed to him, and concluded that the Employer's stated reason for the discharge was pretextual. The ALJ concluded that the Employer had violated the ALRA by discharging **Canedo** for his participation in the work stoppage.

Board Decision

The Board found that **Canedo's** testimony was inconsistent with the testimony of his co-worker on several important points. The Board further found that **Canedo's** credibility was seriously undermined by his inconsistent and contradictory testimony concerning his application for unemployment benefits. After also finding that the ALJ erred in discrediting the testimony of two supervisors who testified that **Canedo** had uttered the language attributed to him, the Board concluded that the clear preponderance of all the relevant evidence demonstrated that the **ALJ's** credibility resolutions were incorrect. The Board therefore overruled the **ALJ's** credibility resolutions and found that **Canedo** did in fact utter the words attributed to him.

The Board then examined **Canedo's** conduct under NLRA precedent, under which an employee's use of profanity during the course of concerted activity does not necessarily take the activity outside the protection of the NLRA. Rather, the employee's right to engage in such activity requires some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. The Board analyzed **Canedo's** conduct under the standards of Atlantic Steel Company (1979) 245 NLRB 814 [102 LRRM 12471, which held that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the NLRA. Determining whether an employee has crossed the line involves consideration of several factors: 1) the place of the discussion, 2) the subject matter of the

discussion, 3) the nature of the employee's outburst, and 4) whether the outburst was in any way provoked by an employer's unfair labor practice. Applying the Atlantic Steel factors, the Board found that the Employer had a greater interest in controlling **Canedo's** conduct because it occurred on the work site rather than off the Employer's property, since the Employer had a legitimate interest in maintaining order and respect among the workers while they were present on the Employer's property. Considering the subject matter of the discussion, the Board found it significant that **Canedo** made no claim that the supervisor made any comments that were derogatory towards him or towards the Union. The Board also found that **Canedo** had repeated his profanity several times although the supervisor never responded in like fashion. The Board thus concludes that **Canedo's** abusive use of profanity was unprovoked and demonstrated a lack of respect for the Employer which was not germane to carrying out his legitimate concerted activity. The Board concluded that because **Canedo's** conduct occurred on the work site and in the presence of other employees, it constituted insubordinate conduct that tended to undermine the Employer's legitimate need to maintain order and respect among employees on his property. In light of all the circumstances, the Board found that **Canedo's** profanity amounted to opprobrious conduct exceeding the bounds of protected activity under the ALRA, and thus constituted insubordination.

The Board also found that the Employer had a dual motive for discharging **Canedo**. However, in applying a Wright Line analysis, the Board concluded that the Employer's primary motive for discharging **Canedo** was his abusive, disrespectful use of profanity toward a supervisor. The Board concluded that **Canedo** would have been discharged for his abusive language even if he had been engaged in activity merely on his own behalf rather than in concerted activity. Therefore, the Board concluded that the Employer had not committed a violation of the ALRA, and it dismissed the complaint.

* * * *

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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
DAVID FREEDMAN AND COMPANY,)	Case No. 86-CE-49-EC
)	
Respondent,)	
)	
and)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Charging Party.)	
<hr/>		

Appearances:

Leonard Strom
319 Waterman Avenue
El Centro, California
for the General Counsel

Thomas M. Giovacchini
5108 E. Clinton Way, Suite 122
Fresno, California
for the Respondent

David Serena
1639 - 6th Street
Coachella, California
for the Charging Party

Before: Thomas Sobel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:1

This case was heard by me in December, 1987 in Indio, California. General Counsel alleged that Respondent, David Freedman & Company, an admitted agricultural employer, discharged Jesus **Canedo**, an admitted agricultural employee, on account of his union activities. In view of Respondent's admissions, I find the Board has jurisdiction. Respondent contends that it discharged **Canedo** for just **cause**, specifically for cursing supervisor Dan **Paxton** and that such invective as it contends **Canedo** directed at **Paxton** is not protected by the Act. Since **Canedo** has denied cursing at **Paxton**, the primary question to be decided is what happened between **Canedo** and **Paxton** on the day of **Canedo's discharge**;² only if I were to determine that **Canedo** cursed **Paxton** would I need to determine whether **Canedo's** language, in context, exceeded the scope of protected activity.

¹**Counsel** for General Counsel has filed a motion to correct the transcript to identify him as appearing on behalf of General Counsel and to identify David Serena as appearing on behalf of Intervenor-Charging Party. The transcript is hereby corrected in these respects.

²**Because** I do not credit Respondent's version of events, I do not need to reach the question whether **Canedo's** alleged language would have justified his discharge. In other words, I **am** viewing this case simply as a pretext case in which my finding that the stated ground of discharge is false ends the inquiry. I am not viewing it as either a dual motive or a striker misconduct case.

I. FACTS

A. Background

Prior to his discharge in June 1986, Jesus **Canedo** worked in Respondent's vineyards for approximately five years deleafing, pruning and picking grapes. His picking foreman, and his foreman at the time of his discharge, was Vidal Garcia. Since General Counsel contends that at least part of the reason Garcia discharged **Canedo** was **Canedo's** role in forcing Garcia to lay-off Garcia's wife, before relating the events leading up to **Canedo's** discharge, I will adumbrate this background.

In the season prior to his discharge, **Canedo** served as union steward and, as such, was responsible for ensuring that all employees came through the union hiring hall. Sometime during the pruning season, Vidal Garcia's wife started working without a union dispatch. **Canedo** testified that he spoke to Garcia about the latter's wife not being properly dispatched and that Garcia did not want to stop her. However, after he suggested they go to the union office to straighten the matter out, Garcia's stopped his wife from working.

Garcia recalled having to stop his wife from working because she had not been properly dispatched. According to Garcia, shortly before the incident with his wife, he had been forced to lay-off the children of another worker, Alfonso Sanchez, after he had given them jobs in accordance with the company's past practice of providing summer employment to the

children of its employees. Although the union and the company had formerly agreed upon the practice, in the negotiations just prior to Garcia's hiring the Sanchez children, they had been unable to again agree to it. As a result, after he put the boys to work, he received a complaint pursuant to which he let them **go.**

Garcia testified that at the time of the controversy about his wife's not being properly hired, he suspected Alfonso Sanchez as the initial source of complaints because the latter was upset that his two boys had been laid-off. Garcia further testified that it was not **Canedo** who told him to lay-off his wife, but Manuel Aguilar (Garcia's superior). On the basis of this testimony, Respondent argues that the incident with Garcia's wife could not have played any role in Garcia's treatment of **Canedo**, first, because **Canedo** played no role in the lay-off of Garcia's wife and, second, because if Garcia had a motive to retaliate against anyone, he had as much reason to retaliate against Sanchez as General Counsel claims he had to retaliate against **Canedo** and, therefore, he had no special reason to discriminate against **Canedo**. Garcia did admit, however, that **Canedo** was the union steward when the incident took place and that it was the steward's job to police hiring under the contract. **Canedo** further testified that he thought Garcia's attitude toward him had changed after the incident.

I credit **Canedo** that the incident took place as he testified. Since even Garcia admitted that **Canedo** was union

steward at the time, and that it was the steward's job to enforce the contract, it seems more likely than not that **Canedo** would have been the one to bring the matter up.

B. THE FIRING

The preceding incident took place in 1984; **Canedo** was fired in 1986. Respondent concedes that on the day of his discharge, **Canedo** took part, with everyone else in his crew, in a protected work stoppage in order to pressure Respondent to reach agreement with the union.³

According to **Canedo**, as the crews were preparing to go back to work, Don **Paxton**,⁴ one of the company's supervisor, drove by and, yelling from his truck, told the employees to either go back to work or to go home. Upon hearing this, **Canedo** shouted back at **Paxton** that he (**Canedo**) wanted to explain why the crew had gone out. **Paxton** thereupon told **Canedo** he was fired. As **Canedo** was preparing to go back to work, **Paxton** and **Garcia** came up to him and **Garcia** asked him to repeat what he said to **Paxton**. As **Canedo** attempted to do so, **Garcia** interrupted him and told him he was fired. **Paxton** said nothing.

30rdinarily the crew takes a ten minute break at **8:30** in the morning; on the day of the stoppage, the crew did not return to work after break, but remained out for another half-hour.

⁴Although **Canedo** indicated he was not aware that **Paxton** was a supervisor, **Paxton's** status is not reasonably subject to dispute. Moreover, neither version of the events leading up to **Canedo's** discharge is made more or less likely by **Canedo's** purported ignorance of **Paxton's** status.

Although he did not hear what **Canedo** and Garcia talked about, another employee, **Frederico** Lua, testified that he heard the initial exchange between **Canedo** and **Paxton**. Lua testified:

Q Were you working for David Freedman on June 14, 1986?

A If it was the day of the discharge from work, yes.

Q Thank you. Were you working in the vicinity of Jesus **Canedo**?

A Yes.

* * * * *

Q Did you hear Mr. **Paxton** drive by hollering out of his truck?

A He went by yelling at everybody to work.

Q Do you recall hearing Mr. **Canedo** respond to him?

A What he told him it was that we were in the process of a work stoppage after we had had a break at 8:30 in the morning. We had to make a stoppage in order to force the company to make a contract.

* * * * *

Q Did you hear Mr. **Canedo** swear at Mr. **Paxton**?

A What he said is that we were in a stoppage of work in the same place we were in the field.

* * * * *

Q Did you hear Mr. **Paxton** respond to Mr. **Canedo**?

A Only that we should get back to work and if we don't want to we should go home.

Q Was that the total of the discussion between the two of them?

A Yes, it's everything that they said only talking in a loud manner.

RT: 79-80

Lua's version differs from that of **Canedo's** in that he did not hear **Paxton** say anything about firing **Canedo** during the initial exchange; he supports **Canedo's** testimony that **Canedo's** remarks to **Paxton** were not provocative.

Paxton and Garcia tell a different story.

Paxton testified that after he shouted at **Canedo's** crew to either go back to work or go home, he heard "this individual"

yell "Fuck you" three times. **Paxton** wanted to see who did this and why. He got out of his truck and, going up to **Canedo**, asked him what "he" said.⁵ **Canedo** first told him to go to hell, before he repeated, "Fuck you." **Paxton** took no action but left the fields, resentful about the incident. He returned a short time later:

Q Did you come back at any later time during the day to the **same** area where Mr. **Canedo** was working?

A I **came** back after some time had gone by to tell them to go work, keep working. In other words, that was part of my job to have to inform the crews exactly where --

* * * * *

Q You came back. Did you find him again?

A Yeah.

Q All right. Did you talk to him?

A No, he yelled at me again.

* * * * *

It was almost a repeat performance when I came back the next time --

* * * * *

Q All right. Walk us through that. What happened?

A Well, he yelled, **fuck** you go to hell. Then I got out of the truck. This time I was pretty mad. And then at this time the crew foreman **was** there and **some** other people were there.

Q Who **was** the crew foreman at that time?

A Vidal Garcia.

⁵**Paxton's** choice of language is quite interesting: he initially does not identify **Canedo** by name **as** the one who cursed at him, but refers to him as "**this** individual." Now it may be that he simply did not know his name, but it also may be that he did not really see whoever cursed at him. A few lines later he plainly identifies **Canedo** as the one who spoke: how he made the specific linkage between **Canedo** and the one who cursed at him was not explored.

Q All right.

A And he was yelling. And he repeated a couple of times. And then I asked him to repeat it just like I'm saying to you right now, I want you to repeat what you said or could you repeat it to me so I could understand fully what you're saying. And he --

Q Why did you need him to repeat it?

A Because I wanted to make sure that he was saying what he was saying. I couldn't believe it, you know. And in my opinion that behavior is unacceptable; union, no union; work no work; not matter what.

Q All right. Did he repeat it then again?

A yes, he did.

Q And Vidal was, Vidal Garcia was present and heard the repetition of this comment?

A Right. Vidal, when I said repeat it the phrase that he was you know hanging on to at that time as go to hell.

Q Okay. What else was said between you, Vidal and Mr. **Canedo**?

A Well, at this time I think Vidal was worried that there was going to be some kind of a confrontation. And he wanted to calm things down. And he did. And he suspended him right then.

Garcia recalled **Paxton's** driving by and telling the crew to go back to work; however, he did not hear what **Paxton** described as his initial exchange with **Canedo**. He did recall **Paxton** telling him that **Canedo** had said something to him which made him want to talk to **Canedo**. Garcia testified:

So I got on my truck. I drove all the way down to block 8, that's about five blocks down. It's a long way to walk. So I got on my truck and I parked my truck on the side of the road. I was walking towards where Jesus **Canedo** was. At this time I was about to talk to him when Don came with his pickup going around in circles. I don't know what he was doing but he was telling the people to go back to work. Now, at this time Don told the people was telling the people from his pickup to go back to work. Okay? So Jesus **Canedo** he heard Don say that and he said these words to him he said, **fuck** you, go to hell. So at that time Don's truck was not going very fast. But by the time he stopped the truck it was about three or four rows. So he backed up his truck, got out of his truck and told Mr. Jesus **Canedo** in front of me to repeat what he had just said. And then he said, go to hell. And Don again repeat him repeat to him to repeat what he said. And Mr. Jesus told him to

to to hell. He did the third time to repeat that what you just told me. At this time I saw Don that he was you know real mad. And I also saw Mr. Jesus that they were real mad. And Jesus **Canedo** told him again to go to hell. At that time I stepped between them and I said, okay hold it. So Don got on the truck, he took off. At that time I told Jesus **Canedo** that he was laid off until further notice.

Later, Garcia and **Paxton** brought the matter up at a meeting with other foremen and company management, including company President Lionel Steinberg. According to Steinberg, it was decided to fire **Canedo** because of the abusive language he directed at **Paxton**.⁶

LEGAL ANALYSIS

General Counsel contends that a mix of illegal motives prompted **Canedo's** discharge: one was Garcia's personal hostility towards **Canedo** which stemmed from **Canedo's** complaints about Garcia's wife, and the second was Respondent's desire to "single [**Canedo**] out as the only voice opposition to the employer's intimidation of workers engaged in a protected thirty minute work stoppage....by threatening the workers with loss of their day's employment if they continue to observe the union called work stoppage." Post-Hearing Brief, p. 2. By imputing to Garcia a

⁶I credit Steinberg that the decision to "**fire**" **Canedo** was made as he related based upon **Paxton's** and Garcia's representation about what happened in the fields but this does not change the focus of my inquiry into what "really" happened between **Canedo** and **Paxton**.

quantum of **animus**⁷ against **Canedo** and further, by characterizing **Canedo's** remarks to **Paxton** as "opposition" to **Paxton's** telling the employees to go back to work or to go home, General Counsel has made a serious attempt to grapple with the most puzzling element of this case which is, of all the people engaging in the work **stoppage**, why was **Canedo** singled out for discharge? Although I have credited **Canedo's** version of the "hiring hall" incident with Garcia's wife, I am not persuaded that Garcia nursed his wounds for so long before taking his revenge. Although it is possible that he did so, I have no sense that it is more likely than not that he did so. Accordingly, General Counsel has failed to meet his initial burden of proving that the lay-off of Garcia's wife was "a motivating factor" in **Canedo's** discharge.⁸ Wright Line (1983) 251 NLRB 1083. More likely to me is the theory that **Paxton** took

'Garcia's "animus" on this score would be "discriminatory" as opposed to "personal" since it arose in connection with **Canedo's** policing of the contract. NLRB v. City Disposal Systems (1984) 456 U.S. 8-22, 115 LRRM 3193. Therefore, retaliation against **Canedo** for policing the contract would be unlawful.

81n disregarding the evidence, I have also considered **Canedo's** testimony that Garcia's attitude towards him changed after the incident. While such impressions are not only common enough, but also typically inform our attitudes toward other people, it is equally common for participants in any sort of unpleasant situation to be self-conscious after it and to interpret each other's behavior in light of the incident. Without more evidence, I couldn't say whether **Canedo** was accurately reading Garcia's mood after the incident or, reading something into it.

offense at **Canedo's** remarks.⁹

To my mind, this case simply comes down to a contest between Canedo's, or of **Paxton's** and Garcia's, version of events. Both **Canedo** and Lua testified that all **Canedo** initially said to **Paxton** was that he wanted to explain why the crew had gone out. Against this **Paxton** claims someone whom he identified as **Canedo** screamed expletives at him from the fields. He further claims that he got out of his truck to confront "this individual" (who turned out to be **Canedo**) whereupon **Canedo** repeated the same language. Garcia testified **Canedo** used the same language when he was present a short time later. While there are elements of **Canedo's** story that do not make sense -- such as his testimony that **Paxton** initially told him he was fired -- and while **Canedo** showed himself to be a guarded witness -- as in his testimony about his unemployment application -- his version of what he initially said to **Paxton** is supported by the presumably disinterested tua. Accordingly, I find **Canedo** was engaged in protected activity, **Paxton** knew of it, **Canedo** said something to **Paxton** in the course of it, and **Canedo** was discharged shortly afterwards because of what he said.

⁹I decline to find as General Counsel urges me to do in his post-hearing brief, that **Paxton's** statements to the crew "to go back to work or to go home" constituted "threats." No such independent violation of the Act was alleged and while General Counsel argues that the matter was fully litigated, I do not believe it was. Although **Paxton's** remarks were ambiguous, they did not clearly threaten discharge (which would have violated the act), but rather lockout. Since General Counsel has not briefed this issue, I decline to pursue it.

The trouble I have with **Paxton's** and Garcia's story is that **Paxton** struck me as totally untrustworthy: part of the time he leaned back in his chair, his feet stretched out in front of him, hands clasped behind his head so that he appeared to be indifferent to the proceeding. Harder to convey to anyone not present at the hearing was the air of hostility and physical menace which he projected which made it seem all the more unlikely to me that **Canedo**, a smaller, older man, would repeatedly hurl curses at him in the fields. Whatever my doubts about **Canedo's** story they simply do not make up for the severity of my mistrust of **Paxton** as a witness.

Although I had no similarly strong impression of Garcia as a witness, Garcia did reveal himself to be impressionable when, in the space of a few moments, he testified under cross-examination by Counsel for Intervenor that "there's foreman that cuss at people." (RT: 155) and under re-direct examination by Counsel for Respondent that he never "heard a foreman cuss at one of the employees." (RT: 156) I simply do not have sufficient confidence in Garcia's credibility to overcome my doubts about Paxton's. Accordingly, I find that Respondent violated the Act when it discharged Jesus **Canedo**.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (**ALRB** or Board) hereby orders that Respondent David Freedman Co., 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 Jesus **Canedo** 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 Jesus **Canedo** 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 out 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, 1986 to January 1, 1987.

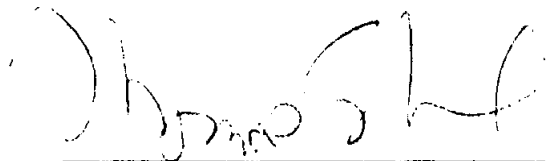
(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined for the Regional Director, and exercise due care to replace any Notice which as been altered, defaced, covered, or removed.

(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 is achieved.

DATED: February 8, 1988

A handwritten signature in dark ink, appearing to read 'Thomas Sobel', is written above a horizontal line.

THOMAS SOBEL
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro 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, David Freedman and Company, 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 Jesus **Canedo** 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 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 Jesus **Canedo** for all losses of pay and other economic losses he has suffered as a result of our discriminating against him, plus interest.

Dated:

DAVID FREEDMAN AND COMPANY

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 Centro, 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