

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRUCE CHURCH, INC. ,	)	
	)	
Respondent,	)	
	)	Case Nos. 87-CE-87-SAL
and	)	87-CE-87-1-SAL
	)	87-CE-89-SAL
UNITED FARM WORKERS	)	87-CE-89-1-SAL
OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	16 ALRB No. 3
	)	

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DECISION AND ORDER

On June 30, 1989, Administrative Law Judge (ALJ) Barbara D. Moore 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 affirm the rulings, findings, and conclusions of the ALJ insofar as consistent with the decision herein, and to adopt her proposed Order.

This case involves the alleged discriminatory threatening, suspension and discharge of two employees, Arturo Jimenez and Victor Ramirez, because of their protected union activities. In its answer to the complaint filed herein by the General Counsel, Respondent denied any knowledge of union activity by Jimenez or Ramirez and asserted that both employees were discharged for the insubordinate use of obscene and abusive language to foremen and supervisors.

Arturo Jimenez

Testimony

Jimenez began working for Bruce Church, Inc. (Respondent or Employer) in 1979 as a cutter and packer of lettuce, and worked at various locations in California and Arizona. In February 1987 a representation election was held at the Employer's operations in Yuma, Arizona, where Jimenez was active in the United Farm Workers of America, AFL-CIO (UFW or Union) campaign, distributing UFW leaflets and flags to employees and posting caricatures of company supervisors. Company foreman Julio Barajas warned Jimenez not to continue his union activities and not to be a "clown," because the Employer was going to fire people for their union activities. Barajas, who repeated his warnings to Jimenez in Salinas, California, also said that the Union was no good because every company that had a union would close.

During the 1987 Salinas lettuce season, the UFW conducted several marches in the Salinas Valley directed against Respondent and other employers. On one occasion, when foreman Filemon Lizaola saw Jimenez giving coworkers directions to a march in Watsonville, Lizaola called Jimenez a derogatory name and told him that if he wanted to spread old wives' tales he should go home.<sup>1/</sup>

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<sup>1/</sup> UFW representative Lupe Castillo testified that foremen Barajas and Lizaola would frequently harass him when he took access to workers in the fields. On one occasion when Castillo attempted to take permitted lunchtime access, Lizaola demanded that he leave and said he had orders not to let Castillo enter. On another occasion, when Castillo arrived at lunch time and told Lizaola he was going to enter the field, Lizaola told him to "behave" himself or Lizaola would "put another hole" in him.

On July 23, 1987,<sup>2/</sup> the day before his discharge, Jimenez was working in Respondent's one remaining ground crew, Crew No. 7.<sup>3/</sup> When his crew began its morning break, he walked over to foreman Filemon Lizaola's machine crew and started talking to some of them about the Union. Jimenez claimed that when he arrived, the machine crew was just beginning its break: the cutters in the front of the machine had stopped working, and those in back were just finishing packing the already cut lettuce. Jimenez told the workers they were being paid less than the ground crew, and that they shouldn't be so dumb and should be united and support the Union.

Foreman Lizaola came up behind Jimenez and told him to shut up, and not to talk about the Union or Lizaola would punch him out. In response, Jimenez told Lizaola not to be a "buey"<sup>4/</sup> and said he was not the owner of the company. Lizaola replied that he was going to punch Jimenez out after work. Jimenez denied swearing at Lizaola, and said that though he gestured with his hands for emphasis while he spoke, he did not make any obscene gestures.

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<sup>2/</sup>All dates herein refer to 1987 unless otherwise indicated.

<sup>3/</sup>Jimenez testified that ground crew No. 1 had been disbanded and replaced by a labor contractor crew. The workers who had the most seniority were put into crew No. 7, while the others went to machine-harvesting crews. Coworker Jorge Munoz testified that in a ground crew the employees could earn up to \$100 for four or five hours under the piece rate system, but on the machines they would work up to ten hours for only \$90.

<sup>4/</sup> This term was defined during the hearing as a "steer" or neutered animal.

Lizaola then called supervisor Juan Guillen, and the Employer's labor relations representative, Gonzalo Estrada, also came over. When Lizaola told them that Jimenez had come over to talk to the crew and that Lizaola had told him to go away, the three men grabbed hold of Jimenez and took him back to his own crew. Jimenez testified that during his afternoon break, his foreman, Marcelino Sepulveda, told him that Lizaola had sent a message that after work he was going to physically attack Jimenez.

The following morning, Jimenez testified, when he arrived at the camp where employees are picked up for work, he went up to Lizaola and asked why he had sent a message by Sepulveda that he was going to punch Jimenez out. Lizaola allegedly replied that what had happened to "Bule" was going to happen to Jimenez. <sup>5/</sup> Jimenez again told Lizaola that he was not the owner of the company, and said that if Lizaola was going to strike him, he should do it right then. Supervisors Guillen and Estrada then arrived, and Jimenez tried to explain to Estrada what had happened. However, Jimenez claimed, Estrada listened only to Lizaola's explanation and then proceeded to fire him.

Two members of Lizaola's machine crew, Jorge Munoz and Guillermo Jaramillo, corroborated Jimenez<sup>1</sup> testimony that the crew was beginning its break when Jimenez arrived on July 23. Both employees testified that Jimenez spoke to the crew about wages and the Union. Munoz stated that Lizaola told Jimenez to "get the

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<sup>5/</sup>Jimenez explained that "Bule" was the nickname of a coworker whom Lizaola had hit. In his testimony, Lizaola admitted having problems with "Bule" on one occasion, but denied hitting him.

hell out" of the area and threatened to punch him out for talking to the crew. Jaramillo stated that Lizaola told Jimenez he had no reason to be there agitating the crew. Neither man heard any swearing from Jimenez. Jaramillo, who was standing close to Jimenez at the camp the next morning, corroborated Jimenez' testimony that on that occasion he asked Lizaola why he was sending messages through Sepulveda, and that Jimenez referred to Lizaola as a "steer."

James Barros, who was working with Jimenez in the ground crew on July 23, testified that both crews were starting their break when Jimenez went over to talk to the machine crew. Barros heard Lizaola tell Jimenez to leave, and not to be talking to the crew about the Union. Barros did not hear Jimenez swear and did not see him make any obscene gesture. Later in the day, Barros testified, Lizaola came to foreman Sepulveda and told him to tell Jimenez that he should not be talking to Lizaola's people about the Union, because otherwise Lizaola was going to hit him or kill him.

Leonel Garcia was the only member of Lizaola's crew to testify that the crew was not on break when Jimenez arrived. Garcia claimed that Jimenez called the workers slaves and said they were stupid for working by the hour instead of at piece rate. He said he did not hear anything else, but saw Jimenez make a gesture which he interpreted to mean, "it's not worth anything," or "you jerk me off."

Filemon Lizaola testified that on July 23 Jimenez came over to his crew ten minutes before he was going to call a break.

Jimenez called the workers stupid for working for what they were paid. Lizaola said he told Jimenez, "Please to get away from there, you don't have any right to insult the workers." Lizaola said that Jimenez responded by calling him obscene and derogatory names and gesturing obscenely with his hands. When Lizaola called supervisors Guillen and Estrada over, Jimenez repeated his obscene, offensive language, and Lizaola told Guillen that he should discharge Jimenez for insubordination. Lizaola admitted that Guillen told him (Lizaola) to be calm. Later, Lizaola stated, he went to Jimenez' foreman, Marcelino Sepulveda, and told him that Jimenez had insulted his crew.

Lizaola denied sending Jimenez a message that he was going to punch him out, but acknowledged that on July 24 Jimenez asked him why he had sent such a message. Lizaola stated that he replied that he didn't need any messengers to let Jimenez know how he felt about him. Jimenez then made a comment about "jerking off," and Lizaola called Sepulveda over and complained that Jimenez had insulted him. Sepulveda then issued Jimenez a suspension.

Gonzalo Estrada testified that he saw Jimenez make an obscene gesture while talking to Lizaola and Guillen on July 23. He also heard Jimenez refer to Lizaola in unflattering and obscene terms, and he admonished Jimenez not to insult the foreman. Both Estrada and Sepulveda testified that on July 24 Jimenez again uttered obscenities before Sepulveda suspended him pending termination.

ALJ Decision <sup>6/</sup>

The ALJ credited the accounts of General Counsel's witnesses of the events leading to Jimenez' discharge. She found that Jimenez' statements to Lizaola's crew were designed not to insult the workers but to encourage them to protest the lower wages they were earning. She credited General Counsel's witnesses regarding Lizaola's threats to Jimenez, and did not believe that Lizaola's mild request that he "please not insult the workers" would elicit from Jimenez a barrage of obscenities and complete unconcern about being fired, since Jimenez had worked for Respondent for 8 years. She also based her findings on Jimenez<sup>1</sup> temperament and the corroboration of his testimony by Munoz and Barros. The ALJ found it unbelievable that if Jimenez had interrupted the crew and uttered a streak of obscenities, no disciplinary action would have been taken against him on July 23. Further, Guillen's admonition to Lizaola to calm down was not consistent with Lizaola's and Estrada's account.

Thus, the ALJ concluded that Jimenez had not uttered obscenities on July 23. She found that Lizaola sent Jimenez a threatening message via Sepulveda during the afternoon of July 23, and that Lizaola again threatened Jimenez on July 24 when he referred to "Bule." She found that on July 24, Jimenez responded to Lizaola as he had the previous day (telling Lizaola that he wasn't the head of Respondent's company and wasn't enough of a

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<sup>6/</sup> We believe that the ALJ's detailed recitation of 10 years' labor relations history at Bruce Church, Inc. was extraneous material not necessary to the resolution of this case. We note that no testimony was taken on this matter.

man) and that Estrada had greatly overstated Jimenez' response.

The ALJ also found that the Employer had given false and inconsistent reasons for discharging Jimenez. She concluded that Respondent's asserted reasons for the discharge were pretextual, and that the real reason was Jimenez' union activities. The ALJ further concluded that even if the Employer had discharged Jimenez for the remarks she found he did make, those remarks did not provide a legitimate ground for discharging Jimenez because they were within the scope of protected activity.

#### Respondent's Exceptions

In its brief, Respondent argues that there was "overwhelming" evidence that Lizaola's crew was still working when Jimenez spoke to the crew members, and that when told to leave, Jimenez used insulting and abusive language. Respondent argues that the ALJ ignored "objective" testimony in disbelieving all of Respondent's witnesses, and that her method of determining credibility was not acceptable.

Respondent also argues that there was no causal relationship between any of Jimenez' union activities and his termination. Respondent states that eighty percent of its employees are active union members, that other employees carried union flags and passed out union leaflets, and yet other employees were not discharged for those activities. Even if Jimenez was engaged in concerted activity during the incidents in question, Respondent asserts, he was discharged for his violation of company rules. Further, Respondent claims, Jimenez' activity cannot be considered protected because it had no specific purpose, and there



was no evidence that his activity had any effect on other workers.<sup>7/</sup>

As part of its argument that there was no causal connection between Jimenez' union activities and his termination, Respondent analyzes this case as a dual motive case, and argues that General Counsel has not shown that the Employer was partially motivated by impermissible grounds for discharging Jimenez rather than permissible grounds alone.

Finally, Respondent objects to the ALJ's comparison of the instant case to United States Postal Service (5th Cir. 1981) 652 F.2d 409 [107 LRRM 3249], which holds that employees are generally protected against discipline for impulsive behavior that occurs during grievance meetings, since such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. Respondent asserts that the case has no bearing on the issues in this case, which does not involve a grievance meeting.

#### Credibility Issue

Some of the ALJ's credibility resolutions herein were based on the witnesses' demeanor. Others, however, were based on such factors as reasonable inferences, the consistency or

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<sup>7/</sup> Respondent appears to disregard the fact that the ALJ found Jimenez to have been engaged specifically in union activity, not just concerted activity, and that he was encouraging the workers to protest their wages and support the Union. Respondent's claim that Jimenez' activity had no effect on other workers is irrelevant; Respondent cites no authority for its contention that the nature of protected concerted activity is dependent on its effect on other workers. (See statutory definition of concerted activity in § 1152 of the Agricultural Labor Relations Act (ALRA or Act), which contains no support for Respondent's contention.)

inconsistency of a witness' testimony, whether a witness' alleged behavior comported with common experience, and the corroboration of disinterested witnesses.

To the extent that an ALJ's credibility resolutions are based on demeanor, the Board will not overrule them unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect. (Standard Dry Wall Product, Inc. (1950) 91 NLRB 544 [26 LRRM 1531]; David Freedman & Co., Inc. (1989) 15 ALRB No. 9 (Freedman).) We decline, however, to decide this case exclusively on the basis of credibility determinations, under which the Board would have to disregard nearly everything that was said by either Respondent's or General Counsel's witnesses. Moreover, although we find that Jimenez and his corroborating witnesses generally gave a truthful account of the events leading to Jimenez' discharge, we are not entirely convinced that Jimenez did not utter some profanity to Lizaola. However, we find it unnecessary to decide this case wholly on the basis of credibility determinations because, as we explain infra, we conclude that Jimenez was engaged in protected union activity and would not have been discharged in the absence of such activity.

#### Insubordination Issue

Under National Labor Relations Act (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 must be balanced against the employer's right to maintain order and respect. (NLRB v. Illinois

Tool Works (7th Cir. 1946) 153 F.2d 811 [17 LRRM 841].)

[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 1247], as quoted in Marico Enterprises, Inc. (1987) 283 NLRB 726 [125 LRRM 1044].)

Where, as here, an employee's protected concerted activity is asserted to have interfered with management's right to maintain order and respect, the National Labor Relations Board (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 2393].) 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 conduct was indefensible under the circumstances, and if so, the employer may indeed discipline the employee without violating the Act. (Id.)

As we did in Freedman, supra, we find it appropriate herein to apply the four-factor analysis established in Atlantic

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Steel Company, supra, 245 NLRB 814.<sup>8/</sup>

Initially, we affirm the ALJ's finding that Lizaola's crew's break had started when Jimenez began talking to crew members on July 23. Thus, although his verbal responses to Lizaola occurred in the crew's work area, his conduct did not disrupt Respondent's operations since work was already halted.

We also affirm the ALJ's findings that Jimenez' remarks to the crew concerned the difference between the ground crew's piece rate wages and the machine crew's hourly wages, that he encouraged the crew members to protest their wages and urged them to be united and support the Union. Thus, the subject matter of Jimenez' remarks was clearly within the realm of protected union activity.

Further, we affirm the ALJ's finding that Jimenez' statements to the crew were not meant to insult the workers, but rather to encourage them to protest their lower wages. While Jimenez may have used disrespectful language to Lizaola, he did not engage in any violent or threatening conduct. No evidence indicated that Jimenez' conduct was prolonged or that he physically resisted when supervisors came to remove him and take him back to his crew.

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<sup>8</sup>The ALJ herein incorrectly applied the ALRB and NLRB standard of review which is applicable to the use of intemperate language by an employee acting in a representative capacity while engaged in negotiations or the presentation of a grievance. (See, e.g., United States Postal Service v. NLRB, supra, 652 F.2d 409 and V. B. Zaninovich & Sons (1986) 12 ALRB No. 5.) The standard of review which the ALJ should have applied is set out in such cases as Atlantic Steel Company, supra, 245 NLRB 814, NLRB v. Prescott Industrial Products Company, supra, 500 F.2d 6, and NLRB v. Illinois Tool Works, supra, 153 F.2d 811.

Moreover, Jimenez did not use any intemperate language on July 23 until foreman Lizaola came up behind him, told him to shut up and not talk about the Union, and threatened to "punch him out." Even if Jimenez' responses to Lizaola were as strong as the Employer's witnesses claimed, his conduct was clearly provoked by Lizaola's own intemperate behavior. This assessment of Lizaola's conduct is further justified by Lizaola's own admission that supervisor Guillen admonished him to calm down.

This case is easily distinguished from Freedman, wherein we found that an employee's use of profanity exceeded the bounds of protected activity. In Freedman, the employee made no claim that the supervisor threatened him or made any comments that were derogatory toward the union or the employee himself. The Board found in Freedman that the employee's abusive use of profanity was unprovoked, and that the supervisor took no action to discipline the employee until he had engaged in several outbursts of such language.

In summary, we find that Jimenez' conduct did not interrupt Respondent's production, that the subject matter of his remarks (as well as the foreman's response) concerned union activity, that Jimenez did not engage in any violent or threatening conduct, and that Lizaola threatened him with physical violence. We conclude that Jimenez' conduct on July 23, even if it was as abusive as Respondent alleged, was not sufficiently flagrant to take it outside the realm of activity which is protected by the ALRA.

(Atlantic Steel Company, supra, 245 NLRB

814; NLRB v. Illinois Tool Works, supra, 153 F.2d 811.)

Respondent's Motivation for Discharging Jimenez

General Counsel clearly established a prima facie case that Jimenez engaged in union activities, that Respondent had knowledge of such activities, and that there was a causal connection between Jimenez' activities and his suspension and discharge. Once General Counsel established a prima facie case, the burden shifted to Respondent to prove that its adverse actions were not unlawfully motivated. (Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enforced (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 455 U.S. 989 [109 LRRM 2779] (Wright Line); Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].)

The ALJ found that Jimenez had not uttered the obscenities ascribed to him by Respondent's witnesses, and concluded that Respondent's asserted reason for discharging Jimenez was pretextual. We have found that Jimenez' conduct on July 23 was protected union activity, and that his language in response to a foreman's provocation did not remove his conduct from the bounds of protected activity. However, the Employer has claimed that Jimenez was discharged not only for his conduct on July 23, but also for his behavior toward Lizaola at the pick-up point the following morning as well. The incident on July 24 did not clearly form a part of Jimenez' union activity<sup>9/</sup>. Therefore,

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<sup>9/</sup> Although Jimenez questioned Lizaola as to why the foreman had sent him a threatening message, apparently neither party to the conversation made any reference to the union matters Jimenez had discussed with the crew the previous day.

it is necessary for us to examine the Employer's motivation in order to determine whether Respondent would have discharged Jimenez for his alleged misconduct on July 24 even in the absence of his protected union activity on July 23. (Wright Line, Inc., *supra*, 251 NLRB 1083.)

A number of factors indicate that Jimenez' union activities were the true reason for his suspension and discharge. In addition to physically threatening Jimenez for talking to the crew about the Union on July 23, Lizaola had shown open hostility to previous union activities of Jimenez and other employees. The timing of Jimenez' discharge, which occurred the very next day after his talking to Lizaola's crew about the Union, is also an indication of an unlawful motive. Further, Respondent gave shifting, inconsistent reasons for its adverse action, asserting initially that Jimenez was discharged for abusive treatment of the foreman but later suggesting that he had violated a company rule by interrupting the crew.

On the basis of the above considerations, we conclude that Respondent would not have suspended and discharged Jimenez but for his protected union activity. Therefore, we affirm the ALJ's conclusion that Respondent's suspension and discharge of Jimenez constituted violations of section 1153(c) and (a) of the Act.

We also affirm the ALJ's conclusion that Lizaola unlawfully threatened to beat up Jimenez because he engaged in protected union activities, and that Sepulveda's repetition of that message from Lizaola constituted a threat in violation of

section 1153(a) because it tended to interfere with or restrain a reasonable employee from engaging in rights protected by section 1152. Further, we affirm the ALJ's conclusion that Respondent did not commit a violation through statements by Estrada that Jimenez would continue to "have problems" if he continued to engage in union activities.

Victor Ramirez

Testimony

Ramirez participated in several UFW marches, distributed union leaflets to workers, and sometimes took union flags to the field. He testified that on one occasion foreman Julio Barajas told him to stop distributing leaflets or the company would fire him. He sometimes wore a UFW pin to work which, on one occasion, Lizaola ordered him to remove. One day, Ramirez testified, he brought a small UFW flag to work and put it on the lettuce machine. When Lizaola told him to remove it, Ramirez stuck the flag into his back pocket. Later, according to Ramirez, Lizaola threw a bundle of empty lettuce boxes at him and broke the flag, and then laughed mockingly.

On the day of his discharge, August 6, Ramirez was assigned by Lizaola to cut lettuce.<sup>10/</sup> The previous day he had loaned his lettuce knife to a coworker in Barajas' crew. He asked Lizaola for permission to get his knife and walked over to Barajas' crew which had not yet begun to work. Ramirez asked several nearby workers why they had not attended the union meeting the day

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<sup>10/</sup>Ramirez did not have a regular place at the machine and was assigned to cut, pack or load lettuce depending on where he was needed.



before. At that point, Barajas arrived and told Ramirez to leave, and that he had no reason to be talking to the workers about the Union. Ramirez testified that he made no reply but simply left and walked back to his machine. Barajas followed him, saying, "Now for sure they're going to hell-fire you." To Lizaola, Barajas added, "And these s . . o . . b . . ' s we don't want here."

Ramirez then went to the front of the machine to begin cutting, but found there was no place for him to work. When he told Lizaola there was no place for him, Lizaola allegedly replied, "In any case, we're going to fire you."<sup>11/</sup> Lizaola then suspended Ramirez for 48 hours pending termination. When Ramirez asked why he was being fired, Lizaola said it was because Ramirez had insulted Barajas<sup>1</sup> mother. Ramirez testified that he did not swear at or threaten Barajas, and would never have dared to insult Barajas' mother because he knew that was something for which he could be fired, and he needed the work.

Barajas testified that the crew had been working for 20 to 30 minutes when Ramirez interrupted them. When Barajas asked him "please" not to interrupt the workers, Ramirez allegedly replied with an obscenity. Barajas went to Lizaola to complain and Lizaola told Ramirez he could give him a warning for interrupting Barajas' crew. According to Barajas, Ramirez again swore and Lizaola thereupon suspended him pending termination.

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<sup>11/</sup> Ramirez stated that he had previously always found a place to work on the machine, and that the foremen were prohibited from bringing more than enough workers to the field. Foreman Julio Barajas testified that he was always careful to count the workers he was taking to the field, because if a worker could not find a place on his or another machine, the worker had to be paid for four hours' work.

Lizaola testified that Ramirez did not ask his permission to go retrieve his knife. About ten minutes after work had begun, Lizaola stated, Ramirez came back with Barajas, who complained that Ramirez had insulted and interrupted his crew. According to Lizaola, Ramirez thereupon insulted Barajas again and, when told he was violating a company rule by doing so, Ramirez allegedly replied with an obscenity. After he told Ramirez that he was going to suspend him, Lizaola stated, Ramirez threatened to beat up Barajas after work. Lizaola then called supervisors Estrada and Guillen over so that Guillen could sign the suspension notice.

Estrada initially testified that he was present when Ramirez was suspended, but later stated that Ramirez was already being suspended when he arrived. When Estrada asked Ramirez to explain what had happened, Ramirez allegedly swore at Barajas and Lizaola who, he claimed, had set him up by bringing an extra worker to the field because they knew that he was going to be fired.

#### ALJ Decision

The ALJ found that the Employer had knowledge of Ramirez' union activities and disbelieved Estrada's testimony that he was unaware of it. She found that General Counsel had established a causal connection between Ramirez' union activities and the Employer's adverse action, partly because his discharge came so close in time to Ramirez' talking to Barajas' crew about the Union. She also found it significant that Ramirez' discharge occurred less than two weeks after Jimenez' under virtually identical circumstances. The ALJ inferred anti-union motivation

from Respondent's denial of any knowledge of Ramirez' union activities in the face of unrefuted evidence that it had such knowledge. She further discredited Estrada's account of the August 6 incident because of inconsistencies in his testimony.

Having discredited Respondent's witnesses, the ALJ concluded that the Employer's asserted reasons for suspending and discharging Ramirez were pretextual, and that the true reason was his union activities. She concluded, therefore, that Respondent had violated sections 1153(c) and (a) of the Act by suspending and discharging Ramirez.

The ALJ credited neither Ramirez nor Lizaola's account of the flag incident. She believed that Ramirez had exaggerated the incident and did not credit his testimony that Lizaola threw a bundle of lettuce boxes at him. However, she also disbelieved Lizaola's claim that he only voiced concern for Ramirez' safety during the incident.

The ALJ credited Ramirez as to the anti-union remarks made to him by Barajas on August 6, and found that those remarks constituted a threat and violated section 1153(a). Although this threat was not specifically alleged by General Counsel as a violation, the ALJ found that the matter was fully litigated and that finding a violation was appropriate under both NLRB and ALRB precedent.

#### Respondent's Exceptions

Respondent makes many of the same arguments concerning Ramirez' suspension and discharge as it did about Jimenez'. Thus, Respondent expresses its disagreement with the ALJ's factual

findings and credibility resolutions, asserting that the ALJ ignored "objective" testimony and employed an "unacceptable" method of determining credibility. Respondent asserts that there was overwhelming evidence that Barajas' crew was working when Ramirez went to talk to crew members. Without citing any authority, Respondent asserts that Ramirez' uncorroborated testimony is insufficient to meet General Counsel's burden of proof.<sup>12/</sup>

Respondent also argues that there is no causal relationship between any of Ramirez' union activities and his termination. Even if Ramirez had been talking to Barajas' crew members about a union meeting, Respondent asserts that Ramirez was disrupting work and his activity was therefore unprotected. As it argued with respect to Jimenez, Respondent claims that Ramirez' activity on August 6 cannot be considered protected because there was no evidence that it had any effect on any other workers.<sup>13/</sup>

Finally, Respondent makes the argument it previously asserted regarding Jimenez, that this is a dual motive case and

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<sup>12/</sup> California Evidence Code, section 411, provides in part:  
" . . . the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. "

<sup>13/</sup> Respondent also argued, with regard to both Jimenez and Ramirez, that union animus was an essential element of General Counsel's case, and that General Counsel had failed to prove such animus. To establish a prima facie case of discriminatory discharge, General Counsel must show by a preponderance of the evidence that the employee was engaged in protected activity, that Respondent had knowledge of such activity, and that there was a causal relationship between the protected activity and the discharge. (Verde Produce Company (1981) 1 ALRB No. 27.) While animus may help to establish the causal relationship, it is not a necessary element of the prima facie case itself.

General Counsel has not shown that the Employer was partially motivated by impermissible grounds for discharging Ramirez rather than permissible grounds alone.<sup>14/</sup>

#### Insubordination Issue

As with Jimenez, we believe it is unnecessary to decide this matter wholly on the basis of credibility resolutions, and we decline to do so. Ramirez' remarks to Barajas<sup>1</sup> crew clearly constituted union activity, in that he asked several workers why they had not been at a union meeting the previous day. While there was conflicting testimony concerning whether the employees were working when Ramirez spoke to them, the evidence indicates that Ramirez' interruption of the crew, if any occurred, was very brief, and that production was not impeded.

The evidence also indicates that Ramirez may have used intemperate language in responding to Barajas' admonition that he should not be talking to the crew. However, no one testified that Ramirez engaged in any violent or threatening conduct at Barajas' machine and all witnesses agreed that he left the area promptly and walked back to Lizaola's machine. Further, since Barajas' complaint to Lizaola was only that Ramirez should not have been interrupting and bothering his workers, it is not likely that Ramirez' language during the incident was as profane as Respondent later claimed. We conclude that Ramirez' conduct while talking to Barajas' crew was not sufficiently flagrant to take it outside the

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<sup>14/</sup> As it did with regard to Jimenez, Respondent also objects to the ALJ's application of a grievance meeting analysis (United States Postal Service, supra, 652 F.2d 409) to Ramirez' August 6 activity.

realm of activity protected by the ALRA. (Atlantic Steel Company,  
supra, 245 NLRB 814; NLRB v. Illinois Tool Works, supra, 153 F.2d  
811. )

Respondent's Motivation for Discharging Ramirez

Respondent contends that when Lizaola told Ramirez he could receive a warning for interrupting Barajas' crew, Ramirez swore at him and threatened to beat him up after work. In its answer to the complaint, Respondent asserts that it was justified in discharging Ramirez both because of his conduct with Barajas and because of his alleged abusive and threatening behavior toward Lizaola.

However, as with Jimenez, we find a number of factors indicating that Respondent would not have discharged Ramirez for his alleged misconduct in the absence of his protected union activity on August 6. We note that when he followed Ramirez back to Lizaola's crew, Barajas said to Lizaola, "And these s.o.b.'s we don't want here," referring to union activists such as Ramirez. Barajas (as well as Lizaola) had previously expressed hostility toward the Union, both in comments to employees and in treatment of UFW organizer Lupe Castillo. We therefore find that Barajas was disturbed by Ramirez talking to the crew specifically because he was talking to them about the Union.

Another reason to infer anti-union motivation for Ramirez' discharge is Respondent's denial of any knowledge of Ramirez' union activity when there is uncontradicted evidence that it had such knowledge. Moreover, the timing of Ramirez' discharge causes us to infer an improper motive, in that Ramirez' discharge

occurred less than two weeks after Jimenez' unlawful discharge under almost identical circumstances. The fact that Lizaola brought one too many workers to the field on August 6<sup>15/</sup> also suggests that Respondent intended to set Ramirez up for discharge that day.

From the above circumstances, we conclude that Respondent would not have suspended and discharged Ramirez but for his protected union activity. Therefore, we affirm the ALJ's conclusion that Respondent's suspension and discharge of Ramirez constituted violations of sections 1153(c) and (a) of the Act.

We also affirm the ALJ's finding that Barajas' anti-union remarks to Ramirez on August 6 constituted a threat and a violation of section 1153(a) of the Act.<sup>16/</sup> Finally, regarding the incident when Lizaola allegedly threw a bundle of lettuce boxes at Ramirez, we affirm the ALJ's finding that neither Ramirez' nor Lizaola's account of the incident was entirely credible; therefore, we find no violation for Lizaola's conduct on that occasion.

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<sup>15/</sup> As we noted earlier, foreman Barajas testified that he was always careful to count the workers before bringing them to the field, because if a worker could not find a place on the machine, the worker had to be paid for four hours' work.

<sup>16/</sup> We affirm the ALJ's finding that although this threat was not alleged as a violation, the matter was related to matters alleged in the complaint and was fully litigated. Therefore, a finding of a violation is appropriate. (Gramis Brothers Farms, Inc. and Gro Harvesting, Inc. (1983) 9 ALRB No. 60.)

ORDER

Pursuant to Labor Code section 1160.3, Respondent Bruce Church, Inc., ("BCI," "Respondent" or "Company") its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Unlawfully suspending, discharging, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or with respect to any term or condition of employment because he or she has engaged in concerted activity protected by section 1152 of the Act;

(b) Threatening employees because of their protected concerted union activity;

(c) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Offer Arturo Jimenez and Victor Ramirez immediate and full reinstatement to their former positions of employment, or if the former positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

(b) Make whole Arturo Jimenez and Victor Ramirez for all wage losses or other economic losses they have suffered as a result of Respondent's unlawful discharge. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus



given by Respondent since the unlawful discharges. The award also shall include interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5;

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

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

( e ) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from September 1, 1987, to September 1, 1988;

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

( g ) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all BCI 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 piece-rate employees in order to compensate them for time lost at the reading and question-and-answer period;

(h) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

DATED: May 4, 1990

BRUCE J. JANIGIAN, Chairman<sup>17/</sup>

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

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<sup>17/</sup> The signatures of Board Members in all Board decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board members in order of their seniority.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO, the General Counsel of the ALRB issued a complaint which alleged that we, Bruce Church, Inc. (BCD, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by suspending and discharging Arturo Jimenez and Victor Ramirez because they participated in Union activities. The Board also found that we violated the law by making various threats, including threatening to discharge Mr. Jimenez and Mr. Ramirez. The Board has told us to post and publish this notice. We will do what the Board has ordered us to do.

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

Because you have these rights, we promise that:

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

WE WILL NOT discharge or threaten any employees because they participated in union activities.

WE WILL offer employment to Arturo Jimenez and Victor Ramirez to their former positions as lettuce harvest employees, and we will reimburse them, with interest, for any loss in pay or other economic losses they suffered because we discharged them.

DATED:

BRUCE CHURCH, INC.

By: \_\_\_\_\_  
Representative Title

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Bruce Church, Inc.  
(UFW)

16 ALRB No. 3  
Case Nos. 87-CE-87-SAL  
87-CE-87-1-SAL  
87-CE-89-SAL  
87-CE-89-1-SAL

Arturo Jimenez

Testimony

On July 23, 1987, Jimenez was working in the Employer's ground crew. When his crew began its morning break, he walked over to foreman Lizaola's machine crew, which was just beginning its break, and started talking to them about the Union. Jimenez told the workers they were being paid less than the ground crew, and that they shouldn't be so dumb but should be united to support the Union. Foreman Lizaola told Jimenez to shut up, and not to talk about the Union or Lizaola would punch him out. Jimenez responded that Lizaola should not be a "buey" and was not the owner of the company. Jimenez denied swearing at Lizaola or making any obscene gestures. Lizaola then called over two supervisors, who took Jimenez back to his crew. Lizaola later sent a message through Jimenez<sup>1</sup> foreman that he was going to attack Jimenez physically after work. The following morning, Jimenez asked Lizaola why he had sent such a message. Lizaola replied with a threat, and Jimenez responded as he had the previous day. Supervisors then arrived and proceeded to discharge Jimenez.

Jimenez' testimony was corroborated by several coworkers. However, Lizaola testified that Jimenez interrupted his crew while they were working and called Lizaola obscene and derogatory names when Lizaola asked him politely not to insult the workers and to leave the area. Lizaola denied threatening Jimenez or sending him any threatening message. Supervisor Gonzalo Estrada testified that during the July 23 incident Jimenez made an obscene gesture and referred to Lizaola in unflattering and obscene terms. Both Estrada and Jimenez' foreman, Marcelino Sepulveda, stated that on July 24 Jimenez again uttered obscenities before Sepulveda suspended him pending termination.

ALJ Decision

The ALJ credited General Counsel's witnesses regarding Lizaola's threats to Jimenez, and did not believe that Lizaola's mild request that Jimenez "please not insult the workers" would elicit from Jimenez a barrage of obscenities and complete unconcern about being fired. On the further basis of Jimenez' temperament and the corroboration of his testimony by coworkers, the ALJ concluded that Jimenez had not uttered obscenities during either the July 23 or the July 24 incident. The ALJ found that the Employer had given false and inconsistent reasons for discharging Jimenez. She

concluded that the Employer's asserted reasons for the discharge were pretextual, and that the real reason was Jimenez' union activities.

### Board Decision

The Board declined to decide the case wholly on the basis of credibility determinations, but concluded that Jimenez was engaged in protected union activity during the July 23 incident and would not have been discharged in the absence of such activity. Regarding the issue of insubordination, the Board noted that under National Labor Relations Act (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 must be balanced against the Employer's right to maintain order and respect.

In reviewing Jimenez' conduct, the Board applied the four-factor analysis established in *Atlantic Steel Company* (1979) 245 NLRB 814 [102 LRRM 1247]: (1) the place of the discussion; (2) the subject matter discussed; (3) the nature of the employee's outburst; and (4) whether the employee's outburst was in any way provoked by the employer. The Board affirmed the ALJ's finding that Lizaola's crew was on break when Jimenez talked to them, as well as her finding that the subject matter of Jimenez' remarks was within the realm of protected union activity. The Board found that while Jimenez may have used disrespectful language to Lizaola, he did not engage in any violent or threatening conduct. Further, Jimenez did not use any intemperate language on July 23 until Lizaola told him to "shut up" and threatened to "punch him out." The Board distinguished this case from *David Freedman and Co., Inc.* (1989) 15 ALRB No. 9, in which the employee's abusive use of profanity was unprovoked and no disciplinary action was taken until after the employee had engaged in several outbursts. The Board concluded that even if Jimenez' conduct on July 23 was as abusive as Respondent alleged, it was not sufficiently flagrant to take it outside the realm of protected activity.

Because the Employer alleged that Jimenez was discharged for his conduct on July 24 as well as July 23, the Board found it necessary to examine the Employer's motivation to determine whether Respondent would have discharged Jimenez for his alleged misconduct on July 24 even in the absence of his protected union activity on July 23. On the basis of Lizaola's open hostility to previous union activities of Jimenez and other employees, the timing of Jimenez' discharge (which occurred the very next day after his talking to Lizaola's crew about the Union), and the fact that the Employer gave shifting, inconsistent reasons for its adverse action, the Board concluded that Respondent would not have suspended and discharged Jimenez but for his protected union activity. Therefore, the Board affirmed the finding of a violation of section 1153(c) and (a) of the Act.

b.

The Board also affirmed the ALJ's findings that Lizaola's threats to Jimenez violated section 1153(a), and that Respondent did not commit a violation through statements by Estrada that Jimenez would continue to "have problems" if he continued his union activities.

## Victor Ramirez

### Testimony

On August 6, 1987, Respondent was assigned to cut lettuce. Before starting work, he asked Foreman Lizaola for permission to get his lettuce knife from a member of Barajas<sup>1</sup> crew, which had not yet begun to work. As he was retrieving his knife, he asked nearby workers why they had not attended a union meeting the day before. Barajas told him to leave and said he should not be talking to the workers about the Union. Ramirez made no reply but simply left and walked back to his machine. Barajas followed him, saying the company would fire him and, to Lizaola, Barajas added, "And these s . . o . . b . . ' s we don't want here." Ramirez then went to the machine but found there was no place to work. When he told Lizaola there was no place for him, Lizaola replied that they were going to fire him in any case. Lizaola then suspended Ramirez pending termination, saying the reason was that Ramirez had insulted Barajas<sup>1</sup> mother. Ramirez denied that he had sworn at or threatened Barajas or insulted his mother.

Barajas claimed that the crew had been working for 20 to 30 minutes when Ramirez interrupted them, and that when he asked Ramirez not to interrupt the workers, Ramirez replied with an obscenity. Barajas claimed that when he complained to Lizaola, Ramirez again swore and insulted Barajas, and that Lizaola thereupon suspended him pending termination.

### ALJ Decision

The ALJ found that General Counsel had established a causal connection between Ramirez' union activities and Ramirez' discharge, partly because the discharge came so close in time to Ramirez' talking to Barajas' crew about the Union. She found it significant that Ramirez<sup>1</sup> discharge occurred less than two weeks after Jimenez' under virtually identical circumstances. She discredited supervisor Estrada's account of the August 6 incident because of inconsistencies in his testimony, and concluded that the Employer's asserted reasons for suspending and discharging Ramirez were pretextual and that the true reason was his union activities. She concluded that Respondent had violated 1153(c) and (a) by suspending and discharging Ramirez. The ALJ also credited Ramirez as to anti-union remarks made to him by Barajas on August 6, and found that those remarks constituted a threat and violated section 1153(a).

## Board Decision

As with Jimenez, the Board declined to decide this matter wholly on the basis of credibility resolutions. The Board found that Ramirez' remarks to Barajas' crew clearly constituted union activity, and that Ramirez' interruption of the crew, if any occurred, was very brief, so that production was not impeded. Although the evidence indicated Ramirez may have used intemperate language in responding to Barajas, there was no testimony that Ramirez engaged in any violent or threatening conduct. The Board concluded that Ramirez' conduct was not sufficiently flagrant to take it outside the realm of protected activity.

Regarding the Employer's motivation for discharging Ramirez, the Board found that Respondent would not have discharged Ramirez for his alleged misconduct in the absence of his protected union activity. The Board noted that both Barajas and Lizaola had previously expressed hostility toward the Union, and found that Barajas was disturbed by Ramirez talking to the crew specifically because he was talking to them about the Union. The Board also inferred anti-union motivation from Respondent's denial of any knowledge of Ramirez' union activity when there was uncontradicted evidence that it had such knowledge. The Board further inferred an improper motive from the timing of Ramirez' discharge (less than two weeks after Jimenez' discharge under nearly identical circumstances) and the fact that Lizaola brought one too many workers to the field on August 6, suggesting that Respondent intended to set Ramirez up for discharge that day.

The Board concluded that Respondent's suspension and discharge of Ramirez constituted violations of section 1153(c) and (a). The Board also affirmed the ALJ's finding of an 1153(a) violation for Barajas' threat to Ramirez on August 6. Finally, the Board affirmed the ALJ's findings of no violation for an incident when Lizaola allegedly threw a bundle of lettuce boxes at Ramirez.

\* \* \*

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

\* \* \*

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: )  
 )  
BRUCE CHURCH, INC. , ) Case Nos. 87-CE-87-SAL  
 ) 87-CE-87-1-SAL  
 Respondent, ) 87-CE-89-SAL  
 ) 87-CE-89-1-SAL  
and )  
 )  
UNITED FARM WORKERS OF )  
AMERICA, AFL-CIO, )  
 )  
Charging Party. )  
 )

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Appearances:

Leonard G. Strom  
for the General Counsel

Arnold B. Myers  
of Abramson, Church & Stave  
for the Respondent

Before: Barbara D. Moore  
Administrative Law Judge

DECISION OF ADMINISTRATIVE LAW JUDGE



BARBARA D. MOORE: This case was heard by me in Salinas, California. It arises out of four unfair labor practice charges filed with the Agricultural Labor Relations Board (hereafter "ALRB" or "Board") by the United Farm Workers of America, AFL-CIO (hereafter "UFW" or "Union.") The charges were consolidated, and the consolidated complaint alleges that Respondent, Bruce Church, Inc. (hereafter "BCI" or "Company") violated sections 1153(c) and (a) of the Agricultural Labor Relations Act<sup>1</sup> (hereafter "Act" or "ALRA") by threatening and discharging its employees Arturo Jimenez and Victor Ramirez because they engaged in protected union activity. Respondent filed its Answer denying knowledge of any union activity by Mr. Ramirez or Mr. Jimenez and asserting that both men were fired for using obscene and abusive language to company foremen and supervisors.

All documents were timely filed and properly served. The official exhibits were introduced into evidence at the Prehearing Conference as General Counsel's Exhibits 1.1 through 1.11, inclusive.<sup>2</sup>

All parties<sup>3</sup> had an opportunity to participate fully in the hearing. General Counsel and Respondent filed post-hearing

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

<sup>2</sup>Hereafter, General Counsel's exhibits will be referred to as G.C., Ex. number, and Respondent's exhibits will be referred to as Resp. Ex. number.

<sup>3</sup>Charging Party did not file a motion to intervene.

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

#### FINDINGS OF FACT

##### I. Jurisdiction

As admitted by Respondent, at all times material, BCI was an agricultural employer; the UFW was a labor organization; and Victor Ramirez and Arturo Jimenez were agricultural employees; within the meaning of the Act.

##### II. Company Operations

BCI is a Delaware corporation, headquartered in Salinas, with farming operations in various parts of California and Arizona. Many workers, including the foremen, follow the harvest, moving to various locations throughout California and Arizona as climatic changes dictate the seasons for growing and harvesting lettuce.

In Salinas, the lettuce harvest generally runs from May to October. In Yuma, Arizona, the lettuce season operates during the winter months spanning the end and beginning of the calendar year. The events at issue herein involve the 1986-87 lettuce harvest season in Yuma, Arizona,<sup>4</sup> and the 1987 lettuce season in

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<sup>4</sup>There is no question of the Board's jurisdiction since the alleged unfair labor practices occurred in California. (Nish Noroian Farms (1984) 35 Cal.3d 726.)

Salinas, California.

### III. Background of Labor Relations at BCI

BCI has a long history of involvement with the ALRB. I have set forth a synopsis of that history in order to provide a context to the case.

It has been involved in two representation matters,<sup>5</sup> six unfair labor practice proceedings<sup>6</sup> and one compliance proceeding<sup>7</sup> prior to the instant case. The following synopsis is drawn from these prior decisions.

BCI and the International Brotherhood of Teamsters had a series of contracts during the 1970's. Late in 1975, after the ALRA came into effect, the Board held elections in three parts of the state in which the Teamsters and the UFW vied for certification as the exclusive bargaining representative of BCI employees.

In the case of Bruce Church, Inc. (1976) 2 ALRB No. 38, the Board decided that a statewide unit, as was desired by BCI and the Teamsters, was appropriate. The Board conducted a statewide

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<sup>5</sup> (1976) 2 ALRB No. 38; (1977) 3 ALRB No. 90.

<sup>6</sup> (1979) 5 ALRB No. 45; (1981) 7 ALRB No. 20; (1982) 8 ALRB No. 81; (1983) 9 ALRB No. 74; (1983) 9 ALRB No. 75; (1985) 11 ALRB No. 9. The court of appeals remanded 9 ALRB No. 74 to the Board. The decision on remand is (1988) 14 ALRB 20.

<sup>7</sup> (1983) 9 ALRB No. 19.

election on January 30, 1976, which the UFW won. On December 13, 1977, the UFW was certified by the Board as the exclusive bargaining representative.<sup>8</sup>

In January 1978, negotiations for the first contract began. In June, the parties agreed on a contract known as the "Bakersfield Agreement" which was similar to the previous contracts between BCI and the Teamsters, and which was effective retroactive from January to December 31, 1978, which was the same date other UFW contracts in the vegetable industry expired.

In late 1978, the UFW began bargaining with a large group of employers in the vegetable industry. These negotiations are described in Admiral Packing Company (1981) 7 ALRB No. 43. These negotiations continued through February 28, 1979, when the growers declared an impasse and terminated negotiations.<sup>9</sup>

BCI decided not to participate in the group negotiations, and its negotiations with the UFW began in earnest in January 1979. The group negotiations focused primarily on economic issues since the UFW previously had reached agreement with many employers

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<sup>8</sup>The unit consists of all BCI employees, excluding vacuum cooler and packing shed workers, except those who work exclusively outside of California.

<sup>9</sup>The Board's decision that the employers engaged in unlawful surface bargaining was reversed by the court of appeals in Carl Joseph Maggio, Inc. v. Agricultural Labor Relations Board (1984) 154 C.A. 3d 40.

on non-economic institutional issues such as union security and other matters which were important to the UFW's viability as a labor organization and which would build worker loyalty to the UFW. In contrast, the focus in negotiations with BCI was on the institutional needs of the Union. (Bruce Church, Inc. (1983) 9 ALRB No. 74, ALJD pp. 10-13.)

The negotiations spanned some 23 months, described by the Board in BCI, *supra*, 9 ALRB No. 74 as "tumultuous", at which time, November 1980, the parties went into "off the record" negotiation sessions. During those 23 months, a number of significant events occurred.

On February 9, 1979, the UFW called a strike at BCI which coincided with strikes called against nearly all of the major vegetable growers involved in the group bargaining. BCI hired striker replacements and continued its operations.

Strikers were threatened, intimidated and attacked and a great deal of tension surrounded the strikes. One worker in the Imperial Valley (in the fields of agricultural employer Mario Saikhon, Inc.) was shot and killed. (BCI, *supra*, 9 ALRB No. 74, ALJD p. 33.)

In addition to calling a major strike, the UFW had singled out one company, Sun Harvest, to boycott. In September 1979, the UFW and Sun Harvest signed a three year contract. The next month, the UFW applied the boycott to BCI. BCI countered with its own campaign directed at both its workers and the public.

Negotiations broke off completely in February 1980 and did not resume until November 1980. When they resumed, the negotiations were conducted "off the record." Meantime, in March 1980, the striking employees at BCI began to make unconditional offers to return to work. The preceding month, BCI had implemented all of its economic proposals.<sup>10</sup>

The Board's finding that BCI had engaged in unlawful surface bargaining was reversed by the Court of Appeal in an unpublished decision,<sup>11</sup> and the case was remanded to the Board to reconsider its previous findings of certain unlawful unilateral changes in view of the court's finding that the parties were at impasse.

The Board, on remand, considered post-impasse events and found that impasse was broken when the UFW made a significant bargaining concession in August 1980. Consequently, the unilateral wage increase by BCI on September 1, 1980, was unlawful. A further unilateral change on September 21, 1980, was still pending before the court of appeal on review of Bruce Church, Inc. (1983) 9 ALRB No. 75.

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<sup>10</sup>At various other points during negotiations, beginning in July 1979, BCI unilaterally implemented wage increases and other matters it had proposed at the table.

<sup>11</sup>Bruce Church, Inc. v. Agricultural Labor Relations Board (1986) 5 Civ. No. F003587.

At the time of the instant hearing, the UFW was still the exclusive bargaining representative of BCI employees, but there was still no contract in effect. Thus, BCI employees have been working without a contract for over 10 years. IV. Union Activity at BCI in Yuma and in the 1987 Salinas Season

In February 1987, there was a representation election at BCI in Yuma which the UFW, at least initially, won. Mr. Jimenez was active on the UFW's behalf.

At work, he distributed UFW leaflets and UFW flags to BCI workers; he also posted a UFW flag and a cartoon with caricatures of BCI supervisors.<sup>12</sup> Jimenez' foreman, Julio Barajas, was aware that Jimenez was responsible for both incidents. ( I : 4 5 . )

Barajas warned Jimenez that if the UFW won the Yuma election, BCI would close its operations as other companies had done. ( I : 4 7 . ) He also warned Jimenez not to continue his union activities or " . . . the company . . . [would] . . . fire all of us . . . " and further told him [n]ot to be a clown."<sup>13</sup> ( I : 4 7 ; 7 5 . ) Barajas

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<sup>12</sup>The cartoon showed the supervisors and a white automobile. Jimenez explained the supervisors drove company cars which were white and that the foremen would pressure the workers to speed up when a white car came by even though the workers were already working hard. ( I : 4 4 . )

<sup>13</sup>James Barros, a co-worker in Jimenez' crew in Salinas, testified to an incident in July when supervisor Luis Garcia was talking about Mr. Jimenez having yelled to workers words to the effect of: "Hurry up, you need to work faster, so you can buy another white car." ( II : 2 3 . ) A worker asked Garcia, "What happened to [Jimenez] ," and Garcia replied, "I've already given orders to fire him at the first opportunity." ( II : 2 2 . ) This testimony was not refuted.

repeated such warnings in Salinas. Barajas did not specifically refute Jimenez' testimony on these points.

In the 1987 Salinas season, shortly before the discharges at issue herein, the UFW conducted several marches in the Salinas Valley directed against various employers including BCI.<sup>14</sup> In addition, the UFW picketed BCI's Salinas office. ( I:16-19. )

Jimenez testified that BCI foreman Filemon Lizaola saw him talking to co-workers about one of the UFW marches in which Mr. Jimenez was participating and told him not to be a "shit ass countryman" (referring to the fact that they came from the same part of Mexico) and not to be a clown. ( I:55-56. ) He also testified that when Lizaola observed him giving co-workers directions to the UFW march in Watsonville, Lizaola told him if he wanted to spread old wives' tales he should go home. ( I:74. )

Lizaola denied he talked to Jimenez about the marches but did not deny he observed Jimenez talking about them to co-workers. (III:135.)

Victor Ramirez also participated in the UFW marches. At BCI, he distributed leaflets regarding the marches and sometimes told co-workers what occurred at UFW meetings. He testified

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<sup>14</sup>Specifically at BCI, the Company had recently consolidated two lettuce ground crews into one crew and transferred the lower seniority employees to the machine crews where they were paid much less. ( I:54; II:4; IV:116. ) The Company also had employed non-union labor through a labor contractor.



Barajas told him to stop distributing the leaflets or they would fire him. (II:38; 69-71.) He sometimes wore a UFW pin to work, which, on one occasion, Lizaola ordered him remove. (II:51.)

He testified that BCI foreman Marcelino Sepulveda warned him that his conversations with the workers about the UFW did not serve a purpose and that the Company could fire him for his actions. Sepulveda did not deny the remarks. Ramirez testified Lizaola and Barajas made similar comments. He could not specify when any of these threats were made.

Barajas acknowledged he heard workers talking about the UFW marches and saw employees pass out UFW leaflets at work. Barajas did not deny that Ramirez was among those workers, and I credit Ramirez. He did deny that he said anything to any of the workers or that he spoke to Ramirez about union activities. Based on Barajas' anti-union remarks to Jimenez, and my overall evaluation of his credibility as detailed elsewhere, I do not credit Barajas but credit Ramirez.

Lizaola admitted he saw Ramirez carry a UFW flag at work and also pass out UFW leaflets but denied he spoke to Ramirez about the leaflets or threatened to fire him for passing them out. (IV:77.) He denied knowing that Ramirez talked to co-workers about the UFW, but did not deny ordering Ramirez to remove the UFW pin.

Ramirez also testified that one day he put a UFW flag on a lettuce machine in the field. Lizaola ordered him to remove it, which he did.

Later, according to Ramirez, Lizaola threw a bundle of empty boxes and hit the flag which was sticking out of Ramirez' back pocket and broke it. Lizaola then laughed mockingly at Ramirez.<sup>15</sup> Ramirez asked why he broke the flag, and Lizaola replied, "...That [the flag] was something that we didn't need to bring to work." (II:41-43.)

Lizaola denied throwing the bundle which he estimated would weigh 25 to 30 pounds. Ramirez admitted the bundle did not touch him. According to Lizaola, Ramirez broke the flag himself when he sat on it, and the only thing Lizaola did was tell Ramirez to be careful not to jab himself. Originally, Respondent denied there was any incident with a UFW flag.

General Counsel contends that Jimenez and Ramirez were threatened and discharged because their union activity occurred at a time when Respondent was especially sensitive because of a spate of UFW activity. To support its theory, it introduced other evidence of hostility to the UFW and its supporters.

Lupe Castillo, the UFW crop manager in the Salinas season,<sup>16</sup> regularly took access to speak to workers in the BCI fields and testified that foremen Lizaola and Barajas frequently

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<sup>15</sup>According to Ramirez, Lizaola told several other workers to remove their flags but did not break their flags. (II:74.)

<sup>16</sup>events described hereafter occurred during this season unless otherwise stated.

harassed him when he did so.<sup>17</sup> ( I : 7 ; 9 - 14 . )

Jorge Munoz, a worker in Lizaola's crew, a BCI employee for 12 years who was still employed there when he testified, witnessed one such incident and essentially corroborated Castillo. ( II : 15 . ) He also described another incident when Lizaola told Castillo to " . . . get the hell out . . . . " Munoz further testified that Lizaola had warned him about asking co-workers to participate with him in a UFW march. Lizaola told him " . . . to quit arousing the people , " and , later that same day , observed to Munoz that Munoz was "very political . " ( II : 10 . )

Lizaola did not dispute Munoz<sup>1</sup> testimony as to his remarks to Munoz. He did deny that he ever refused Castillo access at permitted times,<sup>18</sup> testifying that twice he told Castillo to wait when he arrived before lunch. On both occasions, according to Lizaola, Castillo ignored him and took access.

Barajas testified he could not recall ever refusing Castillo access ( IV : 144 - 145 ) but never specifically disputed

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<sup>17</sup>On one occasion at the Corey Ranch, Castillo approached Lizaola and told him he was going into the fields to speak to the workers. Lizaola responded, " . . . what you need to do is to behave yourself or I will put another hole in you . " ( I : 13 . ) Castillo testified he took Lizaola's remark to be a threat to shoot him. ( I : 14 . ) Lizaola denied he ever said anything like that to Castillo. ( III : 95 . )

<sup>18</sup>The UFW was required to notify the Company when it intended to take access. Access could be taken at the camp where the buses picked up the workers in the morning to take them to the fields, in the fields during the lunch hour, and after work.

Munoz' testimony that he had insulted Castillo when he attempted to take access.

Both Lizaola and Barajas professed they had no more concern with the workers' union activities, nor even the UFWs activities, than they did with the workers' religion. (IV:5; 129-130.) Observing both men deliver these lines, their manner was insincere and unconvincing. The impression conveyed, to the contrary, was that they were very aware of the Union and its activities as well as the activities of workers in support of the Union. I had the same reaction to the testimony of foreman Sepulveda who virtually parroted the testimony of Lizaola and Barajas. (IV:98.)

Both Barajas and Sepulveda appeared very uncomfortable when asked about the Union.<sup>19</sup> Barajas denied ever being told what to do when people from the UFW wanted to distribute leaflets and denied that the subject of Union access was discussed at the regular meetings held with foremen.<sup>20</sup> (IV:130-131.) He testified

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<sup>19</sup>Like Barajas, Sepulveda's testimony showed extreme wariness. This was evident even in responses to questions from Respondent's counsel. A series of questions designed to get Mr. Sepulveda to articulate the Company's policy only elicited denials that anyone from the Company ever talked to him about the Union to the point that he even denied there were any rules about Union access. (IV:96.)

<sup>20</sup>At one point, he did acknowledge that Alphonso Guzman in personnel told them the Union organizers had access at certain times and the Company knew when they would be coming. (IV: 144.)

the foremen never spoke against the Union even amongst themselves.

Based on my disbelief of Lizaola, Barajas and Sepulveda as to their avowed unconcern with the activities of the UFW and its supporters, the unrefuted evidence of hostile anti-Union remarks by Lizaola, Barajas and Sepulveda, and the corroborative testimony of workers Barros and Munoz who had no evident bias, I credit General Counsel's witnesses as to union activity and Respondent's hostile reaction thereto over the denials of Lizaola and Barajas.

I also find credible evidence of overall hostility to union activity in the treatment of Mr. Castillo although not to the extent claimed by General Counsel. Castillo pointed to only a few denials of access during an entire season when he said he took access as often as two or three times a week.<sup>21</sup>

I credit neither Mr. Ramirez nor Mr. Lizaola regarding the flag incident. Based on his demeanor, I believe Ramirez exaggerated the incident and do not credit his testimony that Lizaola threw the bundle at him. I found Lizaola no more believable. His protestation that he only voiced concern for Ramirez' safety rang hollow. Whether Lizaola told Ramirez to

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<sup>21</sup>Both Castillo and Barros acknowledged that Lizaola and Sepulveda usually left the area when Castillo came to talk to the workers. (II:30; 31.)

remove the flag from the machine is of no great moment since I find no reason Lizaola should not have done so, and elsewhere he admitted he saw Ramirez with the flag.

V. The Case of Arturo Jimenez

a. The Events of July 23

Mr. Jimenez began work at BCI in 1979 as a lettuce cutter and packer working in the ground crew. In 1987, he was a member of the one remaining ground crew. He testified as follows.

On July 23, his crew was on its morning break. He walked over to Mr. Lizaola's crew which was also on break.<sup>22</sup> He told several of the workers they were earning less than the ground crew, that they "...shouldn't be so dumb" as to accept that situation and should "be united" and support the Union which would help them.

(I:57-58.)

Foreman Lizaola came up behind him and told him in effect: "...to shut up, not to talk about the Union or he would

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<sup>22</sup>Lizaola testified his whole crew was still working. (III:98; IV:9.) I credit Jimenez. Three worker witnesses, Jorge Munoz, Guillermo Jaramillo and James Barros, called by General Counsel corroborated Jimenez that the workers in front of the machine were already on break and those in back were preparing to break as soon as they finished packing the already cut lettuce. (II:5; 26.) None of these witnesses had any evident personal interest in the case, and all testified credibly. Further, Respondent's worker witness, Leonel Garcia, acknowledged that often the break moves from front to back whereas Lizaola denied it. (IV:73; 115-116.) Although Garcia corroborated Lizaola's testimony that the crew was still working on the 23rd, (IV:104) I do not credit him because I did not believe his testimony on other points.

punch [Jimenez] out."<sup>23</sup> (I:57; 94.) Jimenez admits he reacted by telling Lizaola not to be a "buey"<sup>24</sup> and said, in effect, who did Lizaola think he was, that he was not the owner of the Company. (IV:58; 95.)

Lizaola summoned Juan Guillen, his supervisor, who was nearby. Gonzalo Estrada, a BCI labor relations specialist, also came over. The three men moved Jimenez away from the crew.

Lizaola told Estrada that Jimenez had insulted him, so Estrada told Jimenez he should apologize to Lizaola and that if he used "such foul language they will fire you."<sup>25</sup> Jimenez told Estrada he had not made the remarks Lizaola attributed to him and that Lizaola had threatened to punch him out. He protested he should not have to be quiet when Lizaola was threatening him. (I:78-80; 95.)

By this time, the break was ending, and Jimenez returned to his crew. According to him, nothing further happened until the

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<sup>23</sup>Here, and in other places in the decision, some statements quoted are, in the transcript, broken up by discussions of the appropriate translation and modifications of the original translation. In the interest of clarity, I have quoted the statements as ultimately translated.

<sup>24</sup>"Buey" is translated literally as "steer" but connotes someone who has no balls (as a steer is castrated).

<sup>25</sup>In response to a leading question, Jimenez testified Estrada also told him that he would continue to have trouble if he continued his union activities. (I:64.)

afternoon break when Sepulveda told Jimenez that Lizaola had sent a message that after work he was going to punch Jimenez out. (I:64.)

Both Munoz and Jaramillo corroborated Jimenez as to the essence of his remarks to Lizaola's crew. (II:5; IV:154.) Munoz heard Lizaola tell Jimenez to: "Get the hell out . . . ." and threaten to punch Jimenez out. (II:6-7.) He did not hear Jimenez swear or threaten Lizaola. (II:7.)

Jaramillo heard Lizaola tell Jimenez, ". . . Arturo, you don't have anything to do there (sic) with us" and also "[t]hat he had no reason to be there agitating us that he was from another crew, and he didn't have any kind of business with us." (IV:153-154.)

Barros did not hear Jimenez speak to the workers but heard Lizaola yelling excitedly at Jimenez to "get out of here" and saying that Jimenez "should not be talking to his people regarding the Union and taking up their time." (II:26-27.) None of the workers heard anything after Guillen and Estrada arrived.

Filemon Lizaola testified that on the morning of July 23, he saw Arturo Jimenez talking to members of Lizaola's crew. He heard Jimenez say that ". . . he could not see himself working for that salary and for the piece rate." Jimenez also said "[the workers] were a bunch of stupids. . . . And that is why the Company did what they wanted to do." (III:98-99.)

Thereupon, Lizaola told Jimenez, "[t]o please to get away from there, you don't have any right to insult the workers." (Id.)



He denied that he ordered Jimenez to leave because he spoke about the Union.<sup>26</sup> (IV:67-68.)

He said he did not consider Jimenez' behavior to concern the Union but rather that he was calling the workers a bunch of stupid and oxen and was insulting them, not inciting them. (IV:63.) Thus, he denied he ever told Jimenez not to incite the crew. (IV:49.)

When Lizaola told Jimenez to leave, Jimenez responded, "[t]hat I was not the owner, 'you are a dog, a slave driver.'" (Id.) Jimenez added, "[t]hat when they fire you, you're going to be weeping, and they beat me off." (Id.)

Lizaola replied that Jimenez had no right to insult him or the workers. He told Jimenez that if he didn't move away, he would call his (Lizaola's) supervisor or Jimenez' foreman to give Jimenez a warning or to suspend him.

According to Lizaola, Jimenez told Lizaola to go ahead and fire him and challenged him to fight. (III:101.) Lizaola responded that he didn't see any reason to fight. Jimenez then said that Lizaola was a "son of a bitch, bastard, that the Company would not appreciate what I was doing." Prodded by Respondent's

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<sup>26</sup>On cross-examination, Lizaola denied such behavior would upset him. He testified that if a worker who was not on his crew came up to his crew, which was working, and shouted "Viva Chavez!" that he would not be upset or ask the worker to leave and that, in fact, "... a lot of workers had...done it." (IV:57-58.)

counsel, Lizaola testified Jimenez also said, "he was going to jerk me off."

Again in response to a leading question, Lizaola testified Jimenez gestured moving both arms up and down vertically with clenched fists. Lizaola said that to him the gesture meant, "[t]hat I was a son of a bitch, that I was not worth anything" and was offensive.<sup>27</sup> (III:104.) Lizaola responded to the gesture by telling Jimenez that he did not understand why Jimenez was treating him that way.<sup>28</sup> (III:106.)

At this juncture, Lizaola called to Juan Guillen, his supervisor, who was nearby, to come over. Jimenez then told Lizaola he was "a dog . . ." (111:107.) He also told Guillen and Lizaola words to the effect that they could jerk him off. (Id.)

Lizaola said to Guillen, "Juan, this man you've got to stop him, because of his insubordination." (III:107-108.) Guillen told Lizaola to calm down. Lizaola testified that at this

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<sup>27</sup> Respondent's worker witness Leonel Garcia corroborated that Jimenez gestured as Lizaola described, and testified that in his culture the gesture meant various things. He interpreted it as, "It's not worth anything; do what you want, you jerk me off." (IV:111.) I find the significance of the gesture is ambiguous. "It's not worth anything" is consistent with Jimenez' remark that Lizaola was not the head of the company. I find insufficient evidence to conclude it was obscene.

<sup>28</sup> Jimenez admitted he gestured while speaking but said it was to emphasize his comments and was not obscene. (IV:59-60.) He denied threatening Lizaola.

point Estrada arrived and took Jimenez away. (III:107-108.)

Previously, he testified Estrada arrived the same time Guillen did.

Mr. Garcia corroborated Lizaola as to Jimenez' remarks although he admitted he was standing on top of the machine near the conveyer belt which was making a lot of noise.<sup>29</sup> He said Jimenez said other things but he could not hear because of the noise of the machine. (IV:106.)

Several times Garcia testified he did not hear Lizaola say anything, but after repeated questions from Respondent's counsel, he ultimately testified Lizaola raised his voice and told Jimenez ". . . to move away from there that that was not his crew." (IV:110.) I do not believe Garcia was able to hear Jimenez, and I do not believe he ultimately remembered what Lizaola said. Rather, I find he tried to satisfy counsel's questions. Thus, I do not credit him.

Juan Guillen did not testify, but Gonzalo Estrada did so in great detail. Estrada testified he observed Jimenez talking to Lizaola and Guillen. Jimenez was moving his arms in an excited manner and made a gesture like masturbation. (II:99.) Estrada went over to see what was happening and heard Jimenez saying,

I can say what I want to say, I'm not his stupid, so that he can order me around the way he wants to. It's not worth anything to me, what he tells me. I can go wherever I want, and say what I want, no son of a bitch

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<sup>29</sup>On cross-examination, General Counsel asked Garcia why he was paying attention to Jimenez while he was supposed to be working. Garcia replied, "Because several times those from that crew would

is going to tell me what to say. Who does he think he is? This is a free country, and I can say whatever I want. And I can go wherever I want. (II:106.)

Lizaola responded to Jimenez,

"You do not have any right to come and insult my workers in the machine. Your work is in your crew, and I'm not going to let you—I'm not going to allow you to come and insult the people. (Id.)

Jimenez responded,

You son of a bitch thinks (sic) that you're the owner of the Company or what? You can't refuse me to talk to whomever I want. I can come and talk to whomever I fuck feel like. I'm not going to let a . . . stupid leather skindriver<sup>30</sup> . . .frighten me. (II:107-109.)

Estrada testified he asked Jimenez what had happened.

Estrada then recounted another obscene tirade he said Jimenez delivered which conveyed essentially the same thing Estrada already testified Jimenez had said. (II:111-116.)

Following this outburst, Lizaola asked Guillen what he was going to do. Guillen did not reply. Estrada told Jimenez to calm down and said, "with this, the only thing you're going to encounter are problems. Come over here and tell me what happened."

(II:117.)

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come and bother us at our machine. And we were expecting something similar." Asked who told them to expect something like that, Garcia replied, "It's just that they were not in conformance with us and between now and then they would come to bother us—several of them, not just him. They were waiting for an opportunity.

<sup>30</sup>"skin driver" was later corrected to "slave driver."

He and Jimenez walked to the edge of the field, and twice Estrada asked Jimenez what had happened. Each time according to Estrada Jimenez responded with a string of obscenities essentially repeating himself.<sup>31</sup> (II:117-120.)

By then, according to Estrada, the workers were on break. A co-worker, Melchor Rubio, walked by and said to Jimenez, "Don't back down, Grille."<sup>32</sup> "just because you belong to the Union, they want to belittle you." (II:121-123.) Almost immediately thereafter, Victor Ramirez came by and made a remark similar to that of Rubio. According to Estrada, Jimenez responded to both of them that it had nothing to do with the Union<sup>33</sup> but was just a personal matter between him and Lizaola which had been going on a long time. (II:123-124.)

At that point, Jimenez started walking back to his crew. Estrada accompanied him and told him "...with what you just did,

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<sup>31</sup>Jimenez denied he used foul language other than "buey" and said he would have been fired instantaneously if he had used such language." (I:96; 98.)

<sup>32</sup>"Grille" is Mr. Jimenez' nickname and means "cricket."

<sup>33</sup>The parties stipulated that if Mr. Jimenez were called to testify on rebuttal he would deny he said to either Rubio or Ramirez that the matter had nothing to do with the Union. I credit Jimenez. I have found he engaged in union activity, and foremen had made anti-union comments to him about his activities. Under these circumstances I do not believe Jimenez would make such a statement.

the only thing you're going to do here . . . is creating problems -- finding problems for others, for all." (II:127.) He said Jimenez started to swear again and said he did not care about his job. (II:126-127.) Estrada then left Jimenez at his crew.

According to Lizaola, after Jimenez left, he (Lizaola) went to Jimenez' foreman, Marcelino Sepulveda, and told him Jimenez had insulted his crew and asked Sepulveda to do something. (IV:71.) Sepulveda told Lizaola that he would have to hear Jimenez himself before he could suspend him. (Id.)

Sepulveda testified he asked Jimenez if he had caused trouble with Lizaola and warned Jimenez that he would suspend him if he cursed Lizaola or anyone else on company property.<sup>34</sup> According to Sepulveda, Jimenez replied that it was okay, he was going to try not to say anything. (IV:87.)

b. The Events of July 24

The following morning, Jimenez and Lizaola had another confrontation. Jimenez gave the following account. He sought out Lizaola and asked why he had sent the message by Sepulveda that he was going to punch Jimenez out. At hearing, Lizaola denied he sent such a message but admitted that this is what Jimenez asked

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<sup>34</sup>Jimenez denied that Sepulveda made these remarks and testified Sepulveda only gave him the message that Lizaola was going to punch him out. (I:64; 98.) I credit Sepulveda as to his conversation with Jimenez except that I find he did relay Lizaola's message.

him.<sup>35</sup> (III:115.)

Lizaola replied that what had happened to "Bule" was going to happen to Jimenez. Jimenez explained that "Bule" is the nickname of a worker whom Lizaola had hit.<sup>36</sup>

Jimenez responded that Lizaola was not the owner of the company and said if Lizaola was going to hit him to go ahead and do it. (I:67-70.) Filemon laughed at Jimenez in a mocking fashion.

At this point, Juan Guillen and Gonzalo Estrada arrived. Jimenez tried to explain what had happened, but Estrada said that only Lizaola's explanation was valid. (I:69.)

Estrada told Jimenez that they were going to fire him. Jimenez replied "...it doesn't matter.... That I could still find work. Before I didn't work with Bruce Church and I was able to eat."<sup>37</sup> (1:68.)

Jimenez testified he then went to the bus where his co-workers were waiting to be taken to the fields and told them that the company people had run him off. (I:69.)

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<sup>35</sup>James Barros, a worker witness for General Counsel referred to previously, testified he overheard Lizaola make such a remark to Sepulveda on the afternoon of the 23rd. (11:28.) I credit Barros.

<sup>36</sup>Lizaola denied ever having any sort of altercation with "Bule." General Counsel asked foreman Sepulveda if he had ever seen Lizaola engage in a fist fight, or ever seen Lizaola in the fields with a black eye. Sepulveda responded evasively. (IV:101.)

<sup>37</sup>Jimenez explained his response saying, "I was not going to cry for my job. It seemed to be irreversible. The decision was theirs." (IV:116.)

Worker witness Guillermo Jaramillo corroborated that Jimenez asked Lizaola why he was sending messages to Jimenez and told Lizaola if he was going to hit him to "do it now." He testified Jimenez referred to Lizaola as "buey" and said words to the effect that Lizaola wasn't enough of a man. (IV:155-156.) He referred to "Bule" being mentioned, but the context was not clear. (IV:-155.)

Lizaola described the incident as follows. He and a worker were talking, and Jimenez asked the worker whether it was his habit to talk to the owners of the company.<sup>38</sup> The worker said, "No, I'm chatting with Filemon." Jimenez then said, "Yesterday they jerked me off, and now it's going to be finished in the fields, because that's where it started."

Lizaola called Sepulveda over, and complained Jimenez had insulted him. Sepulveda told Jimenez that he had warned him the day before that if he continued to insult Lizaola he would be suspended for 48 hours pending termination. Jimenez responded that Sepulveda should go ahead and give him the suspension, "[t]hat he wouldn't cry to anybody." (III:116.) Sepulveda warned Jimenez again, and Jimenez said, in effect, "Go jerk me off." (III:116; 118.)

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<sup>38</sup>Elsewhere, Lizaola acknowledged Jimenez asked him why he was sending messages, and Lizaola responded he did not need to send a messenger to tell Jimenez how he felt.



Lizaola testified he left the area as Sepulveda issued the suspension to Jimenez. He denied he was angry that morning because Jimenez was not punished the previous day, but acknowledged he felt Guillen had not supported him because Guillen had not disciplined Jimenez. ( IV:66. )

He also acknowledged that he had talked to Ben Miyaoka about the fact that Juan Guillen had not disciplined Jimenez. Miyaoka was the harvest manager and one of the highest officials at BCI.

Sepulveda testified that when Lizaola called him over, he heard Jimenez yelling that Lizaola was a son of a bitch and that "...it's too bad about the size that you [Lizaola] have." ( IV:89. ) Jimenez also said that Lizaola could jerk him off or was jerking him off and that Lizaola was an asshole. ( IV:90-94. ) Jimenez further said that if he weren't afraid that they would fire him, the two of them could go outside and fight.<sup>39</sup> ( IV:91. )

Sepulveda reminded Jimenez that he had warned him the preceding day about swearing and that he was going to give him a 48 hour suspension pending termination. Jimenez replied "I don't care, ...do it." ( IV:92. ) Sepulveda then suspended Jimenez

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<sup>39</sup>Jimenez denied that he threatened or made any threatening gestures to Lizaola any time that morning. ( 1:69. ) He testified that if a worker engages in fighting, he would be fired." ( 1:70. )

for insubordination because of his behavior toward Lizaola.<sup>40</sup>

(IV:94-95.)

Estrada testified he accompanied Sepulveda. He essentially corroborated Sepulveda's version but ascribed more obscenities to Jimenez than either Sepulveda or Lizaola did.

(II:130-135.)

General Counsel asked Estrada if when he went to the camp on the morning of the 24th he expected to see Jimenez ranting and raving. Estrada said, "Yes" considering what Jimenez had done the day before. Asked whether he expected Jimenez to curse and swear and threaten to fight, Estrada said, "no you don't expect anyone to do that." General Counsel then asked whether with all the foremen and Estrada present Jimenez could have been fired for his behavior. Estrada replied, "Yes." (III:66.)

#### VI. The Case of Victor Ramirez

Mr. Ramirez began working for BCI in March of 1985. In 1987, he worked in Lizaola's machine crew, having been transferred from the disbanded ground crew. Ramirez testified as follows.

On August 6, he arrived at work, and Lizaola assigned him to cut lettuce. Mr. Ramirez did not have a regular place at the

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<sup>40</sup>Resp. Exs. 4 and 5 are copies of the suspension and termination notices, respectively. They were admitted not for the truth of the matters stated in the notices but only to show that they were in Mr. Jimenez' file. (III:20.)

machine and was assigned to cut, pack or load lettuce depending on where he was needed. (IV:47.) The previous day he had not been cutting lettuce and had loaned his lettuce knife to a co-worker.<sup>41</sup> He asked Lizaola for permission to get his knife and walked over to Barajas' crew which had not yet begun to work.

There were several workers nearby, and Ramirez asked them why they had not been to the Union meeting the day before. They were responding to him when Barajas came up and told Ramirez to get out of there, that he had no reason to be talking to the workers about the Union. Ramirez testified he made no response but simply left and walked back to his machine.

Barajas followed Ramirez, who by now had reached his crew, and Barajas said, "Now for sure they're going to hell-fire you. And these son of bitches (sic) we don't want here." (II:45.) The latter statement was directed to Lizaola who was nearby.

Lizaola told Ramirez to go to work. Finding all the places already occupied, Ramirez told Lizaola there was no place for him to work.<sup>42</sup> Lizaola replied, "In any case, we're going to fire you." (II:46.)

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<sup>41</sup>Estrada confirmed that Ramirez told him he went to Barajas<sup>1</sup> crew to retrieve the knife he had loaned.

<sup>42</sup>Ramirez testified that this was the first time he had ever reported to work and not found a place to work. It is undisputed that if there are extra workers, they must be paid for four hours of work, and that, consequently, the foremen count very carefully to ensure they have the correct number of workers.

Lizaola suspended Ramirez for 48 hours pending termination.<sup>43</sup> ( II:49 . ) Ramirez asked Lizaola why he was fired, and Lizaola responded that it was because Ramirez had insulted Barajas' mother. At hearing, Ramirez denied he had used foul or abusive language and said he would never dare to do so because he would be fired immediately, and he needed his job. ( II:47 . )

Mr. Ramirez went to the BCI office before the 48 hour suspension was over and spoke to field supervisor Luis Garcia who told Ramirez the Company was going to fire Ramirez because he had insulted Julio Barajas. ( II:49-50 . )

According to Barajas, his crew had been working some 20 to 30 minutes when he saw Ramirez talking to one of the workers. (IV:140-143.) He did not hear what Ramirez said, but got down off the machine and said to Ramirez, "...please do not be interrupting my workers." (IV:126; 141.) Ramirez responded, "Go to hell, fuckin<sup>1</sup> foreman." (IV:126.)

Barajas went over to Lizaola's machine with Ramirez following behind him. Barajas asked Lizaola what was Ramirez doing interrupting his workers. Lizaola responded he could give Ramirez a warning for interrupting and bothering Barajas<sup>1</sup> workers at the machine.

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<sup>43</sup>Resp. Exs. 6 and 7 are the suspension and termination notices, respectively. Again, these were not introduced for the truth of the matters stated therein but only to show they were issued.

According to Barajas, Ramirez said, ". . . go to hell you, you fuckers, and you can give me the ticket for the warning if you want to." (IV:127.) After Ramirez made those remarks, Lizaola told Ramirez that he was going to suspend him pending termination. Ramirez in effect said, "Go ahead and give me the suspension and fire me you son of a bitch. (Id.)

Barajas said that Lizaola got on his machine to make out the warning ticket, and Barajas returned to his machine. He said Ramirez followed him and said, ". . . he was going to wait for me at the pickup point where we catch the bus in order to beat me up." (Id.) Barajas responded in effect that Ramirez knew where to find him.<sup>44</sup> (IV:128.) Neither of them said anything further because by this time Juan Guillen had arrived to sign the suspension, and Guillen told Estrada to take Ramirez away.

Foreman Lizaola testified the first time he saw Ramirez was when he came to the crew with Julio Barajas which was some 10 or 15 minutes after work had begun. Barajas complained to Lizaola that Ramirez had insulted him and was interrupting his workers. Ramirez said, "[t]hat Julio had worried him, and that Julio was stupid." (III:127.) Lizaola told Ramirez that he was violating company rules by insulting a foreman or any of the workers. To which Ramirez responded, "Both of you can jerk me off."<sup>45</sup>

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<sup>44</sup>Ramirez denied following Barajas or threatening him. (II:48; 50.)

<sup>45</sup>Lizaola testified ". . . I had never had that said to me" and further said, "I have heard [this expression] very few times . . ." in the fields. (IV:72.)

(III:128.)

Lizaola told Ramirez that he was going to suspend him for 48 hours because of his remarks. Ramirez said nothing to Lizaola but told Barajas that upon leaving work he was going to beat Barajas up. (III:129.) Lizaola then called the supervisor, Juan Guillen, to sign the suspension.

Lizaola denied that Barajas told him that Ramirez was disturbing his crew by talking about the Union and said that Barajas only told him that Ramirez was interrupting his crew. (IV:78.) He further denied that Barajas said that he did not want these "Cabrones"<sup>46</sup> in his field or in his crew. (IV:78.)

Despite Estrada's initial testimony that he was present when Ramirez was suspended, it is clear he did not arrive until after Lizaola had suspended Ramirez. (II:36; III:49; IV:129.) He testified Ramirez told him what had happened.<sup>47</sup>

As in his testimony regarding Jimenez, Estrada repeated a string of obscenities Ramirez allegedly used. However, the Company does not contend that Ramirez was disciplined for what he said to Estrada.

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<sup>46</sup>"Cabrones" is the plural of "cabron" meaning "son of a bitch." (11:112.) Barajas did not specifically deny he said it but said only that he would have no cause to call union people that name and that he did not talk to Ramirez about the Union. (IV: 126; 129; 144.)

<sup>47</sup>Ramirez testified Estrada said he would try to get them not to fire him because he was a good worker. Estrada denies having made the remark. (11:48.) Resp. Exs. 1-3 are warning notices issued to Mr. Ramirez in 1986 and 1987. These were not introduced for the

## VII. Credibility Resolutions and Further Findings

After carefully reviewing the testimony of the witnesses and having observed their demeanor at hearing, I make the following finding as to the veracity and accuracy of the various accounts.

I find General Counsel's version of the events leading to the firing of Mr. Jimenez more credible than that of Respondent. I did not believe Lizaola when he testified he considered Jimenez' remarks insulting rather than inciting. Moreover, in the context of Respondent's elimination of the ground crew and transfer of workers to the lower paid machine crew, the UFW marches protesting the situation, and Jimenez' prior union activity, I find his statements were designed not to insult the workers but to encourage them to protest the lower wages. I believe Lizaola so understood the remarks.

I credit Jimenez that he specifically mentioned the Union because I found him on the whole generally credible and have found Lizaola not credible on a number of points. When a witness'

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truth of the contents so they may not be used as evidence that the events described therein occurred. They were admitted only as they reflect on the likelihood that Estrada made the comment. Estrada acknowledged he told Ramirez, "Explain everything to me, Victor so I can talk to them." (II:141.) Observing Ramirez, I am not convinced he lied. Estrada's remark implies he would try to resolve matters. At most, Ramirez may have put his own interpretation on Estrada's comment.

testimony is disbelieved in one area, there is reason to distrust it in other areas as well. (Ranch No. 1, Inc., (1986) 12 ALRB No. 21, rev. den. by Ct. App., 5th Dist. October 8, 1987; San Clemente Ranch Ltd. (1982) 8 ALRB No. 50, p. 3.)

Additionally, Jimenez' testimony was corroborated by Munoz who testified credibly and had no demonstrable interest in the outcome. Especially when such a witness is still employed by the Respondent at the time he testified, such testimony is entitled to significant weight if it is otherwise credible. (Georgia Rug Mill (1961) 131 NLRB 1304 [48 LRRM 1259], enf'd in relevant part (5th Cir. 1962) 308 F.2d 89 [51 LRRM 2144]; Wirtz v. B.A.C. Steel Products (4th Cir. 1963) 312 F.2d 14, 16.)

I also credit General Counsel's witnesses as to Lizaola's threats to Jimenez. Lizaola's and Estrada's version would have me believe that Lizaola's mild admonition to Jimenez to "please not insult the workers" elicited a barrage of obscenities and complete unconcern about being fired from Mr. Jimenez who had been working at BCI For eight years and was one of the most senior employees.

Such behavior does not comport with common experience. I observed Mr. Jimenez for several days during the hearing as well as during his testimony. He did not evidence the temperament of a person who would react in so extreme a fashion, although his demeanor showed that he was still indignant when he referred to Lizaola's threat to punch him out.

Based on the fact that I found Jimenez generally credible, found Lizaola not credible on a number of points and on



my conclusion that I do not believe Jimenez would have reacted as explosively as Respondent's witnesses described, I credit Jimenez. Moreover, Mr. Barros corroborated Jimenez. Barros had no demonstrable interest in the proceedings and testified credibly.

I do not credit Lizaola and Estrada as to the obscenities Jimenez supposedly uttered. For the reasons already set forth and others to be discussed later, I have serious reservations about Lizaola's credibility. The same is true about Mr. Estrada.

Mr. Estrada was an extremely articulate witness. He is fluent in Spanish and English and has worked as an interpreter. He demonstrated a real appreciation of the issues and the significance that testimony bore on them.

But these very characteristics led him to provide unreliable testimony. He testified in great detail to extensive remarks of both Jimenez and Ramirez made over a year and a half prior to his testimony. He explained his vivid recall by saying that the incident with Jimenez occurred on his birthday and that he had never heard such language as Jimenez used. (II:136.)

In fact, he initially misidentified the date of the first incident involving Mr. Jimenez, which occurred on July 23 which is Mr. Estrada's birthday, and Respondent's counsel had to lead him to remind him of this fact. I also found his professed shock at hearing such language disingenuous based on my observation of his demeanor.

Mr. Estrada showed a marked tendency to testify in great and specific detail when relating events favorable to the

Company's position and not to recall when asked about points which did not reflect favorably. For example, when he was asked whether he had ever been told of a fight between "Bule" and Lizaola, he carefully said, "Not to [his] recollection." (III:76.) Such caution is sharply contrasted by his precise recollection of everything Jimenez and Ramirez purportedly said and other matters.

Similarly, he testified evasively and cautiously to avoid providing answers which would undermine Respondent's position that it had no knowledge of union activity by Ramirez but then after a series of careful, qualifying answers responded absolutely that on the day Ramirez was fired he specifically remembered Ramirez had no Union insignia or flag. (III:70-71.)

Estrada's supposed specific recall as to that day is most curious given his avowed previous unawareness of any union activity by Ramirez. I do not believe Estrada's statement and find it characteristic of his tendency to embellish his testimony to enhance the company's position.

Moreover, various inconsistencies and evasions in Estrada's testimony also cause me to doubt him. First, he testified inconsistently as to whether he arrived before or after Ramirez was suspended. Second, he testified that Ramirez was not paid for four hours' work because he was suspended. (III:74.) Then, he changed his testimony and said Ramirez was not paid because he had already been told to go to work and thus was not an

extra worker.<sup>48</sup> (Id.)

As these examples illustrate, Estrada demonstrated a willingness to tailor his testimony to support Respondent's position. This characteristic and his evasiveness are demonstrated in his testimony regarding notes he made of the Jimenez and Ramirez incidents.

Despite his precise recall of details supportive of Respondent, on cross-examination, he was not sure whether the typed statement of facts prepared for him by Respondent regarding Jimenez<sup>1</sup> discharge was the same as the original notes he had submitted. (III:13-17.) General Counsel followed up by asking whether that meant his original notes were not returned, and Estrada testified they were not. He obviously grasped the significance of that statement when General Counsel asked if that meant he was not able to compare them with the prepared statement he was asked to sign. (III:26.) He immediately recanted and said he meant the notes were not returned for him to keep but he did get them back so as to compare them with the typed statement. I did not believe his explanation.<sup>49</sup>

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<sup>48</sup>I note that Estrada's testimony corroborates that of Ramirez. Lizaola, on the other hand, testified he did not put Ramirez to work because he did not see him that morning until he came up with Barajas and immediately thereafter Ramirez was suspended. I do not believe Lizaola. According to him, Ramirez did not appear until some 10-15 minutes after work began. According to Barajas, it was 30 minutes. I do not believe Lizaola would have said nothing to Ramirez if this were true.

<sup>49</sup>I also found his explanation of why he did not ask about a statement regarding Ramirez unconvincing. (III:29.)

In addition to these reservations as to the credibility of Lizaola and Estrada, I find it completely unbelievable that if Jimenez had interrupted Lizaola's crew, and Lizaola had reacted only as he testified, and Jimenez had unleashed the stream of obscene invectives attributed to him that absolutely nothing would have been done on the 23rd.

Although Lizaola apparently had no authority to discipline Jimenez because Jimenez was not in his crew, Juan Guillen was a supervisor, and there is every indication Guillen had the necessary authority. I also find Guillen's statement to Lizaola to calm down is not consistent with Lizaola's and Estrada's account.

I find Lizaola sent the threatening message via Sepulveda because of the numerous instances where I have found Mr. Lizaola not credible, because of his testimony that on the next morning Jimenez confronted him about sending the message, and because of Barros<sup>1</sup> testimony that he overheard Lizaola make the threat.

I further find that Lizaola again threatened Jimenez on the morning of the 24th when he referred to the worker "Bule." I do so because based on Lizaola's demeanor while testifying to what happened between himself and "Bule," I found his manner insincere. I also found Sepulveda's testimony on this point evasive and not credible.

Because of the reasons set forth above, I find Estrada greatly overstated Jimenez<sup>1</sup> response. Estrada's proclivity to tailor his testimony to enhance Respondent's position caused him to exaggerate and testify in an unconvincing manner.

He sought to enhance his prior testimony as to Jimenez<sup>1</sup> obscene outbursts by answering General Counsel affirmatively that he expected to see Jimenez ranting and raving on the morning of the 24th based on his behavior the day before. But later, when he was asked if he expected Jimenez to swear at Lizaola, Estrada focused only on casting such behavior in a negative light, and asserted that of course one does not expect such a thing.

Based on the foregoing, I credit General Counsel's witnesses' accounts, and I find that on the 24th Jimenez responded to Lizaola much as he had the previous day. I also credit Mr. Jaramillo that Jimenez said words to the effect that Lizaola wasn't enough of a man because he testified credibly, and the statement is consistent with Jimenez<sup>1</sup> other remarks.

#### ANALYSIS AND CONCLUSIONS

General Counsel contends Respondent has violated the ALRA by the following conduct: ( 1 ) Foreman Lizaola threatened to beat up Arturo Jimenez because Jimenez engaged in protected concerted union activity by encouraging Lizaola<sup>1</sup>'s crew to protest its wages and to join and support the Union; ( 2 ) Estrada threatened Jimenez he would "have problems" if he continued such union activity; ( 3 ) Sepulveda threatened Jimenez by conveying a message to him that

Lizaola was going to beat up Jimenez if Jimenez again spoke about the Union to Lizaola's crew; ( 4 ) Sepulveda suspended Jimenez because of his union activity; ( 5 ) Respondent fired Jimenez for his actions; ( 6 ) Lizaola physically assaulted worker Victor Ramirez by throwing a bundle of lettuce boxes at Ramirez because he carried a UFW flag into the field; ( 7 ) Foreman Barajas threatened Ramirez by swearing at him and telling him to leave Barajas<sup>1</sup> crew after Ramirez spoke to several of the crew members about the Union; and ( 8 ) Respondent suspended and then terminated Ramirez because he spoke to members of Foreman Barajas<sup>1</sup> crew about the Union.

Threats of physical violence or adverse consequences to an employee because the employee engaged in protected concerted union activity violate section 1153(a) of the Act whether or not the employee actually feels threatened or is intimidated to cease such activity. (Morris, The Developing Labor Law 2d ed. (hereafter Morris) at p. 131.) Further,

interference, restraint, and coercion under Section 8(a)(1) of the [NLRA]<sup>50</sup> does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA]. (Morris, supra, p. 76.)

This Board follows the standard established by the NLRB. (Jack Brothers and McBurney, Inc. (1978) 4 ALRB No. 18.)

<sup>50</sup>Section 8(a)(1) of the NLRA is the corollary of Section 1153(a) of the ALRA.

I find Lizaola's threat to "punch out" Jimenez violated section 1153(a). Similarly, Sepulveda's repetition of that message from Lizaola constitutes a threat and a violation of 1153(a) because it would tend to interfere with or restrain a reasonable employee from engaging in rights protected by section 1152. This is true whether or not Sepulveda himself intended to threaten or intimidate Jimenez.

I did not credit Jimenez<sup>1</sup> testimony that Estrada specifically told Jimenez he would continue to "have problems" if he continued to engage in union activities. I find Estrada<sup>1</sup>s admitted statements on this point ambiguous, and thus do not find a violation of section 1153(a).<sup>51</sup>

In order to prove a violation of section 1153(c), and, derivatively, section 1153(a), General Counsel must establish that the alleged discriminatees engaged in protected concerted union activity, that the employer knew of such activity and that there is a causal connection or nexus between the activity and the adverse action. Once the General Counsel has established its prima facie case by meeting this burden, the burden of proof then shifts to the employer to establish that it would have acted even in the absence of the protected activity.<sup>52</sup>

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<sup>51</sup>Similarly, I find Garcia's testimony regarding Jimenez and his crew ambiguous (fn. 29, supra) and do not rely on it to find anti-union animus.

<sup>52</sup>D'Arrigo Brothers Co. of California (hereafter D'Arrigo) (1978) 13 ALRB No. 1 and cases cited therein at pp. 19-20 of the Decision of the Administrative Law Judge (ALJD); Ranch No. 1, Inc., supra.

Respondent contends that General Counsel has failed to establish a prima facie case and that, in any event, Respondent has established that it suspended and fired Mr. Ramirez and Mr. Jimenez for gross insubordination, namely, using abusive and obscene language to Company foremen and supervisors.

In the case of Mr. Jimenez, General Counsel has clearly established a prima facie case. General Counsel has established that Mr. Jimenez engaged in union activity which fact was known to Respondent. Uncontradicted testimony established that Barajas observed Jimenez engaged in union activity and made hostile remarks about it. Similarly, the testimony that supervisor Luis Garcia commented that he had given orders to fire Jimenez for his remarks to workers regarding supervisors' pressuring them to work harder is uncontested. Also, I have not credited Lizaola's denials of knowledge of Jimenez activities.

General Counsel has also established a causal connection between Jimenez<sup>1</sup> activities and his suspension and discharge. Such causal connection is rarely established by direct evidence. That is, rarely does Respondent directly admit that its adverse action was motivated by anti-Union animus. The finder of fact generally must rely on circumstantial evidence. (See, generally Morris, supra, pp. 214-217.)



Here, there is direct evidence of hostility by supervisors toward Jimenez' union activities. Further, Jimenez' suspension and discharge occurred the very day Jimenez spoke to Lizaola's crew. The timing is a strong indication of an unlawful motive.

Moreover, the uncontradicted anti-union remarks of Barajas and Garcia threatening Jimenez' discharge evidence union animus. Further, there is the fact that Respondent disavowed knowledge of Jimenez<sup>1</sup> union activity, yet there is ample evidence that Lizaola, Barajas and Sepulveda knew of it.

Giving false or inconsistent reasons for adverse action is also circumstantial evidence of an unlawful motive. Respondent contends Lizaola told Jimenez to leave because he was interrupting the crew's work whereas Lizaola clearly testified it was because Jimenez had insulted the workers. I have found he was not insulting the workers. This is further evidence that Jimenez' union activities was the true reason for Lizaola's actions which precipitated the incident on the 23rd.

Respondent's rebuttal is that it fired Jimenez for gross insubordination. I have discredited Respondent's witnesses' testimony as to the numerous obscenities they ascribed to Jimenez. Thus, I find that Respondent's asserted reason for suspending and discharging Mr. Jimenez is pretextual.

Even if I were to find that Respondent fired Jimenez for the remarks I have found he did make, Respondent could not

legitimately discharge Jimenez for them because those remarks were within the ambit of protected activity.

General Counsel cites a recent case decided by the National Labor Relations Board (NLRB) where discipline imposed on an employee engaged in protected activities was found unlawful. (Acme-Arsena Co. (1985) 276 NLRB 1291 [120 LRRM 1156].)

The employee, who was a union steward, complained on several occasions about perceived work safety and work jurisdiction violations. On more than one occasion, the employee used foul and obscene language when the confrontations became heated as he insisted on employee rights being protected and management failed to comply.

Just prior to his discharge, the employee told the superintendent, with whom he had several such discussions, "You can put that up you ass and smoke it." On other occasions he told the same superintendent, "[G]o fuck yourself." (at p. 1294.)

The ALJ found that on all those occasions when such language had been used, the employee had been presenting the above described complaints and therefore was engaged in protected activity. The ALJ noted:

In this regard, the [NLRB] has repeatedly held that profane and foul language, or what is normally considered discourteous conduct while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity. Max Factor & Co., 239 NLRB 804, 818 (1978); Postal Service, 250 NLRB 4 (1980); Kay Fries, Inc., 265 NLRB 1077 (1982). Having been engaged in protected activity by complaining about and protesting work jurisdiction and work safety of laborer employees, Steward Celi's profane, obscene, and foul language, as well as any discourteous conduct on his part were protected by the

[NLRA]. (at 1295)

This Board follows the long-standing precedent of the NLRB. In D'Arrigo, supra, the Board characterized employee Navarro as seeking "to assert himself as the representative of his fellow workers, . . . and to encourage them to resist what he believed to be the imposition...of an unreasonable condition of employment." (D'Arrigo, supra, ALJD, p. 23) Similarly, here, Jimenez sought to arouse his fellow employees to protest the lowered wages and to enlist the support of the Union.

The Board held that even if Navarro had used "impertinent and discourteous" language and uttered one obscenity, such behavior did not remove the mantle of protection of the NLRA.<sup>53</sup> The Board referred to its previous decision of Giannini & Del Chiaro (hereafter Giannini) (1980) 6 ALRB No. 38 where the discharge of an employee who used much stronger language than Navarro did was found unlawful. There are parallels between Giannini and the instant case.

In Giannini, supra, a worker was engaged in protected activity (protesting the way a supervisor was treating another worker). The supervisor swore at the protesting employee and told

<sup>53</sup>The worker assertedly had told his foreman in front of other workers that he was "stupid and uneducated," "not worth a shit," and didn't "have and schooling [and didn't]...know anything regarding the job. (D'Arrigo, supra, ALJD, pp. 12; 15.)

him he was fired. The worker swore back and the exchange became more heated. It dissipated when the foreman decided to back down after the worker called over his co-workers to witness the event. But later that day the supervisor had the worker fired.

The Board noted that the employee's language did not become offensive until the foreman provoked him by swearing at him. It held that the worker's conduct did not deprive him of the protection of the Act noting that:

The law allows employees leeway in presenting grievances over matters relating to their working conditions. Such activity loses its mantle of protection only in flagrant cases in which the misconduct is so violent or of such a serious nature as to render the employee unfit for further service, (citations omitted) (at p. 5.)

The Board in D'Arrigo, supra, quoted from N.L.R.B. v. Thor Power Tool Company (7th Cir. 1965) 351 F.2d 584, 587

...not every impropriety committed during [protected concerted] activity places the employees beyond the shield of the [NLRA]. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect.... (D'Arrigo, supra, at p. 4.)

Here, as in Giannini, supra, Jimenez said nothing untoward until Lizaola swore at him and threatened to "punch him out." And on the 24th, his conduct was provoked by the threat from Lizaola relayed by Sepulveda and by Lizaola's threatening reference to "Bule."

I also find the Board's decision in V.B. Zaninovich & Sons (hereafter Zaninovich) (1986) 12 ALRB No. 5 relevant. In

that case, several workers were engaged in protected concerted activity. The debate between the employee spokesperson and company officials became somewhat heated, and the employee refused to leave the company office until he finished presenting the complaint.

The complaint was based on a matter previously raised about which the employee spokesperson protested the company was giving the employees "the runaround." The Board found the employee had a legitimate basis to resurrect the complaint given the uncertainty of the employer's actions in response to the previous discussion regarding the matter.

The Board in D'Arrigo, supra, compared Navarro's situation to that in Zaninovich in that Navarro's disagreement carried over from one day to the next despite the fact that the incident the following day involved a different issue. Here, as in both those cases, especially D'Arrigo, the incident on the 24th was but a continuation of that on the 23rd caused by Lizaola's threat to Jimenez being repeated by Sepulveda on the afternoon of the 23rd.

Like the employees in both of the above cited cases, Jimenez had a legitimate basis for concern. He believed that Lizaola was continuing to threaten him for having spoken to Lizaola's crew. He sought to confront Lizaola about it and resolve the matter.

The Board in D'Arrigo, supra, and Zaninovich, supra, quoted from a federal case which aptly summarized the competing concerns and the balance to be struck:

[The NLRA] has ordinarily been interpreted to protect the employee against discipline from impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. Both the Board and the courts have recognized that some tolerance is necessary if grievance meetings are to succeed at all; as we have noted before, 'bruised sensibilities may be the price exacted for industrial peace.' [Citations omitted.] United States Postal Service v. N.L.R.B. (1981) 652 F.2d 409 [107] LRRM 3249.]<sup>54</sup>

Based on the foregoing, I find that even if Respondent had suspended and fired Mr. Jimenez for the remarks I have found he made, such action was unlawful and violates sections 1153(c) and (a) of the Act.

I have not credited Mr. Ramirez that foreman Lizaola threw a bundle of lettuce boxes, and, thus, I recommend dismissal of the alleged violation of section 1153(a) based on this incident. I have credited Ramirez as to the anti-union remarks made to him by Barajas on August 6. I find these remarks

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<sup>54</sup>The Board in D'Arrigo cites another Postal Service case which Zaninovich quoted for the proposition that the law recognizes that because of the "confrontational and adversarial nature of organizing campaigns, collective bargaining and grievance processing, "tempers of all parties flare and comments and accusations are made which would not be acceptable on the plant room floor.'" (Zaninovich, supra, at p. 8) quoting from United States Postal Service (1983) 268 NLRB 274, 275 [114 LRRM 1281].

The NLRB there found the employee's conduct unprotected because he was not presenting a formal grievance, there was a grievance procedure, and the foreman had told him to file a grievance over his complaint. The employee ignored the supervisor and became loud and boisterous and disruptive. Here, as in Zaninovich and D'Arrigo, no grievance machinery exists because there is no contract.

constitute a threat and violate section 1153(a).<sup>55</sup>

I find General Counsel has established a prima facie case that Ramirez was suspended then discharged because of his protected union activity in violation of section 1153(c). I have found he engaged in union activity and that Respondent was aware of that activity.

The causal connection is established based on the timing of the suspension and discharge coming as they did on the heels of Ramirez<sup>1</sup> talking to Barajas' crew. I also find it significant that Ramirez<sup>1</sup> discharge occurred less than two weeks after that of Jimenez under virtually identical circumstances. I also infer anti-union motivation from Respondent's denials of any knowledge of Ramirez' union activity when there is unrefuted evidence it had such knowledge.

Just as with Mr. Jimenez, Respondent's rebuttal is that it fired Ramirez because when a foreman politely told him to stop interrupting his crew, Ramirez responded by using obscene language I have discredited Respondent's witnesses, and thus I conclude this was not the true reason for Respondent's actions. I find Respondent suspended and discharged Mr. Ramirez because he engaged in protected union activity and thereby violated sections 1153(c) and (a) of the Act.

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<sup>55</sup>Although this threat was not alleged as a violation, the matter was fully litigated and finding a violation is appropriate under both NLRB and ALRB precedent. (Gramis Brothers Farms, Inc. and Gro Harvesting, Inc. (1983) 9 ALRB No. 60.

REMEDY

Having found that Respondent violated sections 1153( a ) , and ( c ) of the Act by the above described conduct, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Upon the basis of the entire record, the findings of fact and the conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent Bruce Church, Inc. , ( " B C I , " "Respondent" or "Company") its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

( a ) Unlawfully suspending, discharging, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or with respect to any term or condition of employment because he or she has engaged in concerted activity protected by Section 1152 of the Act;

( b ) Threatening employees because of their protected concerted union activity;

( c ) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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



( a ) Offer Arturo Jimenez and Victor Ramirez immediate and full reinstatement to their former positions of employment, or if the former positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

( b ) Make whole Arturo Jimenez and Victor Ramirez for all wage losses or other economic losses they have suffered as a result of Respondent's unlawful discharge. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharges. The award also shall include interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5;

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

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

( e ) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to

all agricultural employees in its employ from September 1, 1987, to September 1, 1988;

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

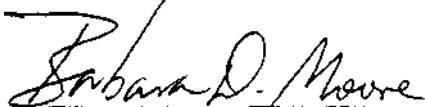
( g ) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all BCI employees on company time and property at time(s) and places( s ) to be determined by the Regional Director. Following the reading, the Board agent shall be given the 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 piece-rate employees in order to compensate them for time lost at the reading and question-and-answer period;

( i ) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved;

( h ) An order requiring Respondent, upon request of the Regional Director or his designated Board agent, to provide

the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have already begun at the time the Regional Director requests peak season dates, Respondent shall inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season.

DATED: June 30, 1989

  
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BARBARA D. MOORE  
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board [ALRB or Board] by the United Farm Workers of America, the General Counsel of the ALRB issued a complaint which alleged that we, Bruce Church, Inc. (BCI) had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by suspending and discharging Arturo Jimenez and Victor Ramirez because they participated in Union activities. The Board also found that we violated the law by making various threats, including threatening to discharge Mr. Jimenez and Mr. Ramirez. The Board has told us to post and publish this notice. We will do what the Board has ordered us to do.

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

Because you have these rights, we promise that:

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

WE WILL NOT discharge or threaten any employees because they participated in union activities.

WE WILL offer employment to Arturo Jimenez and Victor Ramirez to their former positions as lettuce harvest employees, and we will reimburse them, with interest, for any loss in pay or other economic losses they suffered because we discharged them.

DATED:

BRUCE CHURCH, INC.

By:

\_\_\_\_\_  
Representative                      Title

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

DO NOT REMOVE OR MUTILATE