

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BOYD BRANSON FLOWERS, INC.,)	
)	
Respondent,)	Case No. 93-CE-23-EC(OX)
)	
and)	21 ALRB No. 4
)	(August 11, 1995)
RAMON ROMERO,)	
)	
Charging Party.)	
)	

DECISION AND ORDER

On February 9, 1995, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in the above-referenced case, in which he found that Boyd Branson Flowers, Inc. (Employer) unlawfully discharged 12 employees for protesting their wages and hours. Specifically, the ALJ found that the employees reasonably believed that they had been discharged, and did not quit voluntarily, as maintained by the Employer. This matter proceeded as a consolidated liability and compliance hearing, and the ALJ fixed amounts owing to the 12 discriminatees. The Employer timely filed exceptions to the ALJ's conclusion that the employees were discharged, but has not challenged any of his findings with regard to compliance issues¹

The Agricultural Labor Relations Board (Board) has considered the record and the attached decision of the ALJ in light of the exceptions and briefs submitted by the parties and

¹There being no exceptions-to the ALJ's findings with regard to the amounts owing, those findings are adopted pro forma.

affirms the ALJ's findings of fact² and conclusions of law^{3 4}, and adopts his recommended remedy, as modified.⁵

²To a significant degree, the ALJ's decision turns on credibility determinations. The ALJ's credibility determinations are based not only on demeanor, but also the degree of corroboration and the likelihood of the different scenarios in light of all of the evidence and circumstances. The Board will overrule such credibility determinations only where a clear preponderance of relevant evidence demonstrates that they are incorrect. (*Standard Drywall Products* (1950) 91 NLRB 544; *David Freedman & Co.* (1989) 15 ALRB No. 9.) The record here provides no such indication.

³The protected status of concerted demands concerning wages or working conditions does not depend on the reasonableness of the demands. (*Giannirzi Packing Corp.* (1993) 19 ALRB No. 16, ALJ dec., p. 15.) Activity that would otherwise be protected may nonetheless lose its protected status only if it is unlawful, violent, in breach of contract, or indefensibly disloyal. (See, generally, *Hardin, The Developing Labor Law*, 3rd Ed., p. 137; *Nash-DeCamp Co. v. ALRB* (1983) 146 Cal.App.3d 92, 105.) None of these exceptions apply here.

⁴In its exceptions, the Employer posits that the record shows no more than an unfortunate misunderstanding. However, even if Donald Boyd did not intend to convey the message that the employees were fired, the credited statements establish that the employees would reasonably believe that they had been fired. (See *American Protection Industries, et al.* (1991) 17 ALRB No. 21, ALJ dec., p. 18; *Ridgeway Trucking Co.* (1979) 243 NLRB 1048 [101 LRRM 1561], enf'd (5th Cir. 1980) 622 F.2d 1222; *Trumbull Asphalt Company of Delaware* (8th Cir. 1964) 327 F.2d 841, 843 ("It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated.") .) Therefore, the result in the case would not differ even if the entire affair was the result of a misunderstanding. Having made statements that the employees reasonably could have taken as indicating a discharge, it was incumbent upon Boyd, if he did not intend to fire the employees, to clarify the situation.

⁵Paragraph 2 (e) of the Order has been modified to reflect the Board's standard practice of requiring mailing of the attached Notice to all agricultural employees employed by the Employer during the one year period following the unlawful conduct.

ORDER

Pursuant to Labor Code section 1160 .3, Respondent Boyd Branson Flowers, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment, or any term or condition of employment because the employee has engaged in concerted activity protected under section 1152 of the Agricultural Labor Relations Act (Act) .

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

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

(a) Rescind the discharges of the employees discharged on May 3, 1993, and offer them, except for Luis Lemus Orosco, who has died, immediate and full reinstatement to their former positions of employment, or if their positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment.

(b) Make whole the employees who were discharged on May 3, 1993, and the estate of Luis Lemus Orosco, for all wages or other economic losses they suffered as a result of their unlawful discharges. For the period May 3, 1993 through September 30,

1994, the backpay liability shall consist of the amounts set forth in the backpay specification issued in this matter, as modified in the attached decision of the ALJ. For the period commencing October 1, 1994, loss of pay is to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharges. The award shall also include interest to be determined in the manner set forth in *E. W. Merritt Farms* (1988) 14 ALRB No. 5.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning October 1, 1994, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll and social security payment records, time cards, personnel records and reports, and all other records necessary to a determination, by the Regional Director, of the amounts of backpay and/or other economic losses due under the terms of this Order.

(d) Upon request of the Regional Director, sign the attached Notice to Agricultural Employees embodying the remedies ordered. After its translations by a Board agent into all appropriate languages, as determined by the Regional Director, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in this Order.

(e) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time from May 3, 1993, until May 2, 1994.

(f) Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondent's property for 50 days, the period (s) and place (s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which may be altered, defaced, covered or removed.

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

(h) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of this Order.

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

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

DATED: August 11, 1995

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

BOYD BRANSON FLOWERS, INC
(Ramon Romero)

21 ALRB NO. 4
Case No. 93-CE-28-EC(OX)

Background

On February 9, 1995, Administrative Law Judge (ALJ) Douglas Gallop issued a decision in which he found that Boyd Branson Flowers, Inc. (Employer) unlawfully discharged 12 employees for protesting their wages and hours. Specifically, the ALJ found that when the employees left the Employer's premises after making concerted demands for changes in wages and hours, they reasonably believed that they had been discharged, and did not quit voluntarily, as maintained by the Employer. This matter proceeded as a consolidated liability and compliance hearing, and the ALJ fixed amounts owing to the 12 discriminatees. The Employer timely filed exceptions to the ALJ's conclusion that the employees were discharged, but did not challenge any of his findings with regard to compliance issues. The General Counsel did not file a response to the exceptions.

Board Decision

The Board affirmed the ALJ's findings of fact, conclusions of law, and recommended remedy, adopting pro forma the unexcepted to findings with regard to the amounts of backpay owing. The Board noted that the ALJ's decision, to a significant degree, turned on credibility determinations, which the Board will not overrule unless a clear preponderance of the relevant evidence demonstrates that they are incorrect. The Board also noted that the protected status of concerted demands concerning wages or working conditions does not depend on the reasonableness of the demands. Lastly, the Board noted that, in light of credited testimony attributing statements to the Employer that the employees reasonably would have taken to indicate that they had been fired, the result in the case would not differ even if the Employer actually had not intended to discharge the employees. Having made statements that the employees reasonably could have taken as indicating a discharge, it was incumbent upon the Employer, if he did not intend to fire the employees, to clarify the situation.

* * *

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

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, Boyd Branson Flowers, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging 12 employees for protesting their wages and hours.

The ALRB has directed us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative (union);
3. To vote in a secret ballot election to decide whether you want a union to represent you, or to end such representation/
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 otherwise retaliate against employees because they protest about their wages, hours or other terms and conditions of employment.

WE WILL offer the employees who were discharged on May 3, 1993 immediate reinstatement to their former positions of employment, and make them whole for any losses they suffered as the result of the unlawful discharge.

DATED:

BOYD BRANSON FLOWERS, INC.

By: _____

(Representative)

(Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 South Waterman Avenue, EL Centro, CA 92243. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
BOYD BRANS ON FLOWERS, INC.,)	Case No. 93-CE-23-EC(OX)
)	
Respondent,)	
)	
and)	
)	
RAMON ROMERO,)	
)	
_____ Charging Party.)	

Appearances :

Marie Rodarte Tocyansen,
Carpinteria, California
For Respondent

Ramon Romero Carpinteria,
California
For Charging Party

Kristine Rodriguez
El Centro ALRB Regional Office
For General Counsel

DOUGLAS GALLOP: This case was heard before me at Ventura, California on December 13, 14 and 15, 1994.

It is based on a charge filed by Ramon Romero Garcia (Romero) on May 10, 1993. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a Complaint and a First Amended Complaint (hereinafter complaint), alleging that Boyd Branson Flowers, Inc. (hereinafter Respondent) violated section 1153 (a) of the Agricultural Labor Relations Act (Act), by discharging 12 employees for concertedly protesting their wages and hours. Respondent filed an answer, denying the commission of unfair labor practices. General Counsel also issued a Backpay Specification, which was answered by Respondent. General Counsel filed a motion to make the gross backpay allegations true, which was granted, as to the methodology used in the specification. Romero has intervened in the proceedings. Subsequent to the hearing, General Counsel and Respondent filed written briefs.

Upon the entire record, including my observations of the witnesses, and after careful consideration of the briefs and other arguments presented, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Jurisdiction

Respondent, a California corporation, grows, harvests and sells flowers, and is an agricultural employer within the meaning of §1140.4(c) of the Act. The individuals named in paragraph four of the complaint were at all material times

agricultural employees within the meaning of §1140. (b).¹

II. The Events of May 1, 1993

Respondent's President, Donald Boyd, testified that on Saturday, May 1, 1993, he expected the crew to work until 3:30 p.m, but needed to have additional flowers cut. He asked Juan Gonzalez, who speaks and understands more English than the other crew members, to ask "the boys" if they would work until 5:30 p.m. Gonzalez later told Boyd the crew members did not wish to work until 5:30 p.m. According to Boyd, his reaction to this was, "What the hell, okay, fine."

General Counsel did not question any of the crew members concerning this incident, but Sixtos Gonzalez, on cross-examination, gave a radically different picture of Boyd's demeanor on that day. According to Gonzalez, Boyd was very angry, slammed the truck doors, drove very fast and threw things.²

It appears that the issue of hours had become a longstanding sore point for the employees, who would sometimes be sent home early during the week, and would then be required to work on Saturday.³ The employees gave conflicting testimony as to

¹Respondent considered Juan Gonzalez its foreman at the time the events herein took place, and his hourly rate was substantially higher than most, if not all of the other employees. Respondent does not, however, contend that Gonzalez was a statutory supervisor.

²The transcript refers to Boyd "throwing cars," which is either a mistake in the translation or transcript, or Gonzalez simply misspoke.

³Respondent's treatment of this issue was rather evasive, first attempting 'to shift the focus to whether the employees worked a total of 40 hours per week, and then, only under extended prodding, admitting that employees sometimes worked less than eight hour days.

whether they decided to speak with Boyd on May 1, with some denying this, and others contending this is when the decision was made. The conflict may result from confusion as to the question being asked, since Sixtos Gonzalez testified they wanted to speak with Boyd on May 1, but did not do so because he was angry.

III. The Events of May 3, 1993

Ten of the alleged discriminatees testified concerning the events of May 3, the most critical testimony coming from Juan Gonzalez, who was first employed by Respondent in 1986. He testified that on May 2, the crew met before work, and decided to ask Boyd for a raise of 25C per hour and an agreement that the employees work full eight-hour days, Monday through Friday. Gonzalez was selected to speak on behalf of the employees, due to his superior knowledge of English.

Gonzalez approached Boyd outside the packing shed, and said the crew wanted to speak with him. The other crew members gathered around in a circle. The conversation between Gonzalez and Boyd was a mixture of English and Spanish. Gonzalez told Boyd the men wanted a twenty-five cent raise⁴ and eight hours per day. Boyd purportedly responded that he did not have any money, and there would be no raise. According to Gonzalez, Boyd became very angry and began kicking the ground. He then said, "The increase

If Respondent wished to establish that employees worked 8-hour days, it could have introduced payroll records showing this, or if none existed (which is doubtful), explained that on the record.

⁴Some of the other employees testified that Gonzalez said a quarter raise.

is at your home - let's go, let's go,⁵ and that they would not get the eight hours. Boyd allegedly said, "Goddamn it, let's go fuckers, no more work." Gonzalez testified Boyd also ordered him to vacate the trailer, owned by Respondent, in which Gonzalez and his family were living, on Respondent's premises. Boyd also told Sixtos Gonzalez to remove a vehicle he was storing at one of the ranches.

Sixtos Gonzalez, corroborated by Antonio Gutierrez, but not Juan Gonzalez or the other employee witnesses, testified he asked Boyd about his paycheck. Boyd responded that Gonzalez knew when payday was, and he could get his paycheck then. The employees then left.

Juan Gonzalez, and the other employees who were asked, denied that Boyd's son, Eric, was present during this incident. Gonzalez testified that Boyd was "dumping flowers" in an area outside the packing shed, on the opposite side from where the conversation took place. Gonzalez did not recall any conversation with Eric Boyd after the incident, and while he did give Donald Boyd the keys to the trailer, he did not speak with him. Gonzalez, later that day, observed new employees cutting flowers in the fields.

All of the other alleged discriminatees who testified contended they heard Gonzalez ask for both a wage increase and eight-hour workdays, and that Boyd angrily told them the wage

⁵Boyd allegedly said this in Spanish, "vamonos." The Spanish word for go home (plural) is "vayanse."

increase was at their homes, and "let's go." The level of corroboration dropped from that point, with several, but not all, testifying that Boyd told Juan Gonzalez to vacate the trailer and Sixtos Gonzalez to remove his vehicle. Similarly, some of the witnesses did not refer to Boyd kicking the ground. No other witness claimed that Boyd used the word, "fuckers," although several testified he said, "goddamn it."

The employees, since the incident, have met on several occasions, including meetings with a representative of the United Farm Workers of America, representatives of the ALRB and amongst themselves. Several of the former employees, including Juan Gonzalez, denied ever having discussed the incident with any other employee, and either denied, or were very hesitant to admit that any of these meetings took place.

Donald Boyd testified that he had always treated his employees very well, citing various financial and personal favors bestowed by him. Boyd contended that he is an easy-going individual, who is not easily upset. He occasionally became angry with the employees, however, if they engaged in misconduct, such as overstaying their break. Boyd denied he ever uses "really foul" language, although his testimony was peppered with unsolicited remarks, such as "hell," "ass" and "damn."

Boyd contended he only spoke with Juan Gonzalez on May 3. He denied the employees gathered around him in a circle, because this would be like a "lynching party." He also testified, however, that as Gonzalez began speaking with him:

I notice [d] some of the guys were kind of--it's kind of like some of the guys were coming around, or coming--not around me, but I mean they're kind of gathering more closely in some groups.

Boyd later placed four or five of the employees a short distance behind Gonzalez.

According to Boyd, Gonzalez told him the men wanted him to guarantee them eight hours per day. Boyd was "stupefied or dumified" by this, and asked what Gonzalez meant. Gonzalez replied that the crew wanted him to sign a guarantee of eight hours every day. Boyd told Gonzalez he knew Boyd could not do this.

Gonzalez turned and spoke with the four or five others close behind him, and there was an exchange in Spanish. Gonzalez turned back to Boyd and said they wanted him to write out a guarantee and give it to them before they would go to work. Boyd responded he would be lying if he did that. According to Boyd, his son had been 10 to 15 feet away up to that point, but then approached Gonzalez and told him it is impossible to do this in the flower business. Gonzalez responded he knew it, but the men wanted the guarantee.

At that point, Gonzalez and the rest of the crew began discussing the issue. When Boyd tried to say something, Gonzalez told him to shut up. After some additional discussion, Gonzalez told Boyd the crew wanted him to go into the office and sign a paper. Boyd asked what paper they were referring to, and Gonzalez told him to write a paper guaranteeing the hours. Boyd refused, and Gonzalez apparently told this to the others, because they

began leaving. Boyd asked Gonzalez, "What the hell is going on?" and Gonzalez "just kind of shrugged his shoulders."

When asked if the employees made any other requests that day, Boyd testified as follows:

No. This--and I've been sitting here for three days and I've hearing about this 25 cents thing. And I be damned if they ever told me 25¢--and if they would have told me 25¢, it doesn't take a mathematical genius to figure out if you got 10 or \$15,000.00 out in the field, 25¢ is nothing. Sure, you're going to give them 25¢ and really been an ass and right after Mother's Day, fired them all.

Eric Boyd testified, corroborating Donald Boyd's version of what was said on May 3, almost word for word. Eric Boyd claimed to have witnessed the entire incident, including Gonzalez's initial request to speak with his father. Eric Boyd did contradict his father's testimony with respect to the position of the employees, stating none of them moved and, in fact, placing himself closer to Donald Boyd and Gonzalez than any of them.

There was considerable dispute as to Donald Boyd's fluency in Spanish, with General Counsel's witnesses testifying it is not good, but he is able to communicate, while Respondent's witnesses contended it is atrocious or nonexistent. Curiously, when asked if he knew any words in Spanish, the first word chosen by Boyd was "quartar, " a phonetic for the Spanish slang for quarter. Eric Boyd, after testifying that his father speaks no Spanish, stated he missed some of the Spanish words during the conversation between Donald Boyd and Gonzalez.

Donald and Eric Boyd denied that Donald Boyd said anything about a raise, that he told the workers to go home, that

Gonzalez should vacate the trailer or that Sixtos Gonzalez should remove his vehicle. Donald Boyd, corroborated by his wife, Jeanne Francis Boyd; business associate, William W. Lawrence; and former office employee, Mary Ellen Smith-Branson, testified that he told these individuals, on May 3, that the employees had walked off or quit after he refused to grant the eight-hour guarantee. Boyd, purportedly devastated by the loss of his employees, was ready to close down the business, but Lawrence and another grower obtained new employees to cut the flowers. Nevertheless, Respondent's business has greatly suffered since the employees left.

Donald Boyd testified that while he did not order Gonzalez to vacate the trailer, Gonzalez told him, later that day, he would be leaving. Boyd claims he asked Gonzalez where the others were, and asked if they could get them (to return). Gonzalez purportedly replied that Boyd would have to sign "this contract, " and returned to the trailer.

Eric Boyd testified that he, too, spoke with Gonzalez on May 3, after the walkout. When Boyd asked Gonzalez what was going on, Gonzalez replied it was not his fault, and he enjoyed working for his "daddy." Boyd purportedly told Gonzalez his father would "take him back, " but Gonzalez replied he would not do so unless all of the workers were allowed to return.

Respondent's non-percipient witnesses corroborated Boyd's claim that he treated the employees well. Smith-Branson, however, noted that Boyd's "nature" was such that he would become angry at times, and "blow." She also testified that while she did

not directly witness the May 3 incident, she was in the office, and aware that Boyd was speaking with the employees. Smith-Branson recalled that the incident lasted a considerable length of time.

Edward J. Vasquez, a private detective, was hired by Respondent to investigate a disability claim filed by Gonzalez after May 3, and the employees' contention that they had been fired. Vasquez testified that he interviewed seven of the employees present on May 3, plus another who was in Mexico on that date. Vasquez did not interview Juan or Sixtos Gonzalez, Vasquez conceded that seven of the eight employees (he did not specify which) told him that they felt they had been discharged because they had asked for a wage increase and eight-hour workday; however, all but two "forgot" to mention the wage increase when he asked them what specifically had taken place. Vasquez only related Romero's account to him, which was that Boyd told them, in Spanish, that if they did not want to work they way he said, they could go home -- there was no more work for chem. Vasquez also testified that two or three of the employees told him they had decided if Boyd fired any of them, the rest would quit.⁶

IV. Credibility Resolutions

It is concluded, that none of the percipient witnesses has told the whole truth concerning the events of May 3, 1993.

⁶In this regard, a few of General Counsel's witnesses, including Gonzalez, testified on cross-examination that Boyd had discharged them twice before when they had requested wage increases, and then quickly rehired them. Boyd denied ever having discharged these employees .

Neither side's version is logical, since it is unlikely that Boyd would have flown into a rage at the mere request by Gonzalez, and just as unlikely that the employees would have simply left because Boyd turned down the request. With respect to the testimony of the alleged discriminatees, it is clear they were, at best, giving a bare-bones summary of what took place. In this regard, the credible testimony of Smith-Branson establishes that the confrontation lasted a considerable length of time. It is also clear that the alleged discriminatees were fully willing to evade or deny conduct or events they felt damaging to their interests, such as their subsequent discussions and meetings, and interviews with Vasquez.

On the other hand, Donald Boyd was certainly not a sincere witness. His testimony was replete with self-serving statements, ex post facto characterizations and rationalizations, and volunteered, non-responsive information. Boyd's credibility is certainly not bolstered by the conclusion, herein, that his son was not, in fact, present during the confrontation, leading to the inference that Boyd has carefully coached him in his testimony, and altered his own testimony to provide for Eric Boyd's presence.⁷

⁷In discrediting Eric Boyd's testimony, it is unlikely that all of the employees asked would have lied about his presence, if he had, in fact, been in the vicinity. Furthermore, the credible testimony establishes that if Eric Boyd had been "dumping flowers" as he testified, he would have been on the opposite side of the packing shed from where the incident occurred. It is all too fortuitous that Boyd contends he observed the entire incident, even Gonzalez's initial approach to his father, and his testimony sounded pre-recorded. Similarly, his alleged conversation with Gonzalez

Therefore, it is found that the incident began with Gonzalez telling Boyd the employees wanted both a quarter raise and a guarantee of eight hours per day.⁸ Boyd questioned Gonzalez on the hours issue, and Gonzalez told him the employees wanted a guarantee of eight hours per day, Monday through Friday, and they would then help him out on Saturdays if he needed them. Boyd told Gonzalez he could not make such a guarantee, and Gonzalez translated this to the others. Probably after some additional discussion on the subject, the employees told Gonzalez to tell Boyd they were not going to work until he guaranteed their hours, in writing.

At that point Boyd, who was already upset with the employees for refusing to work the extra hours on May 1, "blew."⁹ He told them they would not get the raise or the hours, "goddamn it, " and kicked at the ground. Boyd told them the raise was at

after the incident, denied by Gonzalez, sounded like another attempt to carbon copy Donald Boyd's testimony. Even if true, Gonzalez's alleged statements to Eric Boyd are inconclusive in establishing whether the employees were ordered to leave, or left voluntarily.

⁸It is noted that the charge, filed only two days after the incident, alleges that the employees were discharged for requesting a wage increase, and that practically all of the employees interviewed by Vasquez gave this request as a reason for the alleged discharges. Vasquez's allegation, that several of them "forgot" to repeat the wage issue is unpersuasive, absent a more detailed account of what he asked them, and their actual responses.

⁹Sixtos Gonzalez is credited in his testimony showing that Boyd, in fact, was furious with the employees on May 1. Boyd's mischaracterization of his reaction was consistent with his effort to conceal anger by him toward the employees.

their homes, there was no more work for them, and to go.¹⁰ Boyd also told Juan Gonzalez to vacate the trailer, and for Sixtos Gonzalez to remove his vehicle.¹¹ Sixtos Gonzalez asked for his paycheck, and Boyd told him to get it on payday. Juan Gonzalez is credited in his testimony that nothing was said when he returned the trailer keys to Boyd.¹² While Respondent's witnesses are credited in their testimony that Boyd told them the employees had left or quit, it is concluded that this constituted damage control on Boyd's part.¹³

¹⁰The employees' version of these statements rings true, since if they had wanted to manufacture a discharge, they more likely would have alleged Boyd told them they were fired. It is unlikely these employees could have made up the cynical reference to the raises being at their homes, and the grammatical misuse of "vamonos" instead of "vayanse" is consistent with someone who is limited in the Spanish language. Even if Boyd is correct, and the discussion related solely to the hours of work, Vasquez's account of what Romero told him, that Boyd told the employees if they did not want to work the way he said, they could go home, and there was no more work for them, is still essentially corroborative of the employees' testimony.

¹¹It is unlikely that Gonzalez would have simply left his abode in such a hurry. Much more likely, he would have waited to see if Boyd changed his mind about the guarantee, or if the employees decided to return to work without it. It has been noted that these statements were not corroborated by all the employees. Said omissions are attributed to the employees not hearing or understanding the statements, or being careless in their testimony, rather than showing the statements were not made.

¹²Boyd's attempt to characterize Gonzalez as a reluctant go-between for the other employees is unconvincing. Gonzalez impressed the undersigned as someone who totally agreed with, and was probably a major instigator in the decision to make the demands.

¹⁵Even as a witness, Boyd showed the ability to give off-the-cuff justifications and explanations for his conduct. To the extent that Boyd was "shocked" by what had taken place, it was probably because the employees had not capitulated when he told them to leave.

ANALYSIS AND CONCLUSIONS OF LAW

Section 1152 of the Act grants Agricultural employees the right, inter alia "to engage in ... concerted activities for the purpose of mutual aid and protection." Under §1153 (a), it is an unfair labor practice for an agricultural employer to "interfere with, restrain or coerce" agricultural employees in the exercise of that right. In order to be protected, employee action must be concerted, in the absence of union activity. This means the employee must act in concert with, or on behalf of others. Meyers Industries, Inc. (1984) 268 NLRB 493 [115 LRRM 1025], rev'd (1985) 755 F.2d 941, decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], aff'd, (1987) 835 F.2d 1481, cert, denied, (1988) 487 U.S. 1205; Gourmet Farms. Inc. (1984) 10 ALRB No. 41.

Protected concerted activity includes conduct arising from any issue involving employment, wages, hours and working conditions. Protests, negotiations and refusals to work arising from employment-related disputes are concerted activities. J. & L. Farms (1982) 8 ALRB No. 46; Lawrence Scarrone (1981) 7 ALRB No. 13; Miranda Mushroom Farm, Inc., et. al. (1980) 6 ALRB No. 22; Giumarra Vineyards. Inc. (1981) 7 ALRB No. 7; NLRB v. Washington Aluminum Co. (1960) 370 U.S. 9 [50 LRRM 2235]; Phillips-Industries. Inc. (1968) 172 NLRB 2119, at page 2128 [69 LRRM 1194].

Retaliation by an agricultural employer against employees, because they engage in protected concerted activities, is considered interference, restraint and coercion under §1153(a).

In order to establish a prima facie case of retaliatory interference for engaging in protected concerted activity, the General Counsel must prove: (1) that the employee engaged in such activity, (2) that the employer had knowledge of the activity, and (3) that a motive for the adverse action taken by the employer was the protected activity. Lawrence Scarrone. Supra; United Credit Bureau of America. Inc. (1979) 242 NLRB 921 [101 LRRM 1277], enf'd (CA 4, 1981) 643 F.2d 1017 [106 LRRM 2751]; Mid-America Machinery Co. (1978) 238 NLRB 537 [99 LRRM 1290]. Direct or circumstantial evidence includes inconsistent reasons for the adverse action, the expression of anger by a supervisor toward the protected activity and the failure to follow established procedures. Miranda Mushroom Farm, Inc., et al., supra.

Once the General Counsel has established protected concerted activity as a motivating factor for the retaliation, the burden shifts to the employer to rebut the prima facie case. Respondent must preponderantly show that the adverse action would have been taken, even in the absence of the protected concerted activity. J.& L. Farms, supra; Wright Line, a Division of Wriaht Line. Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].

The credible evidence shows that the employees jointly engaged in a refusal to work in support of their demands for a wage increase and an eight-hour workday. The subject of the dispute clearly pertains to terms and conditions of employment, and the withholding of services in furtherance of those demands constitutes protected concerted activity. Therefore, if

Respondent discharged the employees for this reason, it violated the Act.

A discharge is established by the words and actions of the employer. If the employer's conduct would reasonably lead employees to believe they had been discharged, this element of the case is satisfied. American Protection Industries, et al. (1991) 17 ALRB No. 21, at ALJD, page 18; Ridaeway Trucking Co. (1979) 243 NLRB 1048 [101 LRRM 1561], enf'd. (CA 5, 1980) 622 F.2d 1222; Trumbull Asphalt Company of Delaware (CA 8, 1964) 327 F.2d 841.

In this case, the credited evidence shows that Boyd angrily told the employees there was no more work for them, and they reasonably understood his words, "Vamonos, vamonos," to mean, "go home," based on Boyd's weakness in the Spanish language, and his other conduct and statements during the incident. Similar statements were held to constitute a discharge in a National Labor Relations Board case. Modern Iron Works, Inc. (1986) 281 NLRB 1119 [124 LRRM 1052] . In addition, Boyd's eviction of Juan Gonzalez, and order to Sixtos Gonzalez to remove his vehicle are strong indications that he was terminating the employment relationship. Therefore, the evidence does establish a discharge.

It is clear that the discharge was in response to the employees' refusal to work. As discussed above, a joint refusal to work in support of improved wages, hours or other terms of employment constitutes protected concerted activity under the Act, and an employer may not lawfully retaliate. Accordingly, by discharging the employees, Respondent violated section 1153(a).

THE BACKPAY SPECIFICATION

As noted above, General Counsel's motion to make the backpay specification allegations true was granted as to the methodology for calculating gross backpay. Respondent has failed to show that the gross wages, adjustments for vacation pay or interest calculations are inaccurate. The specification covers the period May 3, 1993 to September 30, 1994. There was testimony at the hearing concerning interim earnings and expenses, both contested by Respondent, and the following findings and adjustments are made, based thereon:

Trinidad Arellano Rodriguez: The backpay specification lists no interim earnings for Arellano. Arellano, however, testified that he worked for two to three months, beginning about July 1, 1993, at a wage rate of \$6.00 per hour. He "sometimes" worked 40 hours per week. Based on the foregoing, Arellano's backpay, for the third quarter of 1993 will be reduced by \$2,000.00 (ten weeks at \$200.00 per week).¹⁴ Arellano further testified that commencing in November 1993, he worked for one month, grossing about \$215.00 per week. Therefore, his net backpay for the fourth quarter will be reduced by \$360.00.

In addition, Arellano began his current employment in February 1994, far earlier than indicated by the specification. He works 40 hours per week, at the rate of \$5.50 per hour -\$220.00 per week. Accordingly, his net backpay for the first

¹⁴In all cases where there has been a reduction in net backpay, the interest shall be adjusted accordingly.

quarter of 1994 will be reduced by \$1,760.00; by \$2,860.00 for the second quarter (interim earnings exceed backpay); and by \$2,860.00 for the third quarter (interim earnings exceed backpay).

Isauro Gamez: Gamez, who is Jose Gonzalez's son and had lived in the trailer, testified that he incurred additional gasoline expenses on one of his subsequent jobs, because he was no longer taking his father, who was contributing one-half of the gas money when they worked for Respondent, to work, and because he had to drive more miles. Branson-Smith testified the subsequent employer is located very close to one of Respondent's fields. Nevertheless, it is clear that Gamez had moved from the trailer, and thus probably lived farther from both employers. In addition, Branson-Smith's testimony does not account for Gamez's loss of gas money from Gonzalez. Therefore, the gasoline expense is allowed.

Gamez testified that he worked for one week in May 1993, at \$4.75 per hour, which does not appear in the specification. Ramon Zendejas Manriquez and Sixtos Gonzalez worked for the same employer, at the same time. Since the specification lists their interim earnings for that employer as \$152.00, Gamez's net backpay for the first quarter of 1993 will be reduced by this amount.

Jose Alfredo Lopez: The specification allows Lopez \$38.00 per week in added expenses. Lopez credibly testified that his gasoline expenses have risen from \$5.00 per week to \$48.00 per week, due to a substantially increased commute, and the loss of a

ridesharer. Accordingly, these expenses are allowed.¹⁵ Lopez testified that he actually began working for a new employer one or two weeks after he left Respondent's employ, rather than during the third quarter of 1993, as alleged. It is unclear from the specification when in that quarter General Counsel began Lopez's interim earnings for this employer. In the fourth quarter, Lopez averaged about \$260.00 per week with this employer. Accordingly, Lopez's interim earnings for the second quarter of 1993 will be set at \$1,560.00 (six weeks), reduced by \$228.00 for gas expenses, for a net reduction in net backpay of \$1,332.00. Lopez's interim earnings for the third quarter will be increased by \$780.00 (three weeks), reduced by \$114.00 for expenses, for a net reduction of \$666.00 (interim earnings exceed net backpay).

Ramon Zendejas Manriquez: At the hearing, General Counsel deleted \$200.00 in vacation pay from Zendejas' gross backpay. Zendejas credibly testified that he incurred \$40.00 in expenses to travel by bus to obtain employment. This expense is allowed. Zendejas left that employment to go to Mexico, because his father was gravely ill, and he had to care for him. The specification lists this as a "vacation, " and does not credit him with backpay for that period.

Zendejas obtained employment soon after he returned, but quit and went back to Mexico in December 1993, because his sister had died. Zendejas did not return until March 1994, and again

¹⁵If anything, Lopez should be credited with an additional \$5.00 per week, to cover the loss of the ridesharer's contribution.

quickly obtained employment. The specification grants Zendejas full backpay for the first quarter of 1994, with no interim earnings. While Zendejas may have been justified in quitting his job to attend to his sister's funeral and related family matters, it is found that by extending his stay, he removed himself from the labor market, and is not entitled to backpay for the first quarter of 1994. Geocre Lucas & Sons (1984) 10 ALRB No. 6, pages 8-9; Bruce Church (1983) 9 ALRB No. 19, at ALJD, pages 16-21.

Luis Lemus Orosco: This former employee has died since being employed by Respondent. The backpay due to him shall be paid to his estate.

REMEDY

Having found that Respondent violated §1153(a) of the Act by discharging the employees listed in paragraph four of the First Amended Complaint, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

In fashioning the affirmative relief delineated in the following order, I have taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14.

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

ORDER

Pursuant to Labor Code §1160.3, Respondent Boyd Branson Flowers, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment, or any term or condition of employment because the employee has engaged in concerted activity protected under §1152 of the Act.

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

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

(a) Rescind the discharges of the employees discharged on May 3, 1993, and offer them, except for Luis Lemus Orosco who has died, immediate and full reinstatement to their former positions of employment, or if their positions no longer exists, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment.

(b) Make whole the employees who were discharged on May 3, 1993, and the estate of Luis Lemus Orosco, for all wages or other economic losses they suffered as a result of their unlawful discharges. For the period May 3, 1993 through September 30, 1994, the backpay liability shall consist of the amounts set forth

in the backpay specification issued in this matter, as modified herein. For the period commencing October 1, 1994, loss of pay is to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharges. The award shall also 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 or its agents for examination and copying, all records relevant to a determination of the backpay and/or make whole amounts due those employees under the terms of the remedial order as determined by the Regional Director.

(d) Upon request of the Regional Director, sign the attached Notice to Employees embodying the remedies ordered. After its translations by a Board agent into all appropriate languages, as determined by the Regional Director, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order.

(e) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of a final remedial order, to all agricultural employees employed by Respondent at any time from May 3, 1993, until the date of the mailing of the notice.

(f) Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondent's property for 60 days, the period(s) and place(s) of posting to be determined by

the Regional Director, and exercise due care to replace any Notice which may be altered, defaced, covered or removed.

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

(h) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of a final order in this manner.

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

Dated: February 9, 1995

A handwritten signature in cursive script, reading "Douglas Gallop", is written over a solid horizontal line.

Douglas Gallop,
Administrative Law Judge,

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, Boyd Branson Flowers, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging 12 employees for protesting their wages and hours.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

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 otherwise retaliate against employees because they protest about their wages, hours or other terms and conditions of employment.

WE WILL offer the employees who were discharged on May 3, 1993 immediate reinstatement to their former positions of employment, and make them whole for any losses they suffered as the result of our unlawful acts.

DATED:

BOYD BRANSON FLOWERS, INC.

By: _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, EL Centro, CA 92243. The telephone number is (619) 232-0441.

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

DO NOT REMOVE OR MUTILATE