El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| THE ELMORE COMPANY, | ) | Case No. 00-CE-306-EC |
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| Respondent, | ) | 28 ALRB No. 3 |
| | ) | |
| and | ) | (April 11, 2002) |
| | ) | |
| ISAURO LOPEZ CORTEZ, | ) | |
| | ) | |
| Charging Party. | ) | |
| | ) | |

DECISION AND ORDER

On November 14, 2001, Administrative Law Judge (ALJ) Douglas Gallop issued the attached recommended Decision in this matter. In his decision, the ALJ found that The Elmore Company (Respondent, Elmore, or Employer) had violated section 1153 (a) of the Agricultural Labor Relations Act (ALRA or Act) by discharging employee, Isauro Lopez Cortez (Lopez), because of his protected concerted activities. Thereafter, Respondent timely filed exceptions to the Decision along with a supporting brief, and General Counsel filed an answering brief.

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

**BACKGROUND**

This case involves the discharge of a single employee, Isauro Lopez Cortez (Lopez). Respondent stipulated that Lopez engaged in protected concerted activity on the day prior to the discharge, August 8, 2000[1], but contends he was lawfully discharged on August 9 because of his insubordinate conduct towards Irrigator Supervisor, Samuel Solorio Quevedo (Solorio).

Lopez had been employed by the Respondent as an irrigator for approximately 19 years.[2] During his long period of employment with Respondent, Lopez had never been disciplined before, nor had he ever been given a verbal or written warning for using foul language at work. Assistant supervisor, Vidal Sornia Lopez (Sornia), who is also Lopez's cousin, credibly testified that Lopez used vulgar terms regularly at work, and that Solorio had been aware of it for years.[3] Saul Chirino (Chirino), a fellow irrigator, testified that many of the crew members, not just Lopez, had used vulgar language among themselves and that Solorio himself occasionally engaged in obscene banter with the workers.

In early August 2000, the work schedule for the irrigators was from 6:00 a.m. to 4:30 p.m. with a brief paid break in the morning, followed by a half-hour unpaid lunch break that began around noon. Solorio testified that he had observed the workers

[1] All dates refer to the year 2000 unless otherwise indicated.
[2] There was a four-year break in Lopez's employment with Respondent between 1987 and 1991. His initial period of employment was from 1977 to 1987, and his most recent period of employment was from 1991 to 2000. Lopez testified that Solorio had contacted him in 1991 and had asked him to come back to work at Elmore.
[3] Lopez's denial that he used foul language was properly discredited by the ALJ.

on several occasions taking extra time for their morning break and taking over an hour for lunch.

On August 7 some issues arose involving the crew's drinking water supply. Sornia testified that around 11:00 a.m. on that day, he found out that Lopez was out of drinking water. Sornia asked whether he should get more water, but Lopez told him it wasn't necessary.[4] Ultimately, no additional water was brought at the time, and soon the crew took its lunch break, and moved to another field to work.

Chirino, his co-worker, testified that later that day, a container of water accidentally spilled, and that they began to run short of water in the afternoon. Another of Lopez's co-workers, Rudolfo Garcia (Garcia), called Sornia and asked him to bring water. Sornia refused to bring more water, telling Garcia that he was too far away and too busy to do so. Sornia gave the crew permission to leave early as their water supply had run out.

The next morning, August 8, Solorio called a meeting with the irrigators before the workday began. Several topics were discussed at the meeting. First, Solorio told the workers he was concerned with the level of verbal abuse they were directing at one another. He did not single out any individual employees or refer to any specific

[4] Lopez, on the other hand, testified that he asked Sornia, in Solorio's presence, for more water and handed him empty water containers to fill. The ALJ credited Sornia's version of this incident and found that Sornia, but not Solorio, knew of the lack of drinking water, but was told at the time by Lopez that he did not need to bring additional water.

incidents, but read from the company handbook which states that abusive language among workers is against company policy.[5]

Second, Solorio addressed the issue of the water supply that had come up the day before. Solorio asked the crew members to sign a handwritten document he had prepared on a pad of paper indicating that from then on, they were each responsible for making sure they had enough drinking water for the day, and designating where they would each be getting their water.[6] All of the crew members except Sornia and the other assistant supervisor refused to sign the paper. When the employees would not sign the paper, Solorio crumpled it up and threw it away.

Finally, Solorio announced to the irrigators that the workday schedule was going to be changed. The unpaid lunch break was to be extended to one hour, from 11:30 to 12:30 p.m., and the workday would end at 4:00 p.m. instead of 4:30 p.m. The paid hours would therefore be shortened from ten to nine hours a day. When Solorio made his announcement about the new schedule, several of the irrigators voiced their displeasure. Lopez was the most vocal member of the group in his objections, telling Solorio that he couldn't make such changes, that they were "illegal," and that Respondent had to pay for the lunch hour.

Solorio, in response to the workers' protests about the proposed schedule change, told them that those who didn't like it could leave, go home, or go talk to the

[5] There is conflicting testimony as to whether this topic was also discussed at an earlier meeting on August 3. Despite the different recollections of the date when the discussion of abusive language took place, it is undisputed that Supervisor Solorio did not single out any individual employees when the topic was raised, but that he warned the whole crew that he was concerned about the level of verbal abuse among co-workers and that he read from sections of the company's employee handbook concerning employee conduct.

[6] The workers were given the option of providing their own drinking water, picking up water in Brawley at a shop where the Respondent had an account, or picking up water at Respondent's main office.

Labor Commissioner. Irrigator Chirino testified that he and some of the other men thought they were being discharged when Solorio told them to go home. Solorio then stated he would delay making the changes, and that the workers who questioned the change could speak to Shelvie Crittendon (Crittendon), the managing partner of Elmore, who would return in two days. At this point, Lopez said, referring to Crittendon, "that son of a bitch is worse than you."[7] This comment provoked laughter among the men. Solorio then abruptly ended the meeting, and the irrigators went back to work. Solorio testified that although he did not discipline or warn Lopez about the comment at the time, he ended the meeting because he felt what was going on was not "proper."

Business Manager Robert Trimm testified that Solorio called him after the August 8 meeting and had told him Lopez had questioned the new meal time policy. Trimm copied an excerpt from an employment law handbook referring to Federal law governing payment for meals and break times and gave it to Solorio.[8]

The next morning, Solorio approached Lopez as he was getting water and ice in the shop area of the ranch at approximately 6:00 a.m. before the workday began, and gave him the photocopied excerpt. Solorio told Lopez it was the law about breaks and meal times.

Solorio told Lopez that he should take the document to someone who could translate it for him into Spanish. Lopez asked Solorio why he had given him something in English when he knew he couldn't read it, and asked twice that Solorio provide the

[7] The term Lopez used was "hijo de chingada," which could also be translated as "mother fucker." Sornia testified that he understood Lopez to say "if you [Solorio] don't understand, that asshole won't either."
[8] Trimm testified that Elmore does not have a designated Human Resources Manager, but that the duties that would normally be handled by Human Resources personnel were "shared" among several people, including him.

information for him in Spanish. Solorio told Lopez that he was in the United States, not Mexico, and that the laws were written in English. Lopez then told Solorio "vete a la verga."[9] Solorio immediately discharged Lopez. Lopez's co-worker, Manuel Gallaga (Gallaga) testified that he overheard the exchange between Lopez and Solorio, and that there were a few other workers in the area, but that they were about 10 meters away, and did not appear to hear the conversation.

Later in the day on August 9, Lopez and several crew members went to the company office to speak with Solorio. The other men asked whether they too had been fired, and Solorio replied that only Lopez had been terminated.

**THE ALJ'S DECISION**

The credited facts in the ALJ's recommended decision were largely based on the testimony of supervisor, Saul Solorio, as the ALJ found Solorio's testimony to be, for the most part, more logical and complete and more closely corroborated by other witnesses than that of Lopez. However, the ALJ noted that he believed that Solorio left out or "soft-pedaled" facts that he believed would damage Respondent's case. Specifically as to the events during the August 8 meeting, the ALJ credited Chirino and Sornia over Solorio as he felt Solorio gave a very "low-key" and diluted version of what he said to the employees when they refused to sign the paper he had prepared and protested the schedule change, and denied being in any way perturbed by their conduct.

[9] The hearing interpreter stated that this term may be translated as "fuck you," "screw yourself," "fuck yourself," or "go to hell."

The ALJ found Lopez, on the other hand, to be an almost completely unreliable witness. Lopez's testimony that he never used profanity on the job, that he did not make the obscene remark about Crittendon during the August 8 meeting, and that he did not tell Solorio "vete a la verga" the next day, was uncorroborated and was contradicted by several other witnesses.

The primary issue addressed in the ALJ's decision was whether Lopez lost the Act's protection when he used profanity towards his supervisor on August 9. The ALJ applied the four-factor balancing test set forth in *Atlantic Steel Co*. (1979) 245 NLRB 814 (*Atlantic Steel*), and adopted by the Board in *David Freedman & Co. Inc.* (1989) 15 ALRB No. 9 (*David Freedman*). In applying this test, the ALJ found it significant that although the August 9 exchange took place on the employer's premises (a factor that generally weighs against finding protected conduct under the *Atlantic Steel* balancing test), the supervisor initiated the conversation, chose the location for the exchange, and needled an already angry Lopez by giving him a document he knew he could not read. The ALJ also found that the crew believed Solorio had discharged them for protesting the announced change in work hours the day before and that this was arguably an unfair labor practice, and could be considered as provocation for Lopez's outburst.[10] The ALJ concluded that under the circumstances, Lopez's obscene remark was an "intemperate, but not unconscionable flash of anger during the course of an otherwise protected discussion."

[10] The ALJ noted that the General Counsel did not allege Solorio's announcement of the reduced hours as an unfair labor practice.

The ALJ reasoned that an analysis under *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083 was not necessary in this case, as the employee's questioned conduct was part of the *res gestae* of the protected concerted activity. Respondent indicated that Lopez was fired solely for his obscene remark. The ALJ determined that a *Wright Line* analysis was not appropriate because the employee's conduct on August 9 remained protected, and a violation was found on that basis. Therefore, the ALJ concluded that there was "no need to pass on whether, in fact, Solorio would have discharged Lopez absent his protected conduct."[11]

**RESPONDENT'S EXCEPTIONS**

The Respondent contends that the ALJ was incorrect as a matter of law in finding that Respondent's discharging Lopez for his use of profanity on August 9 violated section 1153(a). [12] Respondent argues that although Lopez's conduct at the August 8 meeting was protected concerted activity, his use of profanity on August 9 was not protected, and therefore his discharge did not violate the Act. Respondent further argues that the ALJ erred in not applying a *Wright Line* analysis in the instant case, as Lopez's outburst on August 9 was not part of the *res gestae* of the protected concerted activity he engaged in on August 8 when he questioned the meal policy and new schedule. Had a

[11] ALJ Decision at p.14, fn. 16.

[12] The Respondent also contends that the ALJ incorrectly stated that the parties stipulated at the hearing that employee's net back pay as of August 6, 2001 was $23,763.54. The Respondent states that the parties stipulated at the hearing that employee's gross back pay as of August 6, 2001 was $23,763.54. We find that the Respondent is correct in its contention that the parties stipulated that the specified amount reflects gross back pay rather than net back pay.

*Wright Line* analysis been applied, Respondent argues that a preponderance of the evidence showed that Lopez was guilty of conduct warranting a discharge.

Respondent further argues that the ALJ was incorrect in characterizing Solorio's statements during the group meeting on August 8 regarding the new work schedule as "arguably a violation of the Act." The Respondent contends that Solorio did not "threaten to reduce the employees' hours" as the ALJ found, instead he merely announced that he was changing the hours. The Respondent argues that although some employees may have thought that they had been discharged for refusing to sign the paper designating where they would get water, none thought they were being discharged for questioning the change in hours. The Respondent points out that the parties did not litigate this issue as an unfair labor practice, and that the ALJ's statement reflects a pre-disposition against Respondent to find a violation of the Act.

Respondent also disagrees with the result the ALJ reached when he applied the *Atlantic Steel* balancing test to the facts of the case. Lopez's outburst was severe and seriously undermined Solorio's authority. Lopez's use of profanity was therefore unprotected and as such, his termination was lawful.

**ANALYSIS AND DISCUSSION**

Both the General Counsel and Respondent agree that Lopez engaged in protected concerted activity during the meeting on August 8 when he spoke up and questioned the new schedule. The primary issues to examine are, therefore, whether the exchange between Lopez and Solorio on the morning of August 9 was a continuation of

the previous day's discussion and therefore concerted, and if so, whether Lopez's profane remark to his supervisor caused him to lose the Act's protection.

Respondent does not specifically except to the ALJ's finding that "although Lopez was the only employee speaking with Solorio on August 9, this represented a continuation of the previous day's discussion, and was, at law, concerted." However, Respondent argues that "although the subject matter of the regulation that Solorio gave Lopez was related to the meal period, the outburst by Lopez was because the regulation was not presented to him in Spanish, thus the outburst was not part of the *res gestae* of the previous day's protected concerted activity. " We uphold the ALJ's finding that the conversation on August 9 was a continuation of the previous day's concerted activity for the reasons discussed below.

The National Labor Relations Board (NLRB) has found individual conduct like Lopez's to be concerted when it is a "logical outgrowth of group action and/or a continuation of group action." (*Burle Industries*, *Inc.* (1990) 300 NLRB 498.) In addition, an employee's action in answering an employer's response to a concerted employee complaint, "even if done individually, may be construed as an espousal of the other employees' cause, and thus concerted activity." ( *Transport America, Inc*. (1996) 320 NLRB 88.)

Solorio, in presenting Lopez with the excerpt on meal times, was directly responding to the group's protest of the schedule change at the meeting the previous day and in particular, to Lopez's comment that the change was "illegal." Lopez, in asking for

the information in Spanish, was clearly reacting to the Employer's response to the previous day's concerted complaint.

Respondent suggests that since Lopez's request did not concern the substantive content of the document, his action was not a continuation of the previous day's protest about unpaid meal periods. The record shows that other employees besides Lopez who were concerned about the work schedule issue could not read English. Lopez's insistence that he be given the information in a form he and the other employees could read and his subsequent outburst when Solorio refused to do so, is the kind of "logical outgrowth of group action" contemplated by *Burle Industries, supra,* 300 NLRB 498. The ALJ's conclusion that the exchange on August 9 was a continuation of the previous day's protected concerted activity was therefore proper.

We find that the Respondent's argument that the ALJ erred in not applying a *Wright Line* analysis is without merit. *Wright Line*[13] properly applies in dual motive situations when an employer's reason for taking the allegedly unlawful action is disputed. In circumstances where the conduct for which the employer claims to have discharged the employee remains protected activity, the *Wright Line* analysis is not appropriate. (See *Onyx Environmental Services, LLC* (2001) 336 NLRB 83; *Saia Motor Freight Line, Inc.* (2001) 333 NLRB 87.) Where a respondent admits, or the facts show, that "in doing what it did, it was directly responding to the assertion of rights protected by the Act, no shifting of burdens to determine the cause for the discharge is necessary." (*American*

[13] Under *Wright Line,* the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to terminate the employee. Once this is established, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct.

*Protection Industries* (1991) 17 ALRB No. 21.) The proper test for determining whether an employee's use of profanity caused him to lose the Act's protection is the balancing test set forth in *Atlantic Steel* as discussed below. Only if the employee's conduct is found to be unprotected under an *Atlantic Steel* analysis, should *Wright Line* then be applied. (*David Freedman*, *supra*, 15 ALRB No. 9.) [14]

Respondent contends that Lopez's use of profanity towards Supervisor Solorio was unprotected, and therefore his termination was lawful. An employee's use of profanity while engaged in concerted activity does not necessarily strip him of the Act's protection, since the employee's right to engage in such activity requires some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect. (*National Labor Relations Bd. v. Thor Power Tool Co.* (7th Cir. 1965) 351 F. 2d 584.) As further explained in *Consumers Power Co*. (1986) 282 NLRB 131:

> Where an employee is discharged for conduct that is part of the *res gestae* of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for service.

In determining whether an employee's conduct causes him to lose the protection of the Act, *Atlantic Steel* requires the Board to carefully balance the following factors:

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[14] The National Labor Relations Board (NLRB) has been fairly consistent on this point, but there are occasional cases where the analysis has been muddled. An example is the case cited by Respondent in its exceptions, *Transport America, Inc.* (1996) 320 NLRB 88. In that case, the ALJ, after concluding that the conduct for which the employee was discharged was protected, proceeded for unstated reasons to engage in a *Wright Line* analysis. This case was an anomaly, as the NLRB on many occasions since reiterated that a *Wright Line* dual motive analysis is unnecessary and inappropriate in such cases ( See *Onyx Environmental Services, LLC*, *supra*, 336 NLRB 83, and *Saia Motor Freight Line, Inc., supra,* 333 NLRB 87).

1. the place of the discussion,
2. the subject matter of the discussion,
3. the nature of the outburst, and
4. whether the outburst was in any way provoked by an unfair labor practice of the employer.

1. The Place of the Discussion:

The exchange between Lopez and Solorio took place on the Employer's property in an open area where other employees were present, and as Respondent correctly points out, obscene language directed at a supervisor "on the plant floor" can undermine the supervisor's authority and is generally not protected. (*David Freedman, supra,* 15 ALRB No. 9; *Firch Baking Company* (1977) 232 NLRB 772.) On the other hand, the conversation was mostly private, was overheard by just one employee, and took place before the workday began. Case law indicates that an outburst occurring before or after work or during a break where the workday is not interrupted, weighs in favor of finding that the employee's conduct remains protected. (*D'Arrigo Brothers* (1987) 13 ALRB No.1**;** *Bruce Church* (1990) 16 ALRB No. 3.) In addition, Supervisor Solorio initiated the exchange on August 9 and as such, it was the employer and not Lopez who chose the location for the discussion. Therefore, this case can be distinguished from those in which the employee initiates a heated exchange by confronting a manager at the workplace in an angry and belligerent manner. (See *Piper Realty Company* (1994) 313 NLRB 233 discussed below, and *David Freedman*, *supra* 15 ALRB No. 9.)

2. The Subject Matter of the Discussion:

As to the second factor, as previously discussed, the ALJ properly concluded that subject matter of the August 9 discussion was a "logical outgrowth of

group action," was a continuation of the previous day's group discussion, and therefore weighs in favor of finding that Lopez's behavior remained protected.

3. The Nature of the Outburst:

Regarding the third factor, the nature of the employee's outburst, the ALJ concluded that the employee's conduct remained protected as he did not shout, did not make any threats, and his use of vulgar language was limited to one remark. We uphold the ALJ's finding as to the third *Atlantic Steel* factor, however, in doing so, we do not rely solely on the fact that Lopez's profane comment was unaccompanied by threats or violence.

In *Atlantic Steel*, *supra*, the NLRB disavowed the notion that threats or physical violence must accompany insubordinate behavior in order for the conduct to lose the Act's protection. The D.C. Circuit recently remanded a matter similar to the instant case to the NLRB on the grounds that the NLRB's perfunctory application of the third *Atlantic Steel* factor was "arbitrary and capricious" and departed from past precedent. (*Felix Industries, Inc. v. National Labor Relations Bd.* (D.C. Cir 2001) 251 F. 3d 1051.) In that case, the employee called his supervisor on the telephone and called him a "fucking kid" several times during the course of the conversation. The NLRB, in weighing the third *Atlantic Steel* factor, stated merely that the nature of employee's outburst was "brief and unaccompanied by any threat or physical gestures or contact." In remanding the case, the Court of Appeals noted that the fact that "no threat or physical violence accompanied this insubordinate vitriol cannot, under established law, prevent it from weighing in favor of losing the protection of the Act." (*Felix Industries*, *supra*, at

p.1055.) Although the conduct in *Felix Industries, Inc*. was arguably more egregious than Lopez's outburst, because the D.C. Circuit has remanded the case, we do not rely on the NLRB's decision in finding that the employee's conduct remained protected under the *Atlantic Steel* test.

We therefore evaluate the nature of Lopez's comment considering all surrounding circumstances. We find that the extent of Lopez's conduct was not as severe as that of the employee in *Piper Realty Company*, *supra*, 313 NLRB 233, where the NLRB found that the employee lost the Act's protection when he went into his manager's office and in the course of repeatedly refusing a work assignment, angrily told him that other employees thought the manager was a "fucking asshole," and that no one else had the "balls" to tell him that. The NLRB found it significant that the employee used profanity multiple times in the superior's office, continued to shout and swear at the manager during the course of the exchange, refused to leave when asked, and was overheard by several other employees who were shocked by the employee's tirade. Nor was Lopez's conduct as outrageous as that of the employee in *David Freedman*, *supra*, 15 ALRB No. 9, where the employee lost the Act's protection when he repeatedly swore and launched a string of expletives at his supervisor in front of the entire crew despite a lack of provocation by management.

Unlike the employees in *Piper Realty* and *David Freedman*, Lopez's use of obscenity was limited to a single profane remark, that he spoke in a normal tone of voice, and was overheard by only one employee.[15]

The nature of the outburst in light of the workplace environment is also a relevant factor to weigh in discussing the third part of the balancing test. It is well-established that a "certain amount of salty language and defiance must be tolerated" during confrontations with management regarding workplace disputes. (*Severance Tool Industries* (1991) 301 NLRB 1166.) As the Board pointed out in *D'Arrigo Bros.* (1987) 13 ALRB No.1, "workers are not expected to exhibit exemplary or even courteous behavior when they express job-related complaints to supervisors." (*Id.* at p. 25.) In evaluating whether the employee's use of profanity causes him to lose the Act's protection, the Board will generally "extend a mantle of protection over such statements unless they are so egregious and so opprobrious that they render the employee unfit for further service." (*Marion Steel Company, Inc*. (1986) 278 NLRB 897.)

In an agricultural setting, rough talk may be more commonly accepted than in some other work environments. Indeed, credited testimony indicates that at this

[15] We respectfully disagree with our dissenting colleague that the ALJ was unduly swayed by the *Severance Tool Industries* and *Burle Industries* cases. In *Severance Tool Industries, Inc.* (1991) 301 NLRB 1166, the employee's conduct, which was found to be protected, was at least as severe at Lopez's. The employee uttered the obscenity "son of a bitch" while leaving the supervisor's office and while the ALJ noted that this could have been interpreted as a general curse rather than as a direct insult, the ALJ also found that the employee yelled at the supervisor for an extended time in his office, flung the office door open with force on his way out, threatened to discredit the supervisor's reputation to the other employees, and acted in a defiant, disrespectful and aggressive manner toward the supervisor. In *Burle Industries, Inc*. (1990) 300 NLRB 498, the employee was openly defiant towards his supervisor and called him a "fucking asshole" twice yet did not lose the protection of the Act. As our colleague points out, the employee was indeed responding to an emergency situation that was far more serious and emotionally charged than the situation Lopez faced, however the employee's outburst in *Burle Industries* was also proportionally more sustained and egregious than Lopez's single remark. We do agree with our colleague, however, that the ALJ's citation to *Sound One Corporation* (1995) 317 NLRB 854 in the course of his *Atlantic Steel* analysis is improper as this case was decided using a *Wright Line* dual motive analysis.

workplace, profane language had been regularly used for many years by both workers and supervisors. Like the work place in *Transport America, Inc.* (1996) 320 NLRB 88, the use of vulgarity was prevalent at Elmore. While the management at Elmore seemed to be attempting to put an end to the use of profanity and "carrying on" among workers, it is worth noting that Solorio gave only a general warning to the men, and that even though Lopez was at one point the subject of a complaint from one of his co-workers, he was not singled out or individually warned about his use of profanity during the meeting when Solorio addressed the subject of verbal abuse among workers.

We also agree with the ALJ's finding that it is not clear how offensive Lopez's remark was intended to be. The hearing interpreter translated the phrase "vete a la verga" as "go fuck yourself," "go screw yourself," or "go to hell," strongly or mildly speaking. The record as a whole supports a finding that this idiomatic expression can be translated several ways, and that there is no single English equivalent for the phrase.[16]

In addition, Lopez's remark should be viewed in light of Solorio's gratuitous comment during the August 9 exchange, in which he told Lopez that "we are in the United States, not Mexico, and the laws here are written in English," when Lopez asked for a Spanish version of the excerpt on payment for break and meal times. The record indicates that Solorio's behavior toward the workers in the past was not beyond

[16] Our dissenting colleague indicates that it was only at the General Counsel's suggestion that the translation "go to hell" was somewhat reluctantly included in the record. However, we find that the issue of the different translations of the term first arose when the ALJ noted, in an attempt to clarify the record, that the hearing interpreter translated the General Counsel's two separate questions to Lopez "Did you tell [Solorio] to go to hell?" and "Did you tell him to 'go fuck yourself?'" in exactly the same manner. (Hearing transcript Vol. 1, p. 42-43.) A discussion regarding the proper translation of the phrase then occurred on the record, and the interpreter verified that there were several ways of translating the term including "fuck yourself," "screw yourself," or "go to hell," and the record reflects that all three versions were official translations.

reproach. Lopez's co-worker, Chirino, testified that Supervisor Solorio had verbally abused and made crude, insulting comments to workers as recently as a month before Lopez's discharge. Although there was credited testimony that Solorio generally treated the men fairly, it is also clear that Solorio's style of communicating was not always polite and mannerly. Lopez's single use of profanity came as a direct response to Solorio's United States/Mexico remark, and it is reasonable to conclude that Lopez's reaction showed he was provoked and insulted by Solorio's comment, especially coming on the heels of Solorio's treatment of the crew the previous day, and responded in kind.

Solorio, in reopening the discussion about payment for breaks and meal times, gave Lopez the excerpt to justify his own position and put an end to Lopez's opposition to the change. As the excerpt was in English, Lopez and other employees were precluded from understanding it or responding to it at the time. It is reasonable that under these circumstances, Lopez became irritated by Solorio's refusal to provide a Spanish version of the document, and that his expletive was an expression of frustration.

Lopez's single profane comment, in light of the surrounding circumstances, therefore, was not so extreme or outrageous as to "render him unfit for continued employment" at the company. (*Consumers Power Co*. (1986) 282 NLRB 130; *Leasco Inc*. (1988) 289 NLRB 549.) The record as a whole supports the ALJ's characterization of Lopez's reply to Solorio's comment as an "intemperate but not unconscionable flash of anger" in the course of an otherwise protected exchange.

4. Whether the Comment was in Any Way Provoked by an Unfair Labor Practice of the Employer:

As to the final *Atlantic Steel* factor, whether the employee's conduct was provoked by an unfair labor practice of the employer, the ALJ reasoned that Solorio's threat to reduce the employees' paid hours, and his subsequently telling those who didn't like the new schedule to go home or leave, was conduct that arguably violated the Act, and helped to provoke Lopez's outburst the next day. As mentioned above, the Respondent has excepted to the ALJ's characterization of this event as an unfair labor practice because it was neither alleged as such by the General Counsel, nor was it litigated.

We find no merit in Respondent's argument that it was improper to consider, for purposes of background information, conduct that was not alleged in the complaint as an unfair labor practice. It is well-settled that the Board may consider and rely upon conduct that would have been unlawful had it been alleged as evidence of employer animus. (*London Memorial Hospital* (1978) 238 NLRB 704, 709*; Medicine Bow Coal Co*. (1975) 217 NLRB 931.) The ALJ did not make a finding that an unfair labor practice occurred during the August 8 meeting, and did not err in using this conduct as background information in applying the *Atlantic Steel* test. Lopez's discharge can only be explained in light of the entire course of events, including the exchange at the previous day's meeting.

The ALJ characterized the threat of discharge that the employees perceived when they protested the new schedule during the August 8 meeting as conduct that

arguably violated the Act. It is without question that the crew engaged in protected concerted activity when they refused to sign the paper about the water and voiced their displeasure about the change in hours. Solorio's subsequent statement that anyone who did not like the new rules could leave or go home was arguably an adverse action in response to these protests, and his remarks carried with them an inherent threat of future discipline to those that might further question the new rules. It is well settled that if an employer's actions or statements create a "climate of ambiguity" which reasonably causes an employee to believe he had been discharged, or at the very least, that his employment status had become questionable because of his concerted activity, the "burden of the results of that ambiguity must fall on the employer." (*Brunswick Hospital Center* (1982) 265 NLRB 803.) In determining whether the employee reasonably believed his employment status was in question, the operative events are to be viewed through the employee's eyes, not as the employer would have viewed them. (*Brunswick Hospital, supra,* 265 NLRB 803.)

The Respondent's assertion that no employees thought they were being discharged for protesting the new work schedule is not supported by the record. Irrigator Chirino credibly testified that the workers thought they were being laid off when Solorio indicated that those who didn't like the changes would have to go home. As both Chirino and Sornia testified, Solorio backed off this statement when the men asked him for discharge papers, but it is apparent from the record that there was a lingering atmosphere of uncertainty at the workplace.

As Sornia credibly testified, Lopez and the other crew members did indeed go back to work after Solorio abruptly ended the meeting on August 8, and the record does not indicate that anyone stayed home the next day, however, when Lopez's crew members learned that he had been fired, their immediate reaction was to wonder whether they too had been terminated. It was only after some of the members of the crew accompanied Lopez to the office later in the day on August 9 and asked Solorio whether they had been fired as well that Solorio adequately clarified the situation. The fact that the other crew members reacted in this way supports the conclusion that on the morning of August 9, they experienced the situation as unresolved, and perceived a continuing threat to their work status stemming from the protests and questions that Lopez gave voice to the day before. When viewed through the eyes of the employees, it is reasonable to conclude that the result of the August 8 meeting was a continuing atmosphere of confusion that was not clarified until late in the day on August 9.

Although Respondent's behavior in this case falls short of the extreme employer provocation found in *Bruce Church* (1990) 16 ALRB No. 3, where the foreman came up behind an employee who was making remarks about pay rates, told him to shut up and threatened to "punch him out," the record supports the ALJ's finding that Solorio's conduct the day before had a chilling effect on future concerted activity, and would have been provocative to Lopez. We therefore conclude that an application of the fourth *Atlantic Steel* factor weighs in favor of finding Lopez's comment within the protection of the Act.

A thorough balancing of the *Atlantic Steel* factors weighs in favor of concluding that Lopez's conduct on August 9 was protected. There was a confluence of factors in Respondent's workplace in early August 2000, which created an atmosphere where it was reasonable that employees would question management and protest the changes Respondent appeared to suddenly be making. With frustration levels already running high, Solorio presented Lopez with a document he knew Lopez and the other employees couldn't read in order to justify his own position. We therefore affirm the ALJ's conclusion that Lopez's defiant attitude and use of profanity did not exceed the bounds of the Act's protection.

Even assuming, arguendo, that Lopez's swearing at Solorio on August 9 caused him to lose the Act's protection under the *Atlantic Steel* test, an application of the *Wright Line* dual motive analysis also results in the conclusion that Lopez's discharge was unlawful.

Under *Wright Line*, the General Counsel has the burden of establishing a prima facie case by showing that: (1) the employee engaged in protected concerted activity; (2) the employer had knowledge of the protected concerted activity; and (3) there was a causal connection between the protected concerted activity and the adverse action taken by the employer. It is not necessary that the concerted activity be the primary or only cause of the adverse action. Once the General Counsel sets forth it prima facie case, the burden shifts to the employer to show that the adverse action would have been taken even in the absence of the protected concerted activity.

Here, there is no dispute that Lopez's opposition to the new drinking water and work schedule policies was protected concerted activity. In addition, there is no dispute that the employer knew of that activity. A causal connection between Lopez's termination and his concerted activity has also been established, as the Respondent's adverse action immediately followed Lopez's participation in the dispute over the new policies. In addition, Solorio's frustration with the employee's reaction to the proposed policy changes was apparent in the abrupt manner in which he ended the discussion on August 8, a discussion which resumed between Solorio and Lopez on the morning of August 9. The remaining question is whether the employer presented sufficient evidence to meet its burden of showing that Lopez would have been discharged for his outburst even if he had not engaged in other activity that was protected. Indeed, this is the issue on which the Respondent focuses in its exceptions to the ALJ's decision.

The Respondent points out that Elmore had a written policy against verbal abuse and that serious violations could result in immediate termination. In addition, Respondent notes that Solorio had specifically reminded the crew about the section of the employee handbook pertaining to verbal abuse at the employee meeting prior to Lopez's termination. However, a review of the employee handbook indicates that Elmore's general policy is one of progressive discipline. Credited testimony indicates that swearing was common in this workplace. While it is true that the workers had just been reminded not to verbally abuse each other, Lopez was not singled out for a warning during this discussion, and the Respondent did not provide any evidence that the use of profanity had resulted in formal discipline in the past. (See *Sound One Corporation*

(1995) 317 NLRB 125 [the discharge of an employee in a workplace where profanity was commonly used, who, in an incident unrelated to the employee's protected concerted activity, said "fuck you" to his supervisor, and also called him an "asshole" and a "son of a bitch," was found to violate the Act even though he was overheard by other employees].)

Also weighing against the Respondent is that Lopez had worked for Elmore for 19 years without discipline, though his co-workers and supervisor knew he used vulgar language. Lopez was clearly the most vocal employee during the August 9 meeting. These factors, coupled with the close proximity in time between Lopez's protected activity and his termination**,** make the termination suspect. Lopez's obscene comment was limited, brief and unaccompanied by any threats of violence or refusal to perform work as directed. It does not appear to rise to the level of serious misconduct that is likely to have resulted in termination rather than the preferred path of progressive discipline reflected in Respondent's employee handbook. The record supports the conclusion that absent Lopez's questioning of the drinking water and schedule changes on behalf of the group, his outburst may have resulted in some lesser form of discipline, such as a formal warning or brief suspension. However, the Respondent has not met its burden of proving that Lopez would have been discharged even in the absence of his protected activity. Therefore, had we found that Lopez's outburst on August 9 took him outside of the Act's protection, under a *Wright Line* analysis, we nevertheless would find that his termination violated section 1153 (a).

## ORDER

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, The Elmore Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee for participating in concerted protected activity.

(b) In any like or related matter interfering with, restraining, or coercing any agricultural employee(s) in the exercise of rights guaranteed them by Labor Code section 1152.

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

(a) Offer to Isauro Lopez Cortez immediate reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges of employment.

(b) Reimburse Isauro Lopez Cortez for all wage losses and other economic losses he has suffered as a result of Respondent's discrimination against him, such losses to be computed in accordance with Board precedent. Such amounts shall include interest thereon, computed in accordance with our Decision and Order in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

(c) Preserve and, upon request, make available to this Board or

its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the amounts of backpay and interest due under the terms of the Order. Upon request of the Regional Director, the payroll records shall be provided in electronic form if they are customarily maintained in that form.

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all employees employed by Respondent during the period August 9, 2000 to August 8, 2001.

(f) Post copies of the attached Notice for 60 days at conspicuous locations on its premises, the places 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. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of copies of the attached Notice.

(g) Provide a copy of the attached Notice in all appropriate languages to each agricultural employee hired by Respondent during the 12-month period following the date this order becomes final.

(h) Upon request of the Regional Director, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time Regional Director requests peak season dates, Respondent will 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.

(i) Arrange for a representative of Respondent or Board agents to read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time, at times and places to be determined by the Regional Director. Following any reading, Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees 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 to compensate them for time lost at this reading and during the question and answer period.

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(j) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing as to what further steps it has taken in compliance with the order.

Dated: April 11, 2002

GENEVIEVE A. SHIROMA, Chairwoman

GLORIA A. BARRIOS, Member

MEMBER MASON, Concurring and Dissenting:

I concur with the majority's conclusion that The Elmore Company (Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (Act) when it discharged Isauro Lopez Cortez (Lopez). However, as I dissent from the conclusion that Lopez' outburst on the morning of August 9, 2000 was protected, I would base the finding of a violation solely on the application of the dual motive analysis enunciated in *Wright Line, A Division of Wright Line, Inc.* (1980) 251 NLRB 1083 (*Wright Line*).

While the application of dual motive analysis presents a close question, on balance, and keeping in mind that Respondent has the burden of proof on this issue, I agree with my colleagues that the evidence fails to demonstrate that Lopez would have been discharged even in the absence of his previous protected activity. The most significant factors, in my view, are Lopez' 19-year work record without discipline and Respondent's failure to adhere to its written policy of progressive discipline. While it is

true that the employees had been told to cease verbally abusing each other, there is no evidence that profanity or profane insults had previously resulted in any formal discipline. Certainly, the outburst was insubordinate and severe, but in the absence of any evidence that Lopez' conduct included any threat or physical altercation or refusal to perform work as directed, I am convinced that in the absence of his protected activity, Lopez would not have been discharged.

My disagreement with the majority and the ALJ in the present case is in the application of the factors set forth in *Atlantic Steel Company* (1979) 245 NLRB 815, particularly the third and fourth factors. My specific reasons for finding the August 9 outburst unprotected are set forth below. [1]

The *Atlantic Steel* Factors

1) Place of the Discussion

The offensive outburst by Lopez took place at the worksite, though apparently it was overheard by only one employee. The fact that the discussion was initiated by Solorio is not of great import since the credited testimony does not indicate that Solorio approached Lopez in a angry or threatening manner. Moreover, the workplace was the appropriate place for a continuation of the previous day's discussion over meal breaks. But it is fair to contrast this case to those where the employee initiates a heated exchange by confronting a manager in an angry or belligerent manner.

[1] As a preliminary matter, I agree with my colleagues that the Administrative Law Judge (ALJ) did not err in refusing to apply a *Wright Line* dual motive analysis. Where, as here, it is claimed that the conduct for which the employee is purportedly discharged is itself protected, that issue should be the initial focus, to be analyzed under the *Atlantic Steel* factors. Only if the conduct is found to be unprotected, as I find the conduct at issue here, is a *Wright Line* dual motive analysis appropriate, for only then is there a possibility of a dual motive in the discharge.

I conclude that the facts pertinent to this factor provide slight support to the conclusion that Lopez' outburst was protected.

2) Subject Matter of the Discussion

I agree with the ALJ's and the majority's conclusion that the discussion on August 9 was a continuation of the subject matter of the concerted activity that took place the previous day. Thus, the outburst was intertwined with otherwise protected activity.

3) Nature of the Outburst

The outburst on August 9 was brief, unrepeated, and not accompanied by any refusal to perform work as directed. However, on its face, the outburst was extremely severe. The phrase used by Lopez was "vete a la verga," which initially was translated by the interpreter as "screw yourself" or "fuck yourself." Only after the General Counsel suggested that the phrase also could mean "go to hell" did the interpreter include this as an alternative translation.[2] As "verga" is a vulgar term for penis, it is fair to conclude that the initial translation more accurately reflects the intended meaning of the epithet, particularly in light of the fact that at the time of the utterance Lopez was upset about being given information in English rather than Spanish.[3]

[2] The General Counsel first asked Lopez in English if he told Solorio "go to hell" or "go fuck yourself." The interpreter used the same Spanish phrase in translating both of these phrases, but the record does not indicate what Spanish phrase the interpreter used. It was after this exchange that the General Counsel asked Lopez in Spanish if he used the phrase "vete a la verga." The Employer's counsel then asked for a translation of that phrase (indicating that this was not the phrase used earlier by the interpreter), to which the interpreter responded "screw yourself or fuck yourself." (Transcript, Vol. I, pp. 43-44.)

[3] After the General Counsel has established that an employee was discharged for conduct occurring in the course of protected activity, the employer has the burden of establishing a good faith belief that the employee engaged in misconduct that exceeded the bounds of protection. The burden then shifts back to the General Counsel to show that the misconduct did not occur or it was not sufficiently severe to lose the Act's protection. (See, e.g., *Bituma Corporation* (1994) 314 NLRB 36; *NLRB* v. *Burnup & Sims* (1964) 379 U.S. 21.) Here, Respondent met its burden by establishing that Lopez uttered an epithet that Solorio reasonably took to mean "screw yourself" or "fuck yourself," even if it also could have meant "go to hell."

It is difficult to imagine a more insubordinate comment than telling a supervisor to "screw yourself" or "fuck yourself."[4] Surely, if profane comments alone can render conduct unprotected then the one on August 9 would qualify. In *Atlantic Steel*, the NLRB disavowed the notion that threats or physical violence must accompany insubordinate vitriol in order for the conduct to lose protection. It was the NLRB's failure to adhere to this precedent, without explanation, that caused the court in *Felix Industries, Inc. v. NLRB* (D.C. Cir. 2001) 251 F.3d 1051 to disapprove of the NLRB's analysis of the nature of the outburst factor.[5] However, though severe on its face, the outburst from Lopez cannot be fully evaluated without considering all of the surrounding circumstances.

The record does show that there was a history of the use of foul language among the employees. Normally, this might provide a contextual factor that would lessen the severity of Lopez' outbursts. However, Lopez himself was the subject of a complaint from a co-worker concerning verbal abuse. Moreover, on either August 3 or August 8, Solorio told the irrigators that he was concerned about the level of verbal abuse they were directing at each other, reminded them that such behavior violated the conduct standards in the employee handbook, and that such conduct could result in discharge.[6] Therefore, even if there was a pre-existing culture of foul and insulting language at the

[4] On the previous day, Lopez referred to Respondent's Managing Partner as a "son of a bitch," though Solorio testified that the August 9 epithet was the sole basis for the discharge.
[5] For this reason, the NLRB's decision in *Felix Industries, Inc.,* may not be cited for its conclusion that the conduct in that case, which arguably was more egregious than the outburst by Lopez in the present case, was protected. As of this date, the NLRB has yet to issue a new decision in accordance with the court's instructions.
[6] The handbook actually provides for progressive discipline that normally includes one or two warnings prior to discharge. However, it does contain a caveat that serious misconduct could result in discharge without previous warnings.

workplace, it appears that management was making an effort to put a lid on it. In addition, there is no evidence that vitriol directed at supervisors, as opposed to that exchanged among employees, was tolerated by Respondent. In my view, this background, while not determinative, militates against finding the outburst protected.

Putting aside the issue of provocation by employer unfair labor practices (ULPs), which will be discussed *infra*, other forms of provocation may be considered in evaluating the nature of the outburst. For example, if the outburst takes place in the context of a heated discussion in which the supervisor takes equal part, profane outbursts may not be viewed as insubordinate as those not so provoked. Here, while Lopez claimed that Solorio was angry when he approached Lopez on August 9, this is contradicted by the testimony of Solorio and Luis Manuel Gallarga, who was the only witness to the exchange. Gallarga testified that Solorio did not become upset until after Lopez' outburst. While it is true that this exchange took place the day after the initial dispute over the change in hours, Lopez had more than sufficient time to "cool off." Nor do I put much stock in the fact that Solorio gave the excerpt concerning the law on meal breaks in English. Solorio suggested that Lopez have someone translate it for him. When Lopez demanded it in Spanish, Solorio explained that it was an excerpt from a law book that was in English, and later stated that they were in the United States, not Mexico, so the laws are written in English. This latter statement could have been provocative depending on the manner in which it was delivered; however, the record does not indicate that it was delivered in such a manner.

In sum, I do not find any circumstance reflected in the record that would significantly lessen the facial severity or otherwise provide any excuse for Lopez' outburst on August 9. I believe the ALJ was swayed unduly by his comparison of the outbursts to those found protected in other cases. A close look at the cases he cited, and on which the majority presumably relies, reveals that those cases are either inapposite or involved circumstances not found here that were critical to the outcome.

The ALJ notes that an employee's reference to the company president as a "son of a bitch," which was heard by other employees, was found protected in *Severance Tool Industries, Inc.* (1991) 301 NLRB 1166. However, in that case the employee uttered the phrase while exiting the president's office and the ALJ emphasized that it was not clear if the utterance was a general curse or one directed at the president. In *Felix Industries, Inc.* (2000) 331 NLRB No. 12, the employee's outbursts, which were at least as severe as Lopez' outbursts, were found protected. However, for the reasons explained above, it is not proper to rely on the results of this case since it has been remanded to the NLRB to correct a significant analytical error identified by the reviewing court. In *Burle Industries, Inc.* (1990) 300 NLRB 498, the employee's conduct was found protected even though he called a supervisor a "fucking asshole." However, in that case the circumstances were unique, in that the employee was upset because the misuse of a chemical had resulted in fumes that were making employees ill and the supervisor, in his view, was not taking the matter seriously, resulting in continued exposure to the employees. The ALJ acknowledged that the comments were severe, but emphasized that it was an emergency situation in which the employee, while overreacting, was justifiably

frustrated by what he viewed as a grave situation. Indeed, the ALJ contrasted the situation to the one in *Atlantic Steel*, where an employee, after receiving from a supervisor an answer to a question concerning overtime he did not like, provided an obscene reply. The ALJ's citation to *Sound One Corporation* (1995) 317 NLRB 854, where a discharge was found unlawful even though the employee called his supervisor an "asshole," is inapposite. The outburst in that case was not related to protected activity, so the issue was not whether the outburst caused otherwise protected activity to be unprotected. Rather, the case was decided using a *Wright Line* dual motive analysis, i.e., the issue was whether the employee would have been discharged even in the absence of other activity that was protected.

4) Provocation by Employer ULPs

The majority concludes that Lopez were provoked by unlitigated ULPs committed by Respondent. Specifically, the majority suggests that the statements of Solorio on August 8, in response to the employees' refusal to sign the paper concerning drinking water and their protest to the proposed change in hours, created ambiguity as to the continued employment status of the employees. It is true that where an employer makes a statement that the employees reasonably perceive as a discharge, even if due to a misunderstanding or unintended ambiguity, the employer has the burden of clarifying the situation. (See, e.g., *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4.) However, the record in the present case does not support the majority's conclusion that the employees reasonably believed that they were discharged on August 8.

On August 8, Solorio announced the reduction in hours and expansion of the lunch break. The ALJ credited Vidal Sornia, and to a lesser extent, Saul Chirino, on the issue of what Solorio told the workers in response to their refusal to sign the paper concerning drinking water. Sornia testified that Solorio told the workers that if they did not want to work under the new conditions of employment they could go home until they had a chance to talk to Managing Partner Shelvie Crittendon.[7] The ALJ found that this was the statement made by Solorio. Words such as these, which indicate that the employees have the option of continuing to work, do not constitute a discharge. (See, e.g., *Tailored Trend, Inc.* (1960) 126 NLRB 337; *Eaborn Trucking Service* (1965) 156 NLRB 1370.) There is nothing legally wrong with telling employees that if they do not like the terms and conditions of employment that they can leave (quit). It is when statements are made that can be construed as directing the employees to leave or go home that ambiguity as to employment status may arise. (*Boyd Branson Flowers, Inc.*, *supra*; *Dole Farming, Inc.* (1996) 22 ALRB No. 8.)

Chirino, on the other hand, insisted that Solorio first stated that those who refused to sign "would have to go home." However, Chirino also stated unequivocally that Solorio quickly backed off from this statement, telling them to go back to work and that the changes would be postponed until Crittendon returned. Indeed, it is undisputed that all of the workers who were scheduled to work, including Lopez, went back to work on August 8 and showed up for work the next day. Thus, even assuming arguendo that

[7] Sornia also testified that at least one worker asked Solorio for a discharge paper on August 8, but Solorio replied that he could not give him one.

Solorio's statements on August 8 could be construed reasonably as creating some ambiguity as to the crew's employment status, it is clear that the employees themselves did not take it that way because they returned to work. Even if they did reasonably view their employment status as jeopardized, Chirino's testimony establishes that Respondent quickly satisfied its legal duty to clarify the situation. Therefore, there could not have been a violation.

It also is true that on August 9, several employees questioned whether they were fired, but this confusion was created by the employees arriving at work and finding out that Lopez had been fired. Apparently, until it was explained to them that only Lopez was fired, they were concerned that the entire crew had been fired, presumably for their refusal to sign the paper concerning drinking water the previous day. Again, the situation was quickly clarified and these employees returned to work without suffering any harm. Most importantly, whatever confusion was created by learning of Lopez' discharge on August 9 was not due to any legally cognizable breach of duty by Respondent. While the employees may have been concerned that their resistance to the changes announced on August 8 would result in some future retaliation, the record fails to indicate that Respondent undertook any such retaliation, whether in the form of discharge or threat of discharge, prior to Lopez' discharge. Therefore, their concern is irrelevant to the analysis of the fourth *Atlantic Steel* factor.

In sum, the record belies any notion that Respondent committed an unlitigated ULP by leading the employees to reasonably believe that they had been discharged. Therefore, there was no such provocation that could be viewed as

precipitating Lopez' insolent outburst on August 9. The majority relies on a selective citation to Chirino's testimony as to what was said by Solorio, without addressing the ALJ's crediting of Sornia's contrary testimony. Moreover, the majority ignores the import of critical evidence that undermines its conclusion.

Conclusion

In accordance with the discussion above, I would conclude that Lopez' outburst on August 9, which was in response to little or no provocation and was not uttered in extenuating circumstances, was so opprobrious that it lost the protection of the Act. I, therefore, would rely solely on the application of the *Wright Line* dual motive analysis in finding that Respondent violated the Act by discharging Lopez.

DATED: April 11, 2002

HERBERT O. MASON, Member

# CASE SUMMARY

The Elmore Company
(Isauro Lopez Cortez)

28 ALRB No. 3
Case No. 00-CE-306-EC

## Background

This case involves the discharge of a single employee, irrigator Isauro Lopez Cortez (Lopez). At a meeting with the irrigation crew, on August 8, 2000, supervisor Samuel Solorio Quevedo (Solorio) announced a work schedule change and a change in the company drinking water policy. Lopez spoke up during the meeting and questioned the schedule change, voicing his and the crew's displeasure with having their paid hours reduced. Respondent stipulated that Lopez engaged in protected concerted activity during the meeting. The following morning before the workday began, supervisor Solorio approached Lopez and gave him a photocopied excerpt on federal law governing payment for meal and break time. The excerpt was in English. Lopez, who could not read English, asked for a copy of the information in Spanish. Solorio refused to do so, and Lopez uttered an expletive toward Solorio. Solorio immediately discharged Lopez for his use of obscene language.

## ALJ Decision

The ALJ found that Lopez was discharged unlawfully the day after he engaged in the group protest over schedule and work policy changes. In his analysis, the ALJ reasoned that the exchange between Lopez and Solorio on the morning after the meeting was a continuation of the previous day's protected concerted activity. The primary issue addressed in the ALJ's decision was therefore, whether Lopez lost the protection of the Act when he used profanity toward Solorio.

The ALJ concluded Lopez's conduct was protected, and not insubordinate behavior as argued by Respondent. In reaching this conclusion, the ALJ applied the four-part balancing test outlined in *Atlantic Steel Co.* (1979) 245 NLRB 814. The ALJ found that although Lopez used one obscene term towards his supervisor while voicing his concerns, his conduct did not rise to the level of egregious behavior that would cause him to lose the Act's protection. As Lopez's conduct remained protected, his discharge violated Section 1153 (a) of the Act.

The ALJ also reasoned that a dual motive analysis under *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083 was not necessary in this case as he found that the employee's conduct remained protected, and a violation was found on that basis.

## Board Decision

The Board adopted the rulings, findings and conclusions of the ALJ. The Board rejected the Respondent's argument that the exchange between Lopez and Solorio on August 9, 2000 was not a continuation of the previous day's protected concerted activity. The Board reasoned that Solorio, in presenting Lopez with the excerpt on payment for meal times, was directly responding to the group's protest during the meeting on the previous day, and Lopez, in asking for the information in Spanish, was clearly reacting to the Employer's response. The conversation on August 9 was therefore a logical outgrowth of group action, and a continuation of the protected concerted activity from the day before.

The Board also rejected the Respondent's argument that the ALJ had erred in not applying a *Wright Line* dual motive analysis in the case. The Board found that in circumstances where the conduct for which the employer claims to have discharged the employer remains protected, a *Wright Line* analysis is not appropriate. The proper test for determining whether the employee's conduct remained protected in the *Atlantic Steel* balancing test. Only if the employee's conduct is found to be unprotected under an *Atlantic Steel* analysis should *Wright Line* then be applied.

In finding that the *Atlantic Steel* balancing test weighed in favor of finding that Lopez's outburst remained protected, the Board noted that it was not relying solely on the fact that his profane comment was unaccompanied by threats or violence. The Board found that the record as a whole supported the conclusion that the use of vulgar language was prevalent in this work place, Lopez was insulted and irritated by Solorio's refusal to provide the information in Spanish, and in light of all surrounding circumstances, Lopez's single expletive was an expression of frustration during the course of an otherwise protected discussion. In addition, the Board found no merit in the Respondent's argument that it was improper for the ALJ to consider, for purposes of background information, conduct that was not alleged in the complaint as an unfair labor practice. The Board agreed that the record supported the ALJ's finding that Solorio, in responding to the crew's protest of the schedule change on August 8 by telling those who didn't like it could go home or leave, arguably violated the Act. The Board concluded that this unlitigated unfair labor practice had a chilling effect on future concerted activity and was provocative to Lopez on the following day.

The Board further held that even assuming, arguendo, that Lopez's swearing at Solorio caused him to lose the Act's protection under the Atlantic Steel analysis, a subsequent application of the *Wright Line* dual motive analysis would have also resulted in the conclusion that the discharge was unlawful. The Respondent did not meet its burden of proving that Lopez would have been discharged even in the absence of his protected concerted activity, therefore his termination violated section 1153(a).

## Concurrence and Dissent

Member Mason concurred with the majority's conclusion that Respondent violated section 1153(a) of the Act when it discharged Lopez. However, because he does not agree with the majority's conclusion that Lopez' outburst on the morning of August 9, 2000 was protected, he would base the finding of a violation solely on the application of the *Wright Line* dual motive analysis. In Member Mason's view, there are no circumstances reflected in the record that would significantly lessen the facial severity or otherwise provide any excuse for Lopez' outburst on August 9. Moreover, he would find that the record fails to support the conclusion that Lopez' outburst was provoked by unlitigated unfair labor practices. In his view, any confusion as to the crew's employment status that was created by learning of Lopez' discharge on August 9 was not due to any legally cognizable breach of duty by Respondent and, therefore, could not have constituted a violation. In addition, he believes that the cases cited by the ALJ are either distinguishable or inapposite.

* * *

# NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (ALRA) by discharging Isauro Lopez Cortez, who had acted to help and protect fellow workers by complaining to management about working conditions that affected the entire work crew.

The ALRB has told us to post and publish this Notice. We will do what the ALRB has ordered us to do.

We also want to inform you that the ALRA is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
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 you wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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

WE WILL NOT discharge or refuse to hire employees who participate in concerted protected activity.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the ALRA.

WE WILL offer to Isauro Lopez Cortez reinstatement to his former position of employment, and make him whole for all losses in pay or other economic losses he suffered as a result of our unlawful conduct.

DATED:_____ THE ELMORE COMPANY

By:_____
(Representative) (Title)

If you have questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 319 Waterman Avenue, El Centro, California. The telephone number is (760) 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**

| | | |
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| **In the Matter of:** | ) | Case No. 00-CE-306-EC |
| | ) | |
| **THE ELMORE COMPANY,** | ) | |
| | ) | |
| **Respondent,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **ISAURO LOPEZ CORTEZ,** | ) | |
| | ) | |
| **Charging Party.** | ) | |

**Appearances:**

William S. Marrs
Western Growers Law Group
Valencia, California
For Respondent

Eugene E. Cardenas
El Centro ALRB Regional Office
For General Counsel

## DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this consolidated unfair labor practice case and backpay specification at Holtville and El Centro, California on September 11, 12 and 13, 2001.

The Charging Party, Isaurdo Lopez Cortez, filed a charge on August 9, 2000, alleging that The Elmore Company (hereinafter Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (hereinafter Act) by discharging him in retaliation for his protected concerted activities. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint and backpay specification alleging said violation, and claiming the net backpay owed by Respondent. Respondent filed answers denying the commission of unfair labor practices, and setting forth its backpay methodology and calculations.

The Charging Party testified at the hearing, but has not intervened in this proceeding. At the hearing, General Counsel and Respondent stipulated that if a violation is found, Lopez's net backpay, as of August 6, 2001, is $23,763.54. The hearing proceeded to conclusion on the unfair labor practice allegation, and the parties submitted post-hearing briefs, which have been duly considered.

Upon the entire record in this case, including the testimony of the witnesses, the documentary evidence received at the hearing, the parties' briefs and other arguments made by counsel, I make the following findings of fact and conclusions of law.

## FINDINGS OF FACT

### Jurisdiction

The jurisdictional facts are not in dispute. Respondent produces a variety of crops, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. At all times material to this case, Samuel Solorio Quevedo (Solorio) was a supervisor of Respondent within the meaning of section 1140.4(j). While employed by Respondent, Isuardo Lopez Cortez (Lopez) was an agricultural employee under section 1140.4(b).

### Events Leading to Lopez's Concerted Activities

Lopez worked for Respondent as an irrigator for Respondent for about 19 years, with one significant break in employment. Solorio was his supervisor for many years, and before that, a co-worker. One of Solorio's two assistants, stipulated as statutory supervisors, is Vidal Sornia Lopez (Sornia), who is also Lopez's cousin. A series of events led to a meeting called by Solorio on August 8, 2000. From Solorio's viewpoint, as at least partially corroborated by Sornia, the meeting became necessary due to increasingly poor work habits by the irrigators. From Lopez's point of view, as at least partially corroborated by former co-employee, Saul Chirino, the meeting was a continuation of harsh, unsympathetic treatment by Solorio and Sornia, who had little regard for the employees' difficult work in the hot fields.

While the truth of the matter probably lies somewhere between the two accounts, and there may well have been some misunderstandings thrown into the mix, it is not necessary to decide, point for point, which version is correct, for the purposes of this

case. Therefore, since Solorio called the meeting, his reasons will be set forth, without concluding that all of the allegations are true.

Among the irrigators' less pleasant job duties, particularly during the summer, are moving the sprinkler pipes and performing shoveling work, the latter being necessary to prepare the fields for irrigation. In early August 2000,[1] the irrigators' workday, when performing such work, was 6:00 a.m. to 4:30 p.m. The unpaid lunch break was one-half hour, and there was a brief, paid break in the morning. Solorio testified that, with increasing regularity, he observed irrigators overstaying their paid break, and taking a full hour for their lunch breaks.[2]

On a hot August 5, Solorio told Sornia to release the irrigators, who were moving pipes, at noon. When so advised, the irrigators protested to Sornia, inasmuch as they would lose half a day's pay. Solorio, upon being advised of this, relented, telling Sornia to tell those who wanted to finish the day that they could do so. Only one employee on Lopez's crew elected to go home, while the others were moved to another field to complete the shift, unsupervised.

That afternoon or the next morning, Solorio observed the field the crew had worked after lunch. In his opinion, not enough work had been done, and he suspected they had left early. On August 7, he asked Lopez when they had left, and Lopez replied it was 4:15 p.m. Lopez testified that Solorio also complained to him that insufficient work had been performed, and that he denied this.

[1] All dates hereinafter refer to 2000, unless otherwise indicated.
[2] Lopez, contrary to the other witnesses who testified on the subject, including Chirino, claimed that the lunch break was one hour and thus, the irrigators were not overstaying that break.

Solorio and Sornia were with the crew on the morning of August 7. Solorio testified he observed the crew taking excessive breaks that morning. Sornia testified he noticed Lopez was out of water, but when he asked Lopez if he should obtain more for him, Lopez stated he would drink the Gatorade others had brought. Lopez testified he told Sornia, in the presence of Solorio, to bring him more water, and handed him the empty containers. Solorio denied being aware of any lack of drinking water that morning. Sornia appeared to be a more credible witness than Lopez, and it is found that Sornia, but not Solorio, was aware of Lopez's problem, and was told, at the time, that no action needed to be taken.

After Solorio and Sornia left the area, Rudolfo Garcia, one of Lopez's co-workers, called Sornia, telling him the crew had run out of water. Garcia asked Sornia to bring them more water. Sornia refused, due to the distance involved. The worker then told Sornia that the crew wished to be released for the day, if no one was going to bring water. After consulting with Solorio, Sornia granted the request, and the workers were paid for the rest of the day. Solorio was highly suspicious of the claim that the workers had run out of water, since there had been no shortage brought to his attention that morning.[3]

According to Sornia, and not denied by Solorio, both he and Solorio were well aware that Lopez regularly used foul language when speaking to his co-workers. Nevertheless, Solorio was becoming increasingly concerned when he observed irrigators,

[3]Chirino testified that the crew ran out of water because a container overturned, spilling its contents.

not just Lopez, verbally abusing each other. In addition, one of Lopez's co-workers had complained to Solorio concerning Lopez's baiting.[4]

**Alleged Protected Activity and the Discharge of Lopez**

When the irrigators arrived for work on August 8, Solorio spoke with them. There are several conflicts between the testimony of Solorio and Lopez concerning what took place at this meeting and thereafter. There is also a conflict in testimony as to whether some of the statements were made on August 8, or at an earlier meeting, on August 3. For the most part, Solorio's version of the events is credited. Solorio's testimony was generally more complete and logical, and he was more closely corroborated by the other witnesses. On the other hand, the undersigned believes that at times, Solorio left out, or soft-pedaled facts he believed would damage Respondent's case. Examples of the weaknesses in Lopez's testimony are footnoted herein. Lopez was only partly corroborated by Chirino, who himself was sometimes less than an inspiring witness, at least from the standpoint of clarity and conviction. Accordingly, unless otherwise noted, the following facts are based on Solorio's testimony.

Solorio told the workers he was concerned about the availability of water, and wanted them to sign a paper designating where they would obtain it.[5] All of the workers, except Sornia and the other assistant, refused to comply, giving no reason. Solorio then told the workers that if they were not going to sign, they would have to pick up their

[4] Lopez denied ever using abusive language toward his co-workers. Not only was he contradicted on this point by Sornia and Jorge Luis Montenegro, the employee who complained to Solorio, but his corroborating witness, Chirino, acknowledged that Lopez, as well as others, regularly directed vulgar language toward co-workers.

[5] Irrigators had the option of providing their own water, or to pick up water, at Respondent's expense, from the main ranch, or from a vendor in Brawley. Some of the workers lived in or closer to Brawley than the main ranch and, at times, their work assignments were also closer to Brawley.

water at the ranch. If the workers were assigned to a different location, this could mean they would have to travel an additional distance to obtain the water.[6]

Solorio then told the irrigators he was going to shorten their workday by extending the unpaid lunch hour by 30 minutes, and moving the quitting time back to 4:00 p.m.[7] Solorio told the workers they were overstaying their break and lunch periods, although the witnesses, other than Lopez, disagreed as to whether this took place on August 3 or 8.[8] Several of the employees protested, and Solorio acknowledged that Lopez was the most vocal. Lopez told Solorio, inter-alia, that Respondent made the rules for its own benefit, his directive was illegal, and he had no authority to make the change. Witnesses other than Solorio credibly testified he told the employees that if they did not want to work under these conditions, to leave, or go home. An employee asked if this meant they were being discharged, and if so, whether Solorio would prepare a discharge notice. Solorio said he could not do that.[9]

Solorio stated he would postpone the changes, and the employees could discuss the matter with Shelvie Crittendon, Respondent's Managing Partner, when he returned in

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[6] Solorio testified to this both as an adverse witness and as Respondent's witness. Said testimony was stricken, at General Counsel's request on the second, but not the first occasion.

[7] Inasmuch as Lopez had claimed the lunch break was already one hour, he was unable to explain how this directive adversely affected him. Instead, he claimed Solorio was only changing the hours, rather than reducing them. Another example of Lopez's unreliability as a witness was his contention, contrary to the other witnesses, that the paper Solorio wanted them to sign concerned the change in hours, and not where they would obtain water.

[8] Lopez, again contrary to the other witnesses, testified that the complaint was made months before his discharge.

[9] Solorio gave a very low-key version of what he purportedly said, while Lopez testified he simply told the employees that if they did not like the changes, they could get their paychecks. More in line with Lopez's testimony, Chirino and Sornia testified that Solorio told the workers to leave, or go home. On this point, Chirino and Sornia are credited over Solorio, who appeared to be intentionally diluting his statement. Solorio omitted from his testimony the inquiry as to whether the employees were being discharged. Sornia corroborated Lopez and Chirino on this point. Solorio denied being perturbed at all by the employees' conduct at the meeting, which was disputed by Lopez, Chirino and, to a degree, by Respondent's witnesses, Sornia and former employee, Luis Manuel Gallaga. The undersigned believes that Solorio, in fact, was somewhat perturbed by the workers' defiance, coming on the heels of what he considered poor work.

a few days. At that point, Lopez said, "That son of a bitch is worse than you," which provoked laughter from the group.[10] Solorio terminated the meeting and told the employees to go to work. According to Solorio, he did this because he disapproved of Lopez's reference to Crittendon, an assertion open to question, given the lack of any comment made or disciplinary action taken by him at the time.

Either at that meeting, or five days earlier, Solorio told the irrigators he was concerned about the level of abusive language they were directing at each other. He read from Respondent's employee handbook, concerning such conduct, which, inter-alia, states that employees may be discharged for verbally abusing each other. Solorio did not refer to any specific incident or employee at that time.[11]

On August 9, before the irrigators began their shift, Solorio approached Lopez and handed him a copy of a Federal wage and hour regulation. Solorio told Lopez that it was the law concerning meal and break periods.[12] Since the regulation was in English, Solorio told Lopez to have someone read it to him in Spanish. Lopez asked why he had given him something to read which was in English. Solorio replied it had been copied from a book. Lopez twice demanded that Solorio provide him with a Spanish-language version. Solorio told Lopez that they were in the United States, not Mexico, and the laws are written in English. Lopez then said, in Spanish, "Vete a la verga," which may be

[10] Lopez and Chirino denied that Lopez made such a statement at the meeting. The undersigned does not believe that Solorio, as corroborated (although not word for word) by other witnesses, made this up. It is also noted that after flatly denying he made such a statement, Lopez testified he "doesn't think" he said it. Chirino, after denying that Lopez made the statement, acknowledged that the meeting was noisy, and at times, the men were laughing.
[11] It is not particularly disturbing that the witnesses differed as to when this took place. More disturbing was Lopez's denial that Solorio ever referred to such conduct, contrary not only to Respondent's witnesses, but to Chirino's testimony as well.
[12] According to Lopez, Solorio said the document showed Respondent's rules, which obviously was in error.

translated either as, "Go fuck yourself," or "Go to hell." Solorio immediately discharged Lopez, and testified this was the sole reason for that decision.[13]

## 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.

[13] The above primarily reflects Solorio's testimony, although the only other person who appears to have witnessed the incident, Gallaga, agreed with Lopez, that he repeatedly asked for a Spanish-language version of the regulation. Lopez denied making any obscene statements to Solorio, which is not credited, based on the other flaws in his testimony, corroboration of Solorio on this point by Gallaga, and credible testimony presented, that after his discharge, Lopez failed to deny having engaged in the conduct when Solorio told other employees that Lopez had been discharged for insubordination. Regarding that incident, Lopez, contrary to the other witnesses who testified thereon, denied that he spoke with Solorio at all. It is also noted that again, after initially denying he directed profanity toward Solorio, Lopez later testified he "doesn't think" he did this.

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].

The protected nature of the activity does not depend on the reasonableness of the demands. Activity which would otherwise be protected will only lose that status if it is unlawful, violent, in breach of contract or indefensibly disloyal. See *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4, at page 2, footnote 3. A certain degree of rough talk and other discourteous conduct is predictable in the context of workplace disputes, and unless aggravated, such conduct does not eliminate the Act's protection. *Bruce Church, Inc.* (1990) 16 ALRB No. 3; *D'Arrigo Brothers* (1987) 13 ALRB No. 1, at ALJD, page 25; *Agri-Sun Nursery (1987)* 13 ALRB No. 10; *V. B. Zaninovich & Sons* (1986) 12 ALRB No. 5; cf. *David Freedman & Co.* (1989) 15 ALRB No. 9; *Royal Packing Co. v. ALRB* (1980) 101 Cal.App.3d 826.

Respondent agrees that, at least absent the remark concerning Crittendon, Lopez engaged in protected concerted activity during the meeting on August 8. Although Lopez was the only employee speaking with Solorio on August 9, this represented a continuation of the previous group discussion, and was, at law, also concerted. *Transport America, Inc.* (1996) 320 NLRB 882 [153 LRRM 1048]; *Burle Industries, Inc.* (1990) 300 NLRB 498 [136 LRRM 1224], enfd. (CA 3, 1991) 932 F.2d 958 [137 LRRM 2440].

Thus, the remaining issue to be decided is whether Lopez lost the Act's protection by virtue of his use of profanity. In *David Freedman & Co.*, supra, the Board adopted the NLRB's four-point balancing test between the employees' right to jointly present grievances and management's need to preserve order and discipline. The factors to be

considered are: (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. The Board further noted that the courts only remove protected status from otherwise lawful protected activity where the misconduct is so violent or of such a serious character as to render the employee unfit for further service.

In the *David Freedman* case, the alleged discriminatee, who was participating in a work stoppage, shouted "fuck you" to his supervisor three times, when the supervisor told the employees to return to work. When the supervisor asked the employee if he had made the statements, he said, "Go to hell" and "Fuck you." The supervisor later returned and again asked the employees to return to work, at which point, the employee repeated his earlier profanity. When the supervisor asked the employee to repeat what he had said, the employee told him to go to hell. The Board found that the employee's repeated use of profane language, which was largely unprovoked, made at work and uttered in the presence of other employees was sufficiently egregious to deny protection under the Act.

In *Turco Desert Company, Inc.* (2001) 27 ALRB No. 4, the Board held that the discriminatee did not lose the Act's protection when, during the course of a concerted protest, he told a supervisor that whenever he came around, all he did was cause them a lot of "fucking problems," or to "fuck" with the employees. The employee made the statement in the presence of his entire crew.

To the undersigned, Lopez conduct herein was more aggravated than what took place in *Turco Desert Company, Inc.,* supra, in that there were two obscene references,

and both were directed toward supervisors, rather than used as descriptive expletives. See *Piper Realty Company* (1994) 313 NLRB 1289 [146 LRRM 1120]. On the other hand, Lopez's conduct was not as severe as the multiple, sustained and largely unprovoked actions taken by the employee in *David Freedman & Co.*, supra. Accordingly, some of the more recent NLRB cases will be discussed.

In *Piper Realty Company*, supra, the employee lost protected status when he went into a manager's office and shouted 1) he didn't treat the men like men, but like animals; 2) no one else had the balls to tell him this; 3) the manager was "fucking" with his job; and 4) a lot of the employees thought the manager was a "fucking asshole." The employee refused to leave when asked, and continued his abusive tirade. Other employees heard the outburst. In a related case, it was found that a union activist was lawfully discharged when, in an incident unrelated to his union activities, he loudly and repeatedly refused to follow a directive. When asked if he was refusing to follow orders, the employee responded, "You can go fuck yourself, and I'm not going to do anything you say." The employee had previously received a warning for using obscene language. *Alcoholics Anonymous World Services, Inc.* (1988) 288 NLRB 582 [128 LRRM 1188].

Other cases, however, indicate that Lopez's conduct remained protected. In *Severance Tool Industries, Inc.* (1991) 301 NLRB 1166 [137 LRRM 1045], enfd. (CA 6, 1992) 953 F.2d 1384 [139 LRRM 2400], when the company's president attempted to justify his wage position by use of a company handbook, the employee began yelling at him, and referred to him as a "son of a bitch," which other employees heard.

The ensuing discharge was found unlawful. In *Felix Industries, Inc.* (2000) 331 NLRB No. 12 [164 LRRM 1137], remanded (CA DC, 2001) 251 F.3d 1051, the employee, during a protected discussion over the telephone, called the supervisor a "fucking kid" three times, the last after an implied admonishment from the supervisor. The NLRB found the employee's conduct still protected, also noting an earlier implied threat of discharge based on protected activity.[14] In *Burle Industries, Inc.*, (1990) 300 NLRB 498 [136 LRRM 1224], enfd. (CA 3, 1991) 932 F.2d 958 [137 LRRM 2440], the employee, during an otherwise protected face-to-face discussion, twice called the supervisor a "fucking asshole." Again the NLRB held that the employee did not lose protected status. Finally, in *Sound One Corporation* (1995) 317 NLRB 854 [149 LRRM 1191], enfd. (CA 2, 1996) 104 F.3d 356, an employee, in an incident unrelated to his union activities, called his supervisor an "asshole." The NLRB held that this did not justify his discharge, noting, inter-alia, that profanity was common in the workplace.

With respect to Lopez's reference to Crittendon, it appears this was taken as a humorous wisecrack by the employees present, rather than as an assault on his authority. It does not appear that Solorio took the remark very seriously, notwithstanding his testimony to the contrary, since he did not even admonish Lopez. Obviously, the statement made the following day, directly to and concerning Solorio, was more serious, although, due to the dual meaning given the phrase by the interpreter, it is impossible to tell how offensive Lopez intended to be. While the exchange occurred at Respondent's

[14] Although the District of Columbia Court of Appeals denied enforcement in this case, the three other circuit courts have enforced NLRB orders where the employees' conduct was similar to, or more serious than what took place herein. In addition, Lopez, unlike the employee in *Felix Industries, Inc.*, did not repeat his epithet, and was not individually admonished prior to being discharged.

premises, it was Solorio who initiated the conversation, however innocent his intentions might have been. Lopez was not shouting at Solorio, did not refuse any order and made no threats.

There was also some provocation here. Solorio had threatened to reduce the employees' hours for some of their work the day before,[15] and whether Solorio intended it or not, they believed he had discharged them for protesting. Although General Counsel did not allege this as an unfair labor practice, said conduct arguably violated the Act. With Lopez likely to already be incensed, Solorio presented him with a document he could not read, to justify his position. Solorio chose the location for this exchange, and it appears that Lopez did not intend that anyone else hear his statements. Under all these circumstances, it is concluded that Lopez's retort constituted an intemperate, but not unconscionable flash of anger during the course of an otherwise protected discussion, which did not seriously threaten supervisory authority, or render him unfit for further employment. Therefore, even assuming Solorio did discharge Lopez solely for his use of profanity on August 9, this was part of his protected concerted activity, and the discharge, in response thereto, violated section 1153(a).[16]

[15] Respondent later implemented this change.

[16] Where, as is the case here, the questioned conduct is part of the *res gestae* of protected concerted activity, and is excused, a violation is found without using a *Wright Line* analysis. *Turco Desert Company, Inc.*, supra; *Felix Industries, Inc.*, supra. Accordingly, there is no need to pass on whether, in fact, Solorio would have discharged Lopez for swearing at him, absent his protected conduct. The Board and NLRB have held that even if the employee's conduct becomes unprotected due to opprobrious conduct in the course of a protest, a *Wright Line* analysis should then be applied and, on that basis, a violation may be found. *David Freedman & Co*., supra; *Caterpillar, Inc.* (1996) 322 NLRB 674, vacated as moot, with directive that the case still stands as precedent, *Caterpillar, Inc.* (2000) 332 NLRB No. 101. Where profane language is used in incidents unrelated to the union or protected activity, a *Wright Line* analysis applies. *Sound One Corporation,* supra; *Alcoholics Anonymous World Services, Inc.*, supra.

## THE REMEDY

Having found that Respondent violated section 1153(a) of the Act, I shall recommend that it cease and desist there from and take affirmative action designed to effectuate the purposes 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 section 1160.3, Respondent, The Elmore Company, 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 because the employee has engaged in concerted activities 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 discharge of Isaurdo Lopez Cortez, and offer him immediate reinstatement to his former position of employment or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges of employment.

(b) Make whole Isaurdo Lopez Cortez for all wages or other economic losses he suffered as a result of his unlawful discharge, 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 discharge. 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 August 9, 2000, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

(d) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, 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 nonhourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(g) 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 during the period August 9, 2000 to August 8, 2001, at their last known addresses.

(h) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.

(i) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

Dated: November 14, 2001

_____
Douglas Gallop
Administrative Law Judge