

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MUSHROOM FARMS, a Division of Spawn Mate, Inc.)	
)	Case No. 07-CE-34-SAL
Employer,)	35 ALRB No. 8
)	(December 16, 2009)
and)	
)	
EFRAIN RODRIGUEZ,)	
Charging Party.)	

DECISION AND ORDER

On September 3, 2009, Administrative Law Judge (ALJ) Mark Soble issued the attached decision in the above-referenced case, in which he found that Mushroom Farms, a Division of Spawn Mate, Inc. (Respondent or Employer) did not commit a violation of section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act)¹ by discharging Efrain Rodriguez (Rodriguez). The ALJ recommended that the complaint against Employer be dismissed in its entirety. The General Counsel timely filed exceptions to the ALJ’s decision.

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ's decision in light of the exceptions filed by the General

¹ The Agricultural Labor Relations Act (ALRA) is found at California Labor Code section 1140 et seq.

Counsel and affirms the ALJ's findings of fact ² and conclusions of law, and adopts his recommended decision except as modified below.

Background

Pursuant to a provision in the collective bargaining agreement between Respondent and the United Farm Workers of America (UFW), overtime for Respondent's mushroom pickers began after nine hours of work. Boxes of mushrooms picked during overtime were to be paid at one and one-half times the piece rate paid for boxes picked during regular time. In order to keep track of boxes picked in regular time and those picked in overtime, a foreman would mark each individual picker's daily punch card at the beginning of the tenth hour of work. Rodriguez and several other mushroom pickers who worked for Respondent credibly testified that in their view, certain foremen did not give full credit for boxes of mushrooms picked in overtime because they arrived late to mark pickers' cards and because they over-counted regular time boxes. There was credited testimony that several pickers, including Rodriguez, had spoken with each other about their belief that they were not being paid properly for overtime boxes.

² The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7.) A review of the record in this case has revealed no basis for overruling the ALJ's credibility determinations.

ALJ's Decision

The ALJ found that Rodriguez engaged in two pertinent acts prior to his discharge. First, Rodriguez concealed four baskets of mushrooms on the picking room floor with the intent of hiding them from foreman Martin Sanchez so Sanchez would not see them and count them as regular time baskets when he arrived to mark Rodriguez's card. Second, after Sanchez discovered the concealed baskets and confronted Rodriguez, Rodriguez complained to Sanchez about not arriving in a timely manner to mark the transition between regular time and overtime, and about not giving proper credit for baskets picked in overtime.

The ALJ found that Rodriguez's verbal complaint to Sanchez was protected concerted activity because Rodriguez was asserting a right of a collective bargaining agreement, and his complaint pertained to the way all pickers' cards were marked.

The ALJ concluded that Rodriguez's act of concealing the four baskets of mushrooms on the floor was not protected concerted activity. First, the ALJ reasoned that this act could not be characterized as a concerted protest because Rodriguez had purposefully kept his act secret. Second, the ALJ opined that in hiding the mushrooms, Rodriguez was engaged in unprotected self-help because Rodriguez was acting solely for his own personal gain and not that of his co-workers.

The ALJ concluded that Rodriguez was fired due to his unprotected act of concealing the mushrooms on the floor, not due to his protected verbal complaint to Sanchez. The ALJ noted that other pickers had made similar complaints in the past and had not been disciplined or fired. The ALJ ultimately concluded that because the act of concealing the mushrooms was not protected concerted activity, the Employer's adverse action did not violate the Act.

In its exceptions to the decision of the ALJ, the General Counsel argues that Rodriguez was fired not only for concealing baskets of mushrooms on the floor, but because of his protected complaint to Sanchez that the disputed baskets were picked in overtime.

Analysis and Conclusions

As indicated above, while we uphold the ALJ's conclusion that Respondent did not violate the Act by discharging Rodriguez, we do so by modifying the ALJ's analysis as set forth below.

In determining whether an employer has violated 1153(a) of the ALRA, the Board uses the analysis set forth by the NLRB in *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083. Under that analysis, the ALRB's General Counsel bears the initial burden of setting forth a prima facie case of retaliation for engaging in protected concerted activity. This is established showing that: 1) the employee engaged in such activity; 2) the employer had knowledge of the activity; and 3) the adverse action taken by the employer was

motivated at least in part by the protected activity. (*Lawrence Scarrone* (1981) 7 ALRB No. 13.)

Once the ALRB's General Counsel establishes its prima facie case, the burden then shifts to the employer to show by a preponderance of the evidence that it would have taken the same adverse action even in the absence of the employee's protected concerted activity. (*J & L Farms* (1982) 8 ALRB No. 46; *Wright Line, a Division of Wright Line, Inc., supra*, 251 NLRB 1083; *Lawrence Scarrone, supra*, 7 ALRB No. 13; *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 399-403.)

Under the first prong of the above analysis, a key question in this case is whether any part of Rodriguez's conduct was protected concerted activity. The ALJ correctly concluded that Rodriguez's verbal complaints to Sanchez were protected concerted activity because an action taken by a single employee to enforce the provisions of an existing collective bargaining agreement is considered to be an extension of the concerted activity that produced the agreement in the first place. Further, the assertion of such a right affects the rights of all employees covered by the agreement. (*NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 829). In *NLRB v. City Disposal Systems, Inc., supra*, 465 U.S. 822, the Supreme Court endorsed the doctrine established by *Interboro Contractors, Inc.* (1966) 157 NLRB 1295, 1298, enf'd 388 F.2d 495, in which the NLRB held that where an individual employee asserted a right contained in a collective bargaining agreement, such action is protected concerted activity.

The ALJ held that Rodriguez's act of concealing the mushrooms was not protected concerted activity. Part of the ALJ's conclusion rests on his reasoning that Rodriguez was acting solely for his own personal gain when he hid the baskets. In reaching this conclusion, the ALJ relied in part on the principle that an individual acting solely on his or her own behalf is not engaged in protected concerted activity. The ALJ cited *Nash-DeCamp Company v. ALRB* (1983)146 Cal.App.3d 92 and *Meyers Industries, Inc.* (1984) 268 NLRB 493³ in support of this principle.

In *Meyers Industries*, the NLRB distinguished cases involving individual action in the absence of a collective bargaining agreement from those cases where the doctrine established by *Interboro Contractors, Inc., supra*, 157 NLRB 1295 applied. (*Meyers Industries, Inc., supra*, 268 NLRB 493, 496.) The NLRB held that in the absence of a collective bargaining agreement an individual acting solely on his or her own behalf is not engaged in protected concerted activity. As the instant case involves the assertion of a right established by a collective bargaining agreement, the doctrine established by *Interboro Contractors, Inc.* is controlling here. However, as explained below, the covert and secret nature of Rodriguez's act is a relevant factor supporting the conclusion that the act of hiding the baskets cannot properly be characterized as a concerted protest.

³ *Meyers Industries, Inc.* (1984) 268 NLRB 493, *remanded sub nom. Prill v. NLRB* (1984) 755 F.2d 941, *cert. denied* (1985) 474 U.S. 971, *decision on remand* (1986) 281 NLRB 882, *aff'd sub nom. Prill v. NLRB* (1987) 835 F.2d 1481.

Implicit in the principle that a single employee acting alone may engage in protected concerted activity by taking an action to enforce the provisions of an existing collective bargaining agreement is that the employee must communicate this intent to management. For example, in *NLRB v. City Disposal Systems, Inc.*, *supra*, a truck driver refused to drive a truck he believed to be unsafe where a collective bargaining agreement provided that City Disposal's employees were not obligated to drive unsafe trucks. The Supreme Court explained that by refusing to drive a truck he believed to be unsafe, the employee "was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. [The employee] was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharvest the power of that group to ensure the enforcement of that promise. It was just as though [the employee] was reassembling his fellow union members to reenact their decision not to drive unsafe trucks." (*NLRB v. City Disposal Systems, Inc.*, *supra*, 465 U.S. 822, 832.)

The Court recognized that at some point an individual employee's actions could become so remotely related to the activities of fellow employees that it could not reasonably be said that the employee was engaging in protected concerted activity. (*NLRB v. City Disposal Systems, Inc.*, *supra*, at p. 833, fn. 10.) The Court further held that while it was not necessary for an employee to explicitly refer to the collective bargaining agreement when taking the action in

question, “[a]s long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement.” (*NLRB v. City Disposal Systems, Inc., supra*, at p. 840.)

Here, Rodriguez’s intent was that no one would see the baskets on the floor, and he told no one what he was doing. Had Sanchez not discovered the baskets, Rodriguez would have loaded them onto his cart to be counted as overtime baskets when he received his final count of boxes for the day. Therefore it cannot be said that Rodriguez communicated in a reasonably clear way that he was taking an action to enforce the collective bargaining agreement’s overtime clause when he hid the baskets. For this reason, this portion of Rodriguez’s conduct was not protected concerted activity.

Assuming that the General Counsel adequately showed that Rodriguez’s discharge was motivated at least in part by his protected verbal complaints to Sanchez and his claim that the disputed baskets should be credited as overtime, we find that the Respondent met its burden of proving that it would have taken the same adverse action even in the absence of Rodriguez’s protected concerted activity. Respondent admitted it knew that other pickers had complained they were not receiving full credit for overtime baskets, but there was no evidence that any of these other employees were disciplined or discharged for their complaints. The Respondent’s managers had an (incorrect) perception that

Rodriguez was trying to cheat the company by claiming regular time baskets as overtime baskets, but nothing in the record showed that Respondent had any animus toward workers' complaints that they were not receiving full credit for overtime baskets. In fact, Respondent's general manager testified that these complaints were routinely ignored. Routinely ignoring these complaints is not by itself a violation of the Act.

We note that it is understandable that Rodriguez was frustrated and would probably not have resorted to hiding the baskets of mushrooms if Respondent's foremen had consistently been giving pickers full overtime credit; however, we find that Respondent showed it fired Rodriguez for the unprotected aspect of his actions, the physical act of concealing the baskets on the floor.

ORDER

The ALJ's finding that the complaint be dismissed in its entirety is affirmed.

Dated: December 16, 2009

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CASE SUMMARY

**MUSHROOM FARMS, a Division of
Spawn Mate, Inc.**
(Efrain Rodriguez)

Case No. 07-CE-34-SAL
35 ALRB No. 8

ALJ Decision

The ALJ found that mushroom picker Efrain Rodriguez (Rodriguez) engaged in two pertinent acts on the day before his discharge. First, he concealed on the floor four baskets of mushrooms that he had picked after the start of overtime with the intent of hiding them from the foreman so the foreman would not see them and count them as baskets picked in regular time. Second, after the foreman discovered the concealed baskets, Rodriguez complained to him about not arriving in a timely manner to mark the transition between regular time and overtime, and not giving proper credit for baskets picked in overtime.

The ALJ found that Rodriguez's verbal complaint to the foreman was protected concerted activity as he was asserting a right of a collective bargaining agreement, and his complaint pertained to the way all pickers' cards were marked. The ALJ concluded, however, that Rodriguez's initial act of concealing the mushrooms on the floor was not protected concerted activity. First, the ALJ reasoned that Rodriguez's actions could not be characterized as a concerted protest because they were done secretly. Second, the ALJ concluded that Rodriguez was engaged in unprotected self-help because Rodriguez was acting solely for his own personal gain and not that of his co-workers. The ALJ concluded that Rodriguez was fired due to his unprotected act of concealing the mushrooms on the floor, not because of his protected verbal complaint to the foreman; therefore, the Employer's adverse action did not violate the Act.

Board Decision

The Board affirmed the ALJ's decision with some modification. The Board held that because the instant case involves the assertion by a single employee of a right established by a collective bargaining agreement, the doctrine established by *Interboro Contractors, Inc.* (1966) 157 NLRB 1295 controls. The act of hiding the mushrooms did not communicate to management in a reasonably clear way that Rodriguez was taking an action to enforce the collective bargaining agreement. For this reason, this portion of Rodriguez's conduct was not protected concerted activity. The Board found that the Employer proved that it fired Rodriguez for the unprotected aspect of his conduct, and therefore affirmed the ALJ's finding that the complaint be dismissed.

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
)
MUSHROOM FARMS, a Division of) **CASE No. 07-CE-34-SAL**
Spawn Mate, Inc.,)
)
 Respondent,)
)
 and)
)
EFRAIN RODRIGUEZ,)
)
 Charging Party.)
_____)

Appearances:

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for Charging Party *in propria persona*

DECISION

This matter was heard by Mark R. Soble, Administrative Law Judge (ALJ), Agricultural Labor Relations Board (ALRB), at the Salinas Regional ALRB Office, 342 Pajaro Street, Salinas, California, on April 14, 15, 16, 17 and 21, 2009.

The following evidence was considered by the ALJ: the testimony of Gildardo Rodriguez, Efrain Rodriguez, Arturo Carrasco, Rafael Zuniga, Sergio Guzman, Martin Sanchez, David Ghiglione and Robert Vasquez; General Counsel's ("GC") Exhibits 1-3, 5-15, 17-19; Employer's ("E") Exhibits a-i, m-o, q-x, z, aa, ee-gg.

Prehearing conferences in this matter were held on March 26, 2009, and April 6, 2009. On March 30, 2009, and April 10, 2009, respectively, the ALJ issued Orders memorializing the two prehearing conferences, which are marked for identification purposes as PH-1 and PH-2.

ISSUE

The issue is whether, by discharging employee Efrain Rodriguez, the Respondent committed an unfair labor practice in violation of the Agricultural Labor Relations Act (ALRA) section 1153, subdivision (a).

SUMMARY OF THE EVIDENCE

A. The Parties and Witnesses.

Respondent, Mushroom Farms, Inc. ("Mushroom Farms"), is a company that grows and sells mushrooms.

At all pertinent times, United Farm Workers of America (“UFW”) served as the collective bargaining representative for the agricultural workers at Mushroom Farms. UFW Secretary-Treasurer Sergio Guzman was responsible for administering the collective bargaining agreement with Mushroom Farms.

Charging Party Efrain Rodriguez was continuously employed by Mushroom Farms starting on January 26, 2000 and remaining until the company terminated him on or about July 3, 2007. (Reporter’s Transcript, volume one, at page 50, lines 17-25 [hereafter in this decision citations to the Reporter’s Transcript will be abbreviated as follows 1 RT 50:17-25].) Efrain Rodriguez started as a “foot man” cleaning up rooms where mushrooms were picked. In 2002, Efrain Rodriguez became a mushroom picker, from 2002-2004 he was a fork lift driver, a truck driver and a “box man,” and from 2004 to the time of his discharge, he was again a picker. (1 RT 51:12-52:17.)

At all pertinent times, Martin Sanchez was a foreman at Mushroom Farms.

At all pertinent times, Gildardo Rodriguez, Arturo Carrasco, and Rafael Zuniga were pickers at Mushroom Farms. Gildardo Rodriguez is the brother of Efrain Rodriguez.

David Ghiglione served as the Operations Manger of Mushroom Farms, becoming the General Manager in January 2008.

In August 2008, Robert Vasquez became the human resources manager for Mushroom Farms. Back in July 2007, Miksi Achberger served as Mushroom Farm’s human resources manager. Achberger did not appear or testify at the hearing.

B. The Mushroom Growing and Harvesting Process.

At all pertinent times, mushrooms were grown in rooms filed with numerous mushroom beds, which are essentially large rectangular boxes. The rooms all only have a single door by which a person may enter. (1 RT 39:21-25.) From the entry door, there is a straight walkway which divides the room into two halves. (1 RT 53:1-13.) Each half of the room has thirteen “lines” which are wooden structures perpendicular to the walkway, for a total of twenty-six lines. (1 RT 41:2-9.)

A line is essentially ten shelves with a mushroom bed comprising each shelf. Five shelves would be on the left side of the line and five on the right. It is common (but not always the case) to have one picker for each line. (1 RT 42:3-16.)

Hanging from each mushroom bed is a moveable trailer. (1 RT 38:18-25 and 1 RT 58:10-11.) The mushroom pickers cut off the mushroom tops from the stems (sometimes called the “foot”) and put the tops into yellow baskets in the trailer. (1 RT 57:23-25.) Filled yellow baskets are eventually put in a ten-level cart, sometimes known as “wires”. (1 RT 56:23-57:2.) The carts are basically racks on wheels that hold the filled baskets of mushrooms. Each level of the cart is referred to as a “box” and holds four yellow baskets. (1 RT 57:3-11.)

The mushrooms are grown and harvested on three occasions, sometimes referred to as first, second and third “breaks”. As a general but not absolute rule, third break picking rooms generate fewer large mushrooms than first or second break picking rooms. But there is variation from picking bed to picking bed.

C. “Punch Cards” Were Used to Tally Each Employee’s Daily Pick.

At various times, the foreman makes “hole punches” and “ink marks” on a paper card retained by the mushroom picker recording the number of “boxes” picked by that picker. (1 RT 66:20-67:16 and 1 RT 112:6-9; *see also* GC-12.) The foreman usually starts marking the punch cards with the workers picking mushrooms in the lines closest to the entry door, and usually ends with the lines furthest from the entry door. (3 RT 475:2-476:4 and 4 RT 579:2-17.)

The same punch card is used to record the picker’s regular time and overtime. (4 RT 551:17-19.) One of the times that the foreman marks the punch card is to indicate the number of boxes picked by the mushroom picker prior to the commencement of overtime. (1 RT 112:23-113:3.) The foreman would normally make this mark with an ink pen. (1 RT 110:20-23.)

For the transition between regular time and overtime, as well as at the end of the day, the foremen “round up” in marking the number of boxes completed by each picker. According to David Ghiglione, both at the conclusion of regular time and at the conclusion of overtime, if a picker has three-fourths of a box or more that is rounded up to the next highest integer. (5 RT 837:17-838:10.)

D. Overtime: Picking, Punching and Payment.

If an employee started at 6:00 a.m., the payment of overtime typically started at 4:00 p.m. (3 RT 464:9-13.) At the time in question, mushroom pickers were paid an overtime rate of time and a half based on the number of boxes that the picker picked

during overtime. (4 RT 543:19-23.) The overtime piece rate is \$2.807 per box with four yellow baskets of mushrooms. (1 RT 80:19-24.)

Efrain Rodriguez indicates that the foreman typically enters the picking room at 4:00 p.m. to 4:05 p.m., starts punching cards with the pickers closest to the room's entry door, and typically reaches the back of the room, which may have as many as twenty-five to thirty pickers, approximately ten to fifteen minutes thereafter. (1 RT 115:9-13, 1 RT 121:9-16, 1 RT 123:12-15 and 1 RT 143:20-145:13.)

Efrain Rodriguez alleges that foreman Martin Sanchez never gave him proper overtime credit. (1 RT 133:10-16.) He states that if Sanchez reached his station at 4:20 p.m., Sanchez would count all of the mushrooms picked at that juncture as work completed prior to the commencement of overtime. (1 RT 126:12-22 and 1 RT 128:25-130:11.) Thus, in that scenario, Rodriguez believes that he is being cheated out of the overtime differential between 4:00 p.m. and 4:20 p.m. Efrain Rodriguez stated another foreman would count as overtime part but not all of work done between 4:00 p.m. and when the foreman arrived.

Arturo Carrasco has spent twelve years picking mushrooms. (3 RT 448:21-449:2.) Carrasco testified that the foreman often arrived at the picking room between two and five minutes after the time when overtime had commenced. (3 RT 482:16-20.) Carrasco states that it would typically take the foreman between ten and fifteen minutes to punch the cards for all of the mushroom pickers. (3 RT 486:13-18.) Carrasco stated that, based on his personal observations, when the foreman reached a picker's station at 4:10 p.m., he would sometimes attribute some boxes toward overtime. (3 RT 490:12-491:19.) When

the foreman reached a picker only a few minutes after 4:00 p.m., the foreman sometimes gave no credit toward overtime for work done after 4:00 p.m. (3 RT 498:11-25.)

Carrasco stated that his time estimates were done in his head, and that he did not have a watch or other time-keeping device in the picking room. (3 RT 500:4-501:18.) Carrasco was able to name thirteen co-workers with whom he had discussed this issue, including Efrain Rodriguez. (3 RT 503:15-23.) When questioned, Carrasco's answers were spontaneous and responsive. Carrasco was a very persuasive witness.

Rafael Zuniga has spent twelve years picking mushrooms. (4 RT 538:17-19.) He confirmed that pickers are not supposed to put their baskets of mushrooms on the ground. (4 RT 603:19-604:4.) However, Zuniga has seen baskets of mushrooms on the floor when there are two pickers working a line and there is nowhere else to put them. (4 RT 610:5-21 and 4 RT 616:7-20.) Zuniga testified that most of the time Martin Sanchez did not give him proper credit for the overtime picking completed prior to when Sanchez punched his card. (4 RT 580:4-581:10.) Zuniga indicated that in addition to Sanchez, another company foreman (Leobardo) also did not give proper overtime credit, while a third foreman (Benjamin Saldana) was more conscientious in how he marked the transition from regular time to overtime. (4 RT 580:1-24.) Zuniga recalled past conversations with Efrain Rodriguez and three other pickers wherein it was discussed that Sanchez arrived late and failed to give overtime credit for the work done between 4:00 p.m. and the time that Sanchez arrived at their work station. (4 RT 582:13-583:9.)

E. The Events that Took Place on July 2, 2007.

On July 2, 2007, starting at 4:00 p.m., Efrain Rodriguez was working overtime in one of the lines furthest from the entry door. (4 RT 704:13-19.) As a result, foreman Martin Sanchez went to almost all of the other work stations in the room during overtime before he reached Rodriguez. (4 RT 704:20-24.) Prior to the time when Martin Sanchez arrived at his station, Efrain Rodriguez deliberately hid four yellow baskets of mushrooms on the floor under the mushroom bed. Rodriguez states that he hid the mushrooms on the floor to ensure that he received overtime credit for those four baskets. (2 RT 271:23-272:3.) Rodriguez did not tell any of his colleagues that he was hiding the baskets of mushrooms until after Sanchez uncovered them. (2 RT 273:3-15.) At hearing, Sanchez testified that Rodriguez had “twelve baskets” on the floor. (4 RT 709:4-15.) However, in his notes made on the day of the incident, Sanchez wrote that he saw one box (equal to four yellow baskets) on the floor. (Exhibits GC-8 and E-M) Sanchez indicated that his memory of the number of boxes in question would have been fresher when he wrote up the incident than it was at the hearing. Accordingly, the hearing officer finds it much more plausible that there were only four baskets on the floor and not twelve.

Martin Sanchez stated that it typically took him from five to ten minutes to finish punching the cards for all of the pickers in the room. (4 RT 755:5-12.) Sanchez testified that he always started punching overtime cards at 4:00 p.m. Sanchez testified that, on July 2, 2007, he arrived at Efrain Rodriguez’ work station at 4:09 p.m. (4 RT 714:9-10.) Sanchez stated that he looked at his watch when he spoke with Efrain Rodriguez. In turn,

Rodriguez claims that Sanchez arrived at his work station at 4:14 p.m. (1 RT 147:18-21.) According to the signed declaration of Sergio Guzman dated March 12, 2009, Martin Sanchez admitted to Sergio Guzman that, on the day in question, he did not start marking overtime on the employee cards until between 4:05 p.m. and 4:07 p.m. (Exhibit GC-19, at page 1.¹) It typically took Sanchez between ten and fifteen minutes to go through the whole room and mark the punch cards for all of the pickers. (3 RT 486:13-18.) Further, it is undisputed that Sanchez marked the punch cards of almost all of the other pickers in the room before he arrived at Rodriguez's work station. Thus, the hearing officer finds it much more plausible that Sanchez arrived at Rodriguez's station at 4:14 p.m. than at an earlier time such as 4:09 p.m.

At the time Martin Sanchez reached his station, Rodriguez testified that he had two boxes and three baskets in his cart picked during regular time (1 RT 149:9-11 and 2 RT 168:4-169:7), plus another one box and three baskets picked during overtime. (2 RT 168:20-24.) The overtime baskets included three baskets on the mushroom beds and the four baskets that Rodriguez had concealed on the floor. (2 RT 170:15-19 and 2 RT 171:17-172:6.) The hearing officer finds this testimony by Rodriguez to be credible.

Sanchez also testified that he was not angry when he spoke with Efrain Rodriguez at the time of the incident. (4 RT 755:14-17.) Rodriguez, on the other hand, conceded at hearing that Sanchez was irritated with him. (2 RT 324:2-3.) Given Sanchez's

¹ While GC-19 was admitted as hearsay at the employer's request, it serves to support the testimony of Efrain Rodriguez and Arturo Carrasco. Also, the statement by Martin Sanchez is an admission against the employer's interest.

implausible testimony at hearing as to the number of boxes that Rodriguez had hidden on the floor and as to the time that Sanchez arrived at Rodriguez's work station, the hearing officer found Martin Sanchez to be an unpersuasive witness.

It is harder to assess the credibility of Efrain Rodriguez. The hearing officer is convinced that Efrain Rodriguez sincerely believes that the company was cheating him as to the amount of his overtime pay. However, Efrain Rodriguez's testimony also included a few absolute statements that were highly implausible, such as that Sanchez "never" gave overtime credit. Also, during cross-examination, after a question was asked, Efrain Rodriguez sometimes paused for a while before responding and during that pause he would frequently look in the direction of the ALRB field examiner as if he sought guidance or reassurance. Part of this reaction may be that Efrain Rodriguez was nervous at the hearing. But it is also possible that while Efrain Rodriguez was well prepared to give his answers on direct examination, he was less comfortable giving spontaneous answers that took him away from "talking points".

F. On July 3, 2007, Mushroom Farms Sent Out a Termination Letter Which Falsely Accused Efrain Rodriguez of "Attempting to Steal Mushrooms".

David Ghiglione testified that he received a telephone call from Miksi Achberger and Achberger indicated that she was going to terminate Rodriguez. (5 RT 851:12-16.)

In its July 3, 2007 letter signed by human resources manager Miksi Achberger, Mushroom Farms falsely states that Efrain Rodriguez is being terminated because he was "caught attempting to steal mushrooms on July 2, 2007." (GC-2) Ms. Achberger made

this false accusation in three other letters. (See GC-3 “He was discharged from Mushroom Farms for finding him stealing lugs of mushrooms from the Company” [grammatical errors in original]; GC-5 “This wasn’t the first incident in which Mr. Rodriguez was found stealing mushrooms.”; and, GC-6 “He was terminated for stealing mushrooms as I mentioned in my previous letter.”²) No evidence was presented that Ghiglione reviewed these letters before their issuance.

At hearing, however, it was undisputed that on July 2, 2007, Efrain Rodriguez did not try to steal mushrooms or otherwise take mushrooms off the premises. Rather, based upon a preponderance of the evidence, what actually happened is that Efrain Rodriguez was fired for concealing one box (four yellow baskets) of mushrooms prior to when his supervisor arrived to punch the card marking the transition from straight time to overtime.

A disputed issue is whether the concealed box of mushrooms was actually picked during overtime or straight time. For workers with more than five years of employment experience, such as Efrain Rodriguez, the piece rate for regular time was \$1.871 per box. (GC-15, at page 23.) The overtime piece rate was calculated at time and a half, or \$2.807 per box. (GC-15, at page 16; 1 RT 80:19-81:6.) Both in the contract and at Mushroom Farms, the words “boxes”, “wires” and “lugs” are sometimes used interchangeably. (5 RT 859:9-13.) Thus, Rodriguez stood to earn an additional ninety-four cents if he picked the box of mushrooms during overtime, paid at a piece rate of \$2.807 per box, as

² GC-3 and GC-6 involve a dispute between Efrain Rodriguez and the company over whether Rodriguez was entitled to claim unemployment compensation. The hearing officer has assigned zero weight to the dispute over unemployment compensation other than noting that Ms. Achberger repeated in that forum the same erroneous allegation regarding alleged theft on the part of Mr. Rodriguez.

opposed to if he had picked them during straight time, paid at a piece rate of \$1.871 per box.

Under Respondent's theory of the case at hearing, Efrain Rodriguez tried to cheat the company out of ninety-four cents by concealing one box (four yellow baskets) of mushrooms that he allegedly picked during straight time, so that Rodriguez could instead claim those mushrooms as overtime pick.

In contrast, Efrain Rodriguez testified that he picked the concealed box of mushrooms in overtime, and only concealed those mushrooms because he believed that otherwise foreman Martin Sanchez would have cheated him out of the ninety-four cents by inaccurately marking that pick as straight time rather than overtime. Efrain Rodriguez testified that when Martin Sanchez arrived at his station, he had already picked during overtime one box and three baskets. (2 RT 168:20-24.)

As previously noted, the parties offered competing testimony as to the precise time that Sanchez arrived at Rodriguez's station and the maximum amount of mushrooms that could be picked under the existing conditions. However, David Ghiglione conceded that it would have been possible for Efrain Rodriguez to pick seven yellow baskets of mushrooms in fourteen minutes. (5 RT 849:10-14.) This conclusion is also supported by a Mushroom Farms harvest report for July 2, 2007, which shows Efrain Rodriguez having picked eighty-seven boxes in ten and a quarter hours. (GC-9) This is roughly a rate of picking eight and a half boxes per hour, or thirty-four yellow baskets per hour.³ In one-fourth that time, or fifteen minutes, on the average that day, Efrain Rodriguez picked

³ For the previous day, Efrain Rodriguez had picked 10.2 boxes per hour. (GC-9)

eight and one-half yellow baskets. Including the concealed four yellow baskets, Efrain Rodriguez is claiming that he picked seven yellow baskets, plus a fraction, in fourteen minutes. The hearing officer finds this claim plausible.

The hearing officer carefully considered the Respondent's argument that the "third break" mushrooms in room seven at the end of the day may have been slightly smaller or slightly less plentiful, and that a worker may slow down toward the end of the day. Ironically, of course, if the company is correct, then the workers, on the average, are unable to earn a true "time and a half" pay for their overtime work because their piece rate speed is decreasing. In fact, under the company's theory, if a worker was assigned to a first break room during regular time and a third break room during overtime, the worker would likely earn less during overtime than during regular time. But even taking into account these possibilities, it is likely that most of four concealed yellow baskets were picked during overtime. If Efrain Rodriguez only picked three and a half yellow baskets during fourteen minutes, it would be taking him an average of four minutes per yellow basket, or sixteen minutes per box. This would translate to a rate of three and three-quarters boxes per hour, which is vastly slower than the average speed at which Rodriguez typically picked. Moreover, even with a time and a half overtime salary piece rate multiplier, this would mean that the company was paying Efrain Rodriguez significantly less for his overtime work than the average pay rate during regular time.

Based upon the totality of the evidence, the hearing officer concludes that, on July 2, 2007, between 4:00 p.m. and 4:14 p.m., Efrain Rodriguez picked approximately seven yellow baskets of mushrooms. This figure takes into account the picking rate for

Efrain Rodriguez on July 2, 2007, but factors in a slight reduction to the picking rate, from eight and a half boxes per hour reduced down to seven and half boxes per hour, due to the “third break” status of picking room seven, unique to the beds that Rodriguez was picking on that day and at that time. Seven and half boxes of mushrooms is equal to thirty yellow baskets of mushrooms, which means at an hourly rate of seven and a half boxes per hour, the picker is filling one yellow basket of mushrooms during each two minutes of picking.

G. On July 6, 2007, a Second Step Meeting was Held Regarding the Termination of Efrain Rodriguez.

For the past twelve or thirteen years, Sergio Guzman has worked for the UFW. (4 RT 644:8-19.) During the pertinent time period, Guzman represented the Mushroom Farms’ employees. (4 RT 644:20-645:6.) Guzman is fluent in English and Spanish. (4 RT 651:21-652:10.)

Sergio Guzman testified that, at the second step meeting, neither Efrain Rodriguez nor his colleagues raised the issue of the company failing to pay overtime during the time period between 4:00 p.m. and the time when the foreman marked the pickers’ punch cards. (4 RT 654:15-18.) Guzman further testified that at the second step meeting, Efrain Rodriguez stated that it was not his intention that the company pay overtime for the baskets on the floor. (4 RT 666:11-21 and 4 RT 667:23-668:5.) In fact, Sergio Guzman testified that Rodriguez never personally told Guzman that the baskets on the floor were picked during overtime. (4 RT 663:4-19 and 4 RT 671:14-16.)

After Sergio Guzman's testimony that he had never heard directly from Efrain Rodriguez that Rodriguez asserts the concealed baskets of mushrooms were picked during overtime, the General Counsel unsuccessfully attempted to impeach Guzman with Exhibit GC-19, which is a declaration that Guzman signed on March 19, 2009.⁴ It appears that Sergio Guzman concedes that he was aware of the claim by Rodriguez that he picked the mushrooms during overtime, but contends that he learned it from the company, not directly from Rodriguez. (4 RT 681:13-17 and 4 RT 683:14-19.) Guzman also testified that Sanchez told him that he assumed Rodriguez wanted overtime for the baskets on the floor. (4 RT 690:21-691:5.) Guzman's testimony as to what he heard directly from Rodriguez is thus not critical as the hearing officer finds ample other evidence to support that Mushroom Farms understood Efrain Rodriguez to have claimed that he picked the concealed mushrooms during overtime. In addition, there is evidence that during the second step meeting, David Ghiglione did calculations in which he personally concluded that Rodriguez could not have picked eight baskets in ten minutes, presumably using the time that Sanchez told him that he arrived at the work station of

⁴ In its brief, at page twenty-three, lines 13-15, Mushroom Farms requests that the General Counsel be "reprimanded" for its failure to have timely disclosed as exculpatory evidence the March 19, 2009 Guzman declaration. This declaration apparently was obtained in connection with a separate investigation and its attachments were not introduced at this hearing in order to protect farm worker witnesses. At first blush, the hearing officer observes that **portions** of Mr. Guzman's declaration are clearly exculpatory. For example, Guzman interviewed third parties who contend that Mr. Rodriguez could not have picked a certain quantity of mushrooms within a certain time frame. However, ALRB Regulation section 20236, subdivision (d), requires the General Counsel only to provide evidence "which is **purely** and clearly exculpatory." (Emphasis added) However, in this instance, the declaration also includes information that is highly favorable to Mr. Rodriguez, to-wit, Guzman's claim that "Mr. Sanchez stated to me that he began punching overtime cards at about 4:05 or 4:07 p.m." This rather high standard of "purely and clearly exculpatory" is difficult to attain, and given the value of Sanchez' admission contained therein, it is not met by this document. Had the standard been solely "exculpatory evidence" without the "purely and clearly" language, the hearing officer would have agreed that Guzman's declaration included such content. But that is not the applicable standard contained in ALRB Regulation section 20236, subdivision (d). Ultimately, however, it was the company that moved to have this document admitted as a hearing exhibit, albeit as hearsay. (5 RT 962:6-964:15.)

Efrain Rodriguez. (Exhibit E-ff; 5 RT 793:4-8 and 5 RT 965:24-966:13.) There is no logical reason for Ghiglione to have made those calculations unless the company understood the position propounded by Rodriguez on this matter. For that reason, this undercuts the Respondent's position that Efrain Rodriguez failed to tell them at the second step meeting that he picked the concealed baskets after overtime had commenced.

Sergio Guzman testified that he has never received complaints from the Mushroom Farms' workers regarding the failure of foremen to properly credit overtime pay during the interval prior to the punch card being marked. (4 RT 671:24-672:5.)

Sergio Guzman also stated that, to his recollection, Mushroom Farms has never fired an employee for a food and safety violation. (4 RT 662:17-21.)

At the second step meeting, David Ghiglione did consider as one factor the health and safety ramifications flowing from Rodriguez having put the four yellow baskets of mushrooms on the floor. However, at hearing, Ghiglione testified that Rodriguez would not have been fired if there had just been a food and safety issue. (5 RT 878:15-879:6.)

In contrast, there is no evidence that Martin Sanchez or Miksi Achberger ever considered the health and safety ramifications of Efrain Rodriguez having placed mushrooms on the floor in picking room number seven on July 2, 2007. Martin Sanchez testified that he did not direct Efrain Rodriguez to destroy or sequester the four yellow baskets of mushroom from the floor. (4 RT 743:1-21.) Nor did the Respondent present any evidence that mushrooms on the floor were later sequestered or physically set aside from the other mushrooms picked that day. As a result, based upon a preponderance of the evidence, the hearing officer finds that these mushrooms were eventually loaded onto

a cart just like most other yellow baskets of mushrooms picked that day. Indeed, Sanchez did not suggest that Efrain Rodriguez would get zero credit for picking those mushrooms, only that those baskets would be paid at the lesser regular time rate rather than at the enhanced overtime piece rate.

FINDINGS OF FACT

All findings of facts are made based upon a preponderance of the evidence.

(ALRB Regulation § 20286, subdivision (b).)

1. The complaint was properly filed and served. (PH-1, page 1)
2. Respondent is an agricultural employer within the meaning of the ALRA section 1140.4, subdivision (c). (PH-1, page 1)
3. At all pertinent times, Efrain Rodriguez was an agricultural employee within the meaning of the ALRA section 1140.4, subdivision (b). (PH-1, page 1)
4. United Farms Workers of America is labor organization within the meaning of the ALRA. (PH-1, page 1)
5. At all pertinent times, Miksi Achberger, David Ghiglione and Martin Sanchez were supervisory employees of Respondent within the meaning of the ALRA section 1140.4, subdivision (j). (PH-1, page 1)
6. The pickers cut mushrooms in multiple picking rooms.
7. Each picker is typically assigned a row of mushrooms to pick.
8. When the foreman entered the picking room to mark the transition from regular time to overtime on the punch cards, he would start with the employee work stations closest to the door and finish with the work stations furthest from the door.
9. The foreman would typically begin making overtime marks on punch cards between 4:00 p.m. and 4:05 p.m.

10. When there were between twenty-six and thirty pickers in a room, it would typically take the foreman between ten and fifteen minutes to mark all of the punch cards in a picking room.

11. On multiple days prior to July 2, 2007, Efrain Rodriguez had complained both to Mushroom Farms foremen and to other pickers that the foremen sometimes failed to properly credit baskets picked during overtime between 4:00 p.m. and the time when the foreman reached the picker's work station. Arturo Carrasco and Rafael Zuniga had also made similar complaints to the company foremen.

12. On July 2, 2007, Efrain Rodriguez picked seven baskets of yellow mushrooms between 4:00 p.m. and 4:14 p.m.

13. On July 2, 2007, Efrain Rodriguez intentionally concealed four yellow baskets of mushrooms on the floor with the intent that foreman Martin Sanchez not see those mushrooms when he was marking punch cards to transition from regular time to overtime.

14. With respect to the four yellow baskets that Rodriguez placed on the floor, at least three and a half of these yellow baskets were picked during overtime. At approximately 4:07 or 4:08 p.m., Rodriguez concealed these baskets on the floor.

15. On July 2, 2007, foreman Martin Sanchez reached Efrain Rodriguez' work station at 4:14 p.m.

16. Shortly after reaching Rodriguez' work station, Sanchez spotted the four yellow baskets of mushrooms that Rodriguez had concealed on the floor.

17. Sanchez reacted angrily when he saw the four yellow baskets of mushrooms that Rodriguez had concealed on the floor.

18. Had Sanchez not discovered the four yellow baskets of mushrooms on the floor, Rodriguez would not have informed the company or his colleagues that he had concealed these mushrooms. Rather, Rodriguez would have simply loaded these mushrooms onto his cart in the same manner as any other mushrooms that he picked during overtime.

19. The four yellow baskets of mushrooms that Efrain Rodriguez put on the floor on July 2, 2007 were later loaded onto the carts.

20. The recommendations of supervisory employees Martin Sanchez and Miksi Achberger to fire Efrain Rodriguez were not at all based on health and safety reasons.

21. Supervisory employee David Ghiglione did consider health and safety reasons after the matter reached him. However, had Efrain Rodriguez instead placed baskets of mushrooms on the floor in clear view, Ghiglione would not have discharged Efrain Rodriguez, but rather would have imposed a lesser penalty.

22. Efrain Rodriguez regularly checked his pay stubs to ascertain whether or not the paychecks matched up with how supervisors had marked his punch cards. If there were clerical or arithmetic errors, Efrain Rodriguez informed the company.

23. While Mushroom Farms did present evidence that Efrain Rodriguez had been disciplined in August 2005 and January 2006, the termination in July 2007 was based primarily on the July 2, 2007 incident.

24. On days other than July 2, 2007, at least a couple of other mushroom pickers complained to Martin Sanchez that they were not receiving overtime credit for all of the mushrooms picked between 4:00 p.m. and the time when Sanchez reached their work station. These other mushroom pickers were not disciplined for making those complaints to Sanchez.

25. The parties do not dispute the overtime formula in this matter.

ANALYSIS AND CONCLUSIONS OF LAW

One of the reasons why the ALRA exists is to protect the right of agricultural workers to engage in concerted activities for the purpose of mutual aid or protection. (ALRA § 1140.2.) In this instance, to establish a prima facie case of discrimination discharge, the General Counsel must show by a preponderance of the evidence that Efrain Rodriguez engaged in a protected concerted activity, that Mushroom Farms had knowledge of such activity, and that there was some connection or casual relationship between the protected activity and the discharge. (*California Valley Land Co., Inc., and Woolf Farming Co. of California, Inc.* (1991) 17 ALRB No. 8, pages 6-7 (citing *Verde Produce Company* (1981) 7 ALRB No. 27))

Thus, the critical issues for the hearing officer to resolve are: (1) what aspects of Efrain Rodriguez's activity were concerted and (2) whether there is a casual link between the protected portion of his activity and the discharge.

Rodriguez engaged in two pertinent acts on July 2, 2007. First, he concealed four yellow baskets of mushrooms with the intended goal that Sanchez not see them and never learn of his act of concealment. There is no doubt that there is a casual link between this act and the company's termination of Rodriguez. Moreover, the hearing officer finds that Efrain Rodriguez only took this action because Rodriguez sincerely believed that the company was, on multiple occasions, cheating him out of overtime pay. On the other hand, the hearing officer finds that by concealing the four yellow baskets of mushroom, Rodriguez was seeking to remedy the injustice only as to him as an individual, not taking an act to aid or protect his colleagues.

The other act by Rodriguez was to complain to Sanchez about proper crediting of overtime between 4:00 p.m. and the time when Sanchez reached a picker's work station. Any such complaints are clearly protected concerted activity because Rodriguez was asserting a right of a collective bargaining agreement. (*See Meyers Industries, Inc.* (1986) 281 NLRB 882.) Moreover, if complaints by Rodriguez led the company or its foremen to change their practice, the change would inure to the benefit of all of the mushroom pickers, not just Rodriguez. However, given that other mushroom pickers also complained to the foremen about not receiving proper overtime credit,⁵ and that there is no evidence that the company disciplined let alone terminated those other pickers,

⁵ 3 RT 498:23-500:16 and 4 RT 576:6-25.

it appears that, based upon a preponderance of the evidence, the company terminated Rodriguez not because of his comments, but rather because of his physical act of concealing the four yellow baskets of mushrooms on the floor.

Rodriguez's act of concealing four yellow baskets of mushrooms was not protected concerted activity. Protests can be made individually, but an act is not a protest at all when the conduct is purposefully kept secret from both the company and colleagues. Efrain Rodriguez had hoped that the concealed baskets would remain unnoticed by Sanchez and that Rodriguez could then surreptitiously put the baskets in the cart and no one would know what he had done. Rodriguez was acting solely for his own personal gain, not that of his co-workers. (See *Nash-DeCamp Company* (1983) 146 Cal.App.3d 92; also *Meyers Industries, Inc.* (1984) 268 NLRB 498.) There are cases which stand for the proposition that a single worker complaining about wages is engaged in protected concerted conduct. (See *Hansen Chevrolet* (1978) 237 NLRB 584.) But in those cases, where the conduct was held to be protected and concerted, the situations involved circumstances where the worker's act was the actual communication of his or her position to the company. But in the instant matter, Efrain Rodriguez's actions cannot be characterized as a protest, when Rodriguez himself hoped that no one would notice what he did. Instead, Rodriguez was engaged in an unprotected form of self-help. (*Springfield Mushrooms, Inc.* (1988) 14 ALRB No. 10, page 35.) Because Rodriguez's act of concealing mushrooms was not a protected concerted activity, the Respondent did not commit an unfair labor practice in violation of ALRA section 1153, subdivision (a).

ORDER

For the reasons stated in this decision, the Hearing Officer finds that the Complaint should be dismissed in its entirety.

Dated: September 3, 2009.

MARK R. SOBLE
Administrative Law Judge, ALRB