

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

S & F GROWERS,)	
)	
Respondent,)	Case Nos. 77-CE-2-V
)	77-CE-3-V
and)	76-CE-6-M
)	76-CE-10-M
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	4 ALRB No. 58
)	
Charging Party,)	
)	

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On June 13, 1977, Administrative Law Officer (ALO) Morton P. Cohen issued the attached Decision in this matter. Thereafter, Respondent filed exceptions with a supporting brief, and the General Counsel submitted a brief in support of his position. The UFW submitted no exceptions or brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the ALO and to adopt his recommended Order as modified herein.

The ALO found that Respondent suspended its employee, Manuel Ramirez for a period of ten days in violation of Sections 1153 (c) and (a) of the Act. We disagree.

Although there was no union organizational activity at

the Employer's operation at the time of Ramirez's suspension, February 18, 1976, it is clear that Respondent was aware that Ramirez was a UFW supporter and had been an active member of the union's ranch committee during the Fall of 1975.

The suspension evolved out of a quarrel Ramirez had with his immediate supervisor, Jesus Rico. The record indicates that Ramirez was talking to a fellow employee in a lemon orchard during wet-time^{1/} on the day in question. Rico apparently interpreted Ramirez's actions as an attempt to discourage the other employee from working and admonished Ramirez to leave the other employee alone. Thereafter, Rico and Ramirez engaged in an argument which culminated in Ramirez challenging Rico to discharge him. Rico then wrote out a disciplinary notice.

About ninety minutes later, Rico notified the employees that wet conditions had improved and directed them to resume their work. Ramirez effectively countermanded Rico's order by advising his co-workers that conditions were still too wet to work. As a result the employees did not start to work for an additional thirty minutes. Rico gave another employee notice to Ramirez and then reported both incidents to general manager Otto Spencer, who made the decision to suspend Ramirez. Spencer was aware of Ramirez's previous union activities.

On the record herein we find that Ramirez was

^{1/}Pursuant to a 1974 labor agreement Respondent paid its employees a reduced hourly rate for work-time lost during periods of wet tree and/or ground conditions. The employee, however, retained the option to work during wet-time at the regular hourly rate, if he or she chose to do so.

insubordinate when he countermanded Rico's legitimate order to return to work and challenged Rico to discharge him. In light of these facts we conclude that the ten-day suspension was for cause, was unrelated to union or concerted activity, and therefore was not violative of the Act. Accordingly, this allegation of the complaint is hereby dismissed.

CONCLUSION AND REMEDY

We affirm the ALO's conclusion that Respondent discharged Gregorio Hurtado in violation of Labor Code Section 1153(a) and discharged Braulio Hurtado in violation of Sections 1153(c) and (a) of the Act. We shall modify the ALO's recommended Order to provide that the Hurtado brothers be awarded back pay pursuant to the formula set forth in Sunnyside Nurseries, Inc. 3 ALRB No. 42 (1977). In order to remedy the effects of Respondent's unfair labor practices, we shall require, in addition to reinstatement and back pay for the affected workers, that Respondent cease and desist from further violations of the Act and post, mail, distribute and read the attached Notice to its employees. We have found these remedies to be necessary and desirable in the agricultural setting. Tex-Cal Land Management, 3 ALRB No. 14, (1977).

ORDER

Pursuant to the provisions of Labor Code Section 1160.3, IT IS HEREBY ORDERED that Respondent S & F Growers, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging, or in any other manner discriminating against, any employee with respect to such employee's hire,

3.

tenure of employment or any term or condition of employment, to discourage membership of any employee(s) in the UFW, or any other labor organization.

(b) In any other manner interfering with, restraining and coercing employees in the exercise of their right to self-organization, to form, join or assist labor organizations, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer to Gregorio Hurtado and Braulio Hurtado immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges to which they may be entitled, and make them whole for any loss of earnings they may have suffered as a result of their termination from employment,

(b) Preserve and make available to the Board or its agents, for examination and copying, all payroll records and any other records necessary to compute the amount of back pay due and other rights of reimbursement under the terms of this Order.

(c) Sign the Notice To Employees attached hereto. Upon its translation by a Board Agent into appropriate languages,

Respondent shall reproduce sufficient copies of the Notice in each language for the purposes set forth hereinafter.

(d) Post copies of the attached Notice for 90 consecutive days at places to be determined by the Regional Director. Respondent shall exercise due care, to replace any Notice which has been altered, defaced or removed.

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed during the payroll periods which include the following dates: July 28, 1976, and March 7, 1977.

(f) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading(s) shall be at such time(s) and place(s) as are specified 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 employees may have concerning the Notice or their rights under the Act.

(g) Notify the Regional Director in writing, within 30 days from the date of receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional

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Director, Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with this Order.

DATED: August 21, 1978

ROBERT B, HUTCHINSON, Member

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

After a hearing at which all sides had an opportunity to present evidence and state their positions, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice:

1. The Act is a law which gives all farm workers these rights:
 - (a) To organize themselves;
 - (b) To form, join, or help unions;
 - (c) To bargain as a group and to choose whom they want to speak for them;
 - (d) To act together with other workers to try to get a contract or to help and protect one another; and
 - (e) To decide not to do any of these things.

2. Because this is true, we promise that we will not do anything else in the future that forces you to do, or stops you from doing, any of the things listed above.

3. The Agricultural Labor Relations Board has found that we discriminated against Braulio Hurtado and Gregorio Hurtado by discharging them from employment. We will reinstate them to their former jobs and give them back pay plus 7 percent interest for any losses that they suffered while they were off work.

S & F GROWERS

DATED: _____

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

S & F Growers

4 ALRB No. 58
Case Nos. 77-CE-2-V
76-CE-6-M
76-CE-10-

ALO DECISION

On June 13, 1977, Administrative Law Officer (ALO) Morton P. Cohen issued his decision.

1. He found that the Respondent violated Section 1153 (a) and Section 1153 (c) of the Act by suspending employee Manuel Ramirez for 10 days following a dispute between Ramirez and his supervisor. The dispute centered around the supervisor's termination of "wet time," an issue that had been in contention between labor and management on prior occasions. Even though no union was involved at the time, the ALO found that emotions regarding the union were existent and that Respondent's actions were motivated by a desire to discourage union activity

2. He found that the Respondent violated Section 1153(a) by discharging Gregorio Hurtado after a dispute arose between Gregorio Hurtado and his supervisor over the quantity of work done by Braulio Hurtado, Gregorio's brother. The supervisor had ordered Braulio Hurtado to put more lemons into the bin, to which Gregorio objected, claiming Braulio had filled the bin to the prescribed level. The ALO found that Gregorio was engaged in protected concerted activity when he intervened on behalf of his brother because the proper level of lemons to constitute a full bin had been the subject of a labor-management dispute for some time.

3. The ALO found that Respondent violated Section 1153(a) and Section 1153(c) by discharging Braulio Hurtado. Braulio Hurtado was discharged during a union organizational campaign. The ALO found that Respondent knew of Braulio's union sympathies and that he was subjected to quality control inspection that differed significantly from company practice. The ALO concluded therefore that Respondent's contention that Braulio was discharged for poor work was not supported by the facts and that the General Counsel had satisfied his burden of showing that the discharge was unlawfully motivated.

BOARD DECISION

The Board affirmed the ALO's findings in paragraphs 2 and 3 above, but reversed the ALO's finding that Manuel Ramirez's suspension violated the ALRA.

The Board concluded that Ramirez was insubordinate in countermanding his supervisor's legitimate order and challenging the supervisor to discharge him. Thus, his suspension was for cause, was unrelated to union or concerted activity, and therefore not violative of the Act.

S & F Growers

4 ALRB No. 58
Case Nos. 77-CE-2-V
76-CE-6-M
76-CE-10-M

REMEDY

As a remedy for the above violations, the Board ordered the Respondent to cease and desist from such conduct, and to sign, post, and mail to its employees a copy of a Notice explaining its actions and to arrange for a reading of the Notice to employees on company time. The Board also ordered the Employer to offer reinstatement to Gregorio and Braulio Hurtado and make them whole for any losses suffered.

This summary is furnished for information only and is not an official statement of the Board.



STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

S&F GROWERS,

Respondent,

and

UNITED FARM WORKERS OF AMERICA,

AFL-CIO,

Charging Party.

Cases Nos. 77-CE-2-V
77-CE-3-V
76-CE-6-M
76-CE-10-7

DECISION

MORTON P. COHEN, Administrative Law Judge

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for the Respondent

I

ALLEGATIONS

Charges in Case No. 76-CE-6-M (ALRB exhibit no. 1) were filed on March 8, 1976 claiming violations of Section 1153, subsections (a) and (c) of the Agricultural Labor Relations Act (hereafter Act' in that Respondent allegedly suspended one Manuel Ramirez for ten working days as of February 19, 1976 in violation, of the aforesaid sections of the Act. Charges in Case No, 76-CE-10-V (ALRB exhibit no. 2) were filed on August 23, 1976 claiming violations of Section 1153, subsections (a) and (c) of the Act in that Respondent allegedly discriminatorily fired one Gregorio Hurtado on July 30, 1976 in violation of the aforesaid sections of the Act. Charges in Case No. 77-CE-2-V (ALRB exhibit no. 3) were filed on March 8, 1976 claiming violations of Section 1153, subsections (a), (c) and (d) of the Act in that Respondent allegedly discriminatorily fired one Braulio Hurtado on March 7, 1977 in violation of the aforesaid sections of the Act. Charges in Case No. 77-CE-3-V (ALRB exhibit no. 4) were filed on March 8, 1977 claiming violations of Section 1153 subsection (a) of the Act in that Respondent allegedly improperly disciplined Luis Magdaleno and Federico Becerril on March 7, 1977 in violation of the aforesaid section of the Act.

On April 6, 1977, complaint issued herein (ALRB exhibit no. 5) and was duly served on Respondent, setting forth the charges as specified above and requesting relief including a cease and desist order, reinstatement where appropriate, back pay, a public apology and requesting the reciting as well as posting of the Board's order. On April 19, 1977, Respondent answered (ALRB exhibit no. 6),

admitting service, jurisdictional facts and that the alleged discriminatees are agricultural employees within the meaning of Section 1140.4(b) of the Act. On April 6, 1977, an Order was duly issued consolidating each of the aforesaid charges pursuant to Section 20244 of the Regulations of the Agricultural Labor Relations Board (hereafter Regulations) for purposes of hearing.

On May 16, 1977, hearings were commenced herein and testimony was taken on that day as well as May 17-19, 1977 and during the evening of May 17, 1977. At the outset motion was made by Mr. Fritz Conle, representing the UNITED FARM WORKERS, to intervene generally and such motion was granted. Subsequent to such intervention, it was stipulated by all parties that the charges in Case No. 7 -CE- - were withdrawn based upon the exchange of mutual assurances. Thereafter, testimony was taken as to the remaining charges. All parties were given full opportunity to present witnesses and exhibits. At the end of the hearing all parties were given full opportunity to present briefs and replies. All such testimony, exhibits, briefs and replies have been reviewed and considered, and based upon such evidence and argument, and the credibility of the witnesses, the decision herein follows.

II

JURISDICTION

The complaint alleges, and the answer admits, that Respondent is a California corporation engaged in agriculture in Ventura County, California and is now and has been at all times material herein an agricultural employer within the meaning of Section 1140.4

(c) of the Act, The complaint further alleges and the answer admits that the UNITED FARM WORKERS, AFL-CIO (hereafter UNION) is now, and has been at all times material herein, a labor organization within the meaning of Section 1140.4(f) of the Act. The complaint further alleges, and the answer admits, that the alleged discreditees, Braulio Hurtado, Gregorio Hurtado and Manuel Ramirez, were and are agricultural employees within the meaning of Section 1140.4(b) of the Act, Pursuant to the Act, the Agricultural Labor Relations Board (hereafter Board) has power to determine whether an unfair labor practice has occurred, and if it is determined that an unfair labor practice has occurred to remedy such practice.

III

PENDING MOTIONS

At the close of the hearing Respondent moved to dismiss the complaint for insufficient evidence or, alternatively, for a directed verdict. Decision on such motions was reserved at that time. In light of the findings of fact and conclusions of law as set forth hereinafter, both motions are denied.

IV

FACTS

A. Background

Respondent S&F GROWERS is a corporation having its main purpose the harvesting of lemons for some 160 lemon growers in the general area of Ventura County, California. Each of the growers maintains I

its own lemon orchards and engages S&F GROWERS as necessary to bar vest the lemons. The lemon harvesting season runs approximately from January through October, at which time most of the "pisca-dores" or pickers are laid off, During the peak of the season there are about 300 pickers employed by Respondent, comprising an average of about thirty pickers in each of ten crews. Each of the crews is overseen by a "majordomo" or foreman, who reports to either of two field bosses, who in turn report to the general manager. The general manager reports to the growers themselves through a board of directors.

At the completion of the picking process, the pickers, who have cut the lemons from the trees with scissors and loaded them into picking bags carried across their shoulders, dump the lemons into bins which, when filled, are transferred out of the fields by large forklifts and eventually to the packing house. The packer, Saticoy Packing House, also owned by the growers, transfers the lemons to the Sunkist Company except for those lemons which do not meet the quality standards set by Sunkist and by the State of California, which fruit, up to a specified amount, is sent to a juice plant. The fruit which is considered below standard includes long stemmed fruit which is likely to scratch other fruit, fruit whose stem is cut too short (known in the trade as "buton trosado" or "cut button") and is likely to rot or pulled fruit, which is also likely to rot.

Until sometime in 1974-1975, workers would unload their sacks into boxes and were paid by the box. In 1975, a switch was made, for economical reasons, to loading in bins and boxes were no longer used. At the time of the switch, the packing house began to pay

Respondent by the bin but, for reasons described by Respondent's general manager as "psychological", the pickers continued to be paid by the now-nonexistent box. The problems which this has caused remain to the present day in that there has been no agreement as to how many boxes make up a bin. One witness estimated that over fifty percent of the workers have day-to-day problems as to the measurement and a number of tests have been run to determine the actual contents of the bin, including one by the County of Ventura (Respondent's exhibit no. 6),

Given the *fact* of piece rates for the pickers and the differences in trees, yield and size of fruit, an objective standard has been worked out regarding the price to be paid per box of lemons (General Counsel exhibit no. 1C), but it is the foreman who decides the application of the objective standard in individual situations, another problem which has led to friction in the fields.

The method of determining quality control is for the foreman to take a worker's bag when, it is filled with lemons and count one hundred lemons out of the bag into a box and then examine them for pulled, long stem and cut button lemons, If the percentage of bad lemons is eight percent or less, the results are acceptable, if more, the results are unacceptable. If the results of the quality check are unusually high, over eight percent unacceptable, the picker receives a quality control ticket. Three such bad tickets in thirty days, or four in sixty days, results in suspension of employment. This check is performed by the foreman and has led to greater friction with the workers.

Still another problem between labor and management arises from working during wet conditions. Such work may lead, according to

witnesses for both sides, to illness for the picker. In 1974, an agreement was reached whereby workers would be paid \$2.00 per hour wet time (General Counsel exhibit no. 1A) and would not have to, but could, work during wet conditions. In 1977, this was changed to insure that workers would not work during wet conditions but would instead simply receive wet pay in order to insure no illness or accidents,

B. Suspension of Manuel Ramirez

Manuel Ramirez has been an employee of Respondent's since 1965, and within the past several years has been an active spokesman for what he and other pickers conceived to be the rights of workers. Thus, in 1974 when the workers went on strike around issues such as wet pay, Ramirez was one of the striker's spokesmen. Similarly, Ramirez was involved in 1975 when there was a general lay-off by Respondent which resulted in a worker recall on a Settlement Agreement achieved through the ALRB (General Counsel exhibit no. 3). Organizing activities for the UNION commenced toward the end of 1975, were suspended of ALRB activities, and were re-activated in 1977 resulting in the election of the UNION on April 5, 1977 (Respondent exhibit no, 10).

During the foregoing period, Ramirez was friendly with one of the foremen by the name of Jesus Rico. Both lived in the same housing development, Cabrillo Village, and both were involved in coaching and sponsoring a boy's soccer team. While Ramirez was not a UNITED FARM WORKER organizer, he was a spokesman, and this fact was known to Rico, as Rico testified. Further, as Ramirez credibly testified, he and Rico had discussed the UNION in the past, and Rico had said that if the UNION came there would be a lo

of problems.

On February 18, 1976, a crew of workers, including Ramirez, went to pick an orchard but found wet conditions precluding picking. The foreman at the time was Jesus Rico, While waiting for the field to dry, Ramirez was told about a picker, Rafael Rosales, who was then picking, and who Ramirez spoke to about the availability of wet time pay. After Rosales indicated he did not want to stop, Ramirez left him and began to return to where he had come from, passing one Patrocino Viramontes on the way. According to Rico, Ramirez said to Viramontes, "don't be picking, come with us" whereupon Rico told Ramirez to let the workers alone and let Viramontes pick. Viramontes's testimony was quite different from that of Rico. Viramontes said he had stopped picking since it was too wet, that Ramirez had not asked him to stop and that when Rico approached him the conversation was regarding the homes at Cabrillo Village. Given that Rico was then approaching the two others, and that Viramontes is independent for purposes of this hearing, I find his testimony more credible than that of Rico on this point.

According to a number of witnesses, Rico, who constantly used a loud voice, then said to Ramirez "don't be stupid, pendejo", the word "pendejo" meaning either pubic hair or coward. According to Jose G. Tovar, another foreman present at the time, it was Ramirez who called Rico a "pendejo", but Tovar admitted to being 100 feet behind Rico when Rico first came on the scene, and I therefore again credit the testimony of Viramontes that it was Rico who started the name-calling, although Ramirez soon joined in. What happened thereafter is difficult to resolve but the credible evidence indicates that Ramirez said to Rico "You have bad feelings

towards me, fire me so your problems will be solved."

At this point, Rico prepared and gave to Ramirez an employee notice which recited Rico's version of the story wherein he told Ramirez to let the man work if he wishes but was told by Ramirez to fire him, Rico concluded the notice with "one cannot work with persons like that" (Respondent's exhibit no, 9). Later that morning, at about 8:30 A.M., Rico told the workers to return to work and that wet time had ended, but Ramirez told them not to because it was still wet. It was not until 9:00 A.M. that the workers did return to pick. Again, Ramirez was given an employee notice (Respondent's exhibit no. 9).

According to Rico, he made no recommendation to the general manager, Otto Spencer, concerning the incident but merely reported it. Spencer, for his part, is responsible for determining suspensions and discharges and he decided that Ramirez should be suspended for ten days for using bad words (General Counsel exhibit no. 4), but not because of the wet time issue, since, as Spencer put it, "To permit a worker to say something bad to a foreman without doing anything about it is bad," It should be noted that Spencer was very much aware of Ramirez's union activities as of December 1976 according to Spencer himself. A subsequent Unemployment Insurance decision held that the word "pendejo" was not that offensive and found for Ramirez (General Counsel exhibit no. 5).

C. Discharge of Gregorio Hurtado

Gregorio Hurtado, nineteen years old, is the brother of another alleged discriminatee herein, Braulio Hurtado. Gregorio had worked for Respondent from 1974 until the end of July, 1976.

On July 28, 1976, while Gregorio and Braulio Hurtado were in the same crew, the foreman, Jose Tovar, told Braulio that one of his, bins required more lemons, Braulio said he would not add more lemons because there were more than seventeen boxes already in the bin. All witnesses agree that seventeen boxes at that time constituted a full bin. All witnesses agree that Gregorio then told Braulio not to put any more lemons in since they would not be paid for more than seventeen boxes.

That evening Tovar prepared, and the next morning distributed, an employee notice for Braulio and Gregorio each, saying Gregorio Hurtado "... does not want to fill his bins to where the measurement is" (Respondent exhibit no. 1C). When the notice had been given to Gregorio on the next day, Tovar testified that as he left the area Gregorio yelled out "Go fuck your mother with all your tickets" and that this was quite loud. At that point, Tovar claimed he made out another notice (Respondent exhibit no. 1B) setting forth the incident which occurred when Tovar gave Gregorio the first report. According to Tovar, when he gave Gregorio the second notice, Gregorio said he would "knock my teeth out".

Gregorio's version of these incidents is obviously different. He testified that he asked Tovar why he had gotten the first notice, had been told because of his bins not being filled, and was asked if he agreed, and when he said no, was given another notice. Several independent witnesses were called by both sides to resolve this point, For Gregorio, two witnesses, Gustavo Macias and Conrado Gonzalez, testified essentially identically to that of Gregorio's testimony, stating that they were from eight to eighteen feet away from the incident and that neither man was shouting or cursing.

For the employer, Fernando Gonzales testified that he was a fork-lift driver in the area that day and heard Gregorio say that Tovar was "the son of a fucked up mother" and that he should "put the ticket up his ass". Fernando Gonzales claimed he had turned his machine off to hear this. Fernando Gonzales went on to say that he had had trouble with Gregorio in the past because Gregorio felt Fernando was too slow bringing in the bins, that Gregorio had cursed Fernando, and that "clearly the Hurtado brothers are very good pickers and faster than most pickers", Conrado Gonzalez state the forklift was not in the area when the incident occurred.

Resolution of this point is quite difficult, particularly given the language set forth in the notes by Tovar. I have decide to credit Gregorio's version for a number of reasons. One, the first ticket was given because he did not want to fill his bins, whereas the accusation in fact concerned his brother's bin. Thus, the language of the second notice does not necessarily give it credibility although made at the time of the incident. Second, I find Fernando Gonzales, because of his antipathy to Gregorio, his use of language being different from Tovar, the noise of the fork-lift and the tesimony of Conrado Gonzalez that the forklift was not in the area, is entitled to no credibility. Thus, I am persuaded by the unimpeached testimony of Macias and Conrado Gonzalez that Gregorio did not say to Tovar what Tovar claimed.

It must be noted that the entirety of this dispute concerned the number of boxes necessary to fill a bin, with such distinction as two inches below the rim, to the bottom of the metal strip comprising the rim, or to the metal rivets attaching the strip, to the bin. Workers and management both before and after the "Gregor

incident" have legitimately disagreed on this point, including the vantage point from which one should observe when determining level. During the afternoon of the 29th, Tovar told Gregorio that he was fired, and again, according to Tovar, Gregorio cursed and suggested a fight but, according to Macias, Tovar simply said "here's another paper -- go to the office" and Gregorio said "I can't - I have no car", Macias said neither man shouted or cursed. In light of the above, Macias's testimony is the more sensible and I find it the more credible version. The next morning, Gregorio got on the company bus to go to work and was told by Tovar to leave the bus but Gregorio would not do so. There were six or seven workers on the bus at the time. Gregorio refused to leave and, about one hour after, the general manager and the sheriff arrived and ordered Gregorio off the bus and he left. On the same day, a letter was sent by the general manager indicating that Gregorio was fired for insulting his supervisor and not filling his bins properly (Respondent exhibit 1A).

D. Discharge of Braulio Hurtado

After his brother Gregorio was fired, Braulio continued to work for Respondent. On February 28, 1977, Braulio, together with many other crew members, signed UNION authorization cards while in the field and in the presence of the foreman, David Esquivel. Esquivel, a foreman for Respondent for only one month, claimed that he did not see Magdalene distribute the cards but saw the cards themselves and did not know what they were. This, coupled with Esquivel's testimony that nobody had told him of the UNION but "I had heard of them" and Luis Magdaleno's testimony that Esquivel had seen Magdalene hand out the cards and had told the workers in

February, 1977 that the UNION was no good "because the price of lettuce would rise", leads me to believe Esquivel not only saw but also recognized and had a negative reaction regarding the distribution of UNION cards. Further, the next few days brought a rash of employee notices by Esquivel. Magdaleno, Hurtado and a worker by the name of Federico Becerril all received such notices within one week after the cards were handed out, and only a few weeks before the election (Respondent exhibit no. 10). The notices given to Magdaleno and Becerril were the subject of unfair labor practice allegations which were settled by the parties at the outset of the hearing.

As to Braulio's notice, the first was given on March 2, 1977 and was a result, according to Esquivel, of Braulio's refusal to accept a quality inspection ticket indicating a twenty percent rejection rate (Respondent exhibit no. 7). However, Esquivel testified that his method of testing quality was to pick 100 lemons from the bin, rather than, as Otto Spencer, the general manager, later testified, to take 100 lemons from the bag prior to its going in the bin. The difference permits the foreman to determine which lemons would make up the test. Further, although it is customary to make the check in the presence of the workers, Esquivel did not check Braulio's work in his presence.

On March 7, 1977, Esquivel again did a quality control test on Braulio's work, again in Braulio's absence, and this time taking lemons from a half-full bin, according to Esquivel. This time Esquivel claimed to find thirty percent bad fruit and once again wrote an employee notice when Braulio refused to accept the quality inspection ticket (Respondent exhibit no. 73). At this point

Esquival told Braulio he was fired and when he refused to leave, Esquival went to call the police. Upon his return, Braulio asked him if he was fired, Braulio having thought he was merely being transferred, and when told he was fired, Braulio left.

According to Otto Spencer, the general manager, approximately four employee notices per foreman were given out in March of 1977, the month before the election while in April of 1977, the election having been held on April 5, 1977, fewer than half that number were given out. Further, Spencer testified that the rule was that three bad inspection notices were necessary to fire someone but that Braulio had been fired with only two because Braulio did not plan to improve, When asked on cross-examination whether his instructions were to do quality test directly from the bag rather than picking the 100 lemons from the bin Spencer said "I see your point "

V

CONCLUSIONS OF LAW

The charges herein concern violations of Sections 1153(a) and (c) of the Act. Section 1153(c) requires discrimination for the purpose of encouraging or discouraging membership in any labor organization. Thus, as has been said by the United States Supreme Court, "The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination". Radio Officers Union v. NLRB, 347 U.S. 17, 33 LRRM 2117 (1954). Further, it has been held that an employer has a right to take disciplinary action for good cause related to the maintenance of order and efficiency in the plant. (See Associated Press v. NLRB, 301 U.S.

103, 1 LRRM 732 (1937).) Indeed, so long as the employer's motivation is not encouragement or discouragement of union membership, the employer may discharge without any cause whatsoever. (See Associated Press v. NLRB, supra.) To prove a violation of Section 1153(c), there must be some act of discrimination, it must be in regard to tenure, terms or conditions of employment, and it must be intended to encourage or discourage membership in a union. (Se NLRB v. Great Dane Trailers, 388 U.S. 26, 65 LRRM 2465 (1967).)

As to Manuel Ramirez, the fact of suspension is sufficient to prove the necessary element of discriminatory action under the section. (NLRB v. JW Mortell Co., 440 F.2d 455, 76 LRRM 2489 (1971).) As to the intentions of Respondent regarding Ramirez, there is ample proof that both his supervisor and the general manager knew of his union activities as of February 18, 1976. Indeed, Ramirez was then one of the more outspoken of the workers as was clear at the hearing. Further, it is clear that the action taken by Respondent, in suspending Ramirez, was taken in response to one of the major items in contention between labor and management, wet time, and based upon another item in contention, respect of the workers for the supervisors. The fact of the UNION not then being in existence is not of relevance since emotions regarding the UNION were undoubtedly existent at the time. Thus, there is ample evidence to conclude that the action taken regarding Ramirez was motivated by a desire to discourage union activity. (NLRB v. Great Dane Trailers, supra.) I therefore conclude, as to the Ramirez suspension, that there was a violation of Section 1153(c) of the Act committed, and as well of Section 1153(a) of the Act.

As to Braulio Hurtado, there is ample proof that both the

firing and the quality control inspection upon which the firing was allegedly based were not conducted in keeping with Respondent's own rules. Thus, the inspection was not performed from a random sample of lemons in the employee's presence and there were not three checks done prior to firing. However, as had been set forth earlier, Respondent may fire for no reason-at all, under Section 11.53(c) of the Act, so long as the intent was not to discourage union activity. Braulio Hurtado's termination occurred during the key period between the signing of UNION authorization cards and the election of the UNION, ' Further, the rate of dispensing employee notices during this period ran about twice that in the period after the election and Esquivel, the foreman who had seen the actual distribution of the UNION cards, was responsible for a substantial number of employee notices to people active in the UNION within only a few days after such distribution. The proof is ample to conclude that the rash of employee notices was a result of UNION activities at the time and that Braulio Hurtado was the one fired because of a particular animosity toward him in the midst of general tensions regarding the UNION. In essence, this was punishment, meted out, at least in part, for the UNION activities of all workers but borne by those as to whom the employer had the most antagonism. It has been said, in NLRB v. Great Dane Trailers, supra, a leading case in the field:

. . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.
(388 U.S. at 34)

As to Braulio Hurtado, the proof of improper inspections, of fewer than three inspections before termination, as well as the fact that these occurred immediately after the UNION's representation drive, fully support the conclusion that the employer has not satisfied its burden but that the General Counsel has satisfied its burden. Thus, I conclude there was a violation of Section 1153(c) as well as Section 1153(a) of the Act as to Braulio Hurtado,

As to Gregorio Hurtado, there is no possibility of a violation of Section 1153(c) since there was then no consideration of UNION activities as is necessary for a violation of such section. Further, numerous cases regarding violations of Section 8(a)(1) of the NLRA, the equivalent of Section 1153(a) of the Act, have held that a dischargee's offensive conduct is not protected under concerted activity participation. (See NLRB v. Garner Tool & Die Mfg Inc., 493 F.2d 263 (1974); Chemvet Laboratories v. NLRB, 497 F.2d 445 (1974); Southwestern Bell Telephone Co., 200 NLRB 101, 82 LRRM 1247 (1972) ("Ma Bell is a Cheap Mother" statements deemed offensive).) However, in the instant matter there has been a factual finding that such offensive conduct in regard to the alleged obscenities did not occur. Therefore, the issue becomes whether or not there has been a violation of Section 1153(a) of the Act. It has been held, as to Section 8(a)(1) of the NLRA, the equivalent of Section 1153(a) of the Act:

interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of em-

ployee rights under the Act.
Cooper Thermometer Co.,
154 NLRB 502, 59 LRRM
1767 (1965)

The cases interpreting Section 8(a)(1) of the NLRA thus turn on whether the employee was engaged in protected activity when action was taken, and whether the employer interfered with such activity. Here, the proof is that Gregorio told his brother not to fill the bins further, and also that the general manager believed in good faith that Gregorio had been abusive of his foreman. There is also substantial proof regarding the dispute then and now regarding the filling of the bins. General Counsel point to one case, Oklahoma Allied Telephone Co., 86 LRRM 1394 (1974), regarding allegedly similar conduct. In that case an employee complained, about overheated working conditions and, in conversation with other employees at the time, said "We can go home". Thereafter, she was told to go home, was told to eliminate "further displays of insubordination, bad attitude and temper flareups, things of this nature" and when she refused to change her attitude and refused to apologize, she was discharged for "temper and insubordination" and refusal to work, The NLRB held that there had been other such complaints, which the discriminatee joined in and she was". . . discharged because she engaged in protected concerted activity."

Thus, it would seem that there must be a violation of Section 1153(a) herein if the reason for the discharge of Gregorio was the involvement in protected concerted activity. I conclude that Gregorio was engaged in such activity when telling his brother not to fill the bins further, based upon the previous and subsequent problems regarding piece work quantities. However, that does not

end the inquiry as it may not have been the purpose of the termination. Otto Spencer testified that Gregorio was terminated for disrespect but it has to be determined that this alleged disrespect did not occur and, further, in Oklahoma Allied Telephone Co. supra, the NLRB coverlooked similar conduct as is here alleged when part of otherwise protected conduct. In addition, the incidents leading up to and resulting in the termination of Gregorio Hurtado were undoubtedly triggered by his involvement in the bin measurement problem. Thus, the conclusion is that the firing of Gregorio Hurtado was in violation of Section 1153(a) of the Act. It must be noted in closing that if the factual determination had been that Gregorio Hurtado, while engaged in a protected activity, had been as abusive as it is claimed he was, his activity would not have been protected, (See NLRB v. Garner Tool & Die Mfg. Inc., supra.)

IV

REMEDY

Having concluded that Respondent has violated Section 1153(a) and (c) of the Act, my recommendation shall be an Order to cease and desist therefrom, as well as to take such affirmative action as appears reasonable to effectuate the policies of the Act.

As to Braulio and Gregorio Hurtado, there having been a violation of Section 1153(a) and (c), and of Section 1153(a) respectively, it is reasonable to recommend that Respondent be ordered to offer them immediate and full reinstatement to their former jobs or the substantial equivalent thereof, and at their former pay rate. Further, it shall be recommended that Respondent make each of them whole for any losses each may have incurred as a result of Respondent's discriminatory action, by payment to each of an amount equal to the wages each would have earned from the date, of the discharge to the date of actual or offered reinstatement, less the net earnings of each together with interest at seven percent (7%) per annum. (Valley Farms v. Rose J. Farms, 2 ALRB 41 (1976).) The computation of such loss of pay and interest should be made in accordance with the formulae set forth in F.W. Wool-worth Company, 90 NLRB 289 (1950) and Isis Plumbing and Heating Company, 138 NLRB 716, 51 LRRM 1122 (1962).

As to Manuel Ramirez, there having been a violation of Section 1153(a) and (c) of the Act resulting in his suspension with a subsequent award of unemployment insurance benefits and reinstatement thereafter pending, recovery from a compensated injury, it shall be recommended that Respondent remove any and all record of such suspension, and the reason therefor from its files and

make said Manuel Ramirez whole for any losses he may have incurred as a result of Respondent's discriminatory action, during the period of his suspension, less his net earnings, such computation to be determined as set forth in the foregoing paragraph.

It shall be recommended that a Notice to Employees be issued (Valley Farms, supra) and that it be read in English and Spanish, on company time, to all those then employed, by a company representative or by a Board agent, and that the Board agent be accorded the opportunity to answer questions which employees might have regarding the Notice and their rights under Section 1152 of the Act. (Tex-Cal Land Management Inc., 3 ALRB 14 (1977).)

Upon the basis of the entire record, the findings of fact and conclusions of law, I hereby issue the following recommended;

ORDER

Respondent S&F GROWERS, its officers, agents, representatives, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the UNION, or any other labor organization, by discharging, suspending, or in any other manner discriminating against individuals in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153(c) of the Act.

(b) In any other manner interfering with restraining and , coercing employees in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act,

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer to Braulio and Gregorio Hurtado immediate and full reinstatement to their former or substantially equivalent jobs

without prejudice to their seniority or other rights and privilege and make them whole for any losses they may have suffered as a result of their termination in the manner described previously withi this decision, including interest thereon at the rate of seven per cent (7%) per annum.

(b) Issue the attached NOTICE TO EMPLOYEES (to be printed in English and Spanish) in writing to all present workers, wherever geographically located, and post such Notice immediately for a period of not less than sixty (60) days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted, such locations to be determined by the Regional Director.

(c) Have attached NOTICE TO EMPLOYEES read in English and Spanish at the commencement of the first working day following the filing of this Order by the Board, on company time, to all those then employed, by a company representative in the presence o a Board Agent or a Board Agent, and accord said Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act.

3.It is further ordered that the allegations in the Consolidated Complaint not specifically determined herein to be violation

of the Act are dismissed.

Dated: June 13, 1977.

A handwritten signature in black ink, appearing to read 'Morton P. Cohen', written over a horizontal line.

MORTON P. COHEN

Administrative Law Officer

Appendix

NOTICE TO EMPLOYEES

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we discriminate against workers to discourage membership in a union, and to discourage concerted activities of workers. The Board has told us to send out and post this notice.

We will do what the Board has ordered, and also tell you that

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. to join or help unions;
2. to bargain as a group and choose whom they want to speak for them;
3. to act together with other workers to try to get a contract or to help or protect one another.

We will reinstate Braulio and Gregorio Hurtado to their former jobs and will remove all records as to the suspension of Manuel Ramirez, and give them back pay for any losses that they had while they were not working here, We promise that:

We will not threaten you with being fired or suspended because of your feelings about, actions for, or membership in any union.

We will not fire you or suspend you because of the union.

We will not ask you whether or not you belong to any union, or do anything for any union, or how you feel about any union,

Dated:

S&F GROWERS

By: _____

REPRESENTATIVE (title)

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

DO NOT REMOVE OR MUTILATE

PROOF OF SERVICE BY MAIL

I, DIANA C. BAKER, declare that I am a citizen of the United States, a resident of the County of Alameda, am over the age of eighteen (18) years and am not a party to the within action, that my business address is 536 Mission Street, San Francisco, Ca., 94105, and that on June 13th, 1977, I served the within Decision of the Administrative Law Officer, Case No. 77-CE-2-V et al by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in a postal mail box owned and operated by the United States Post Office, addressed as follows:

J. Richard Glade,
Gordon & Glade,
600 S. Commonwealth Ave.,
Los Angeles, Calif., 90005.

Fritz Conle,
United Farm Workers,
517 E. Cooper Rd.,
Oxnard, Ca., 93030

Lorenzo Campbell, Esq.,
A.L.R.B.,
326 So. "C" Street,
Oxnard, Ca., 93030.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 13th day of June, 1977, Berkeley, California.

DIANA C. BAKER
DIANA C. BAKER

