Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

M. CARATAN, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 75-CE-54-F 4 ALRB No. 83

DECISION AND ORDER

On March 15, 1977, Administrative Law Officer (ALO) Sheldon L. Greene issued the attached Decision in this proceeding. Thereafter, Respondent, the General Counsel and the-Charging Party each filed timely exceptions and a supporting 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, conclusions and recommended Order of the ALO, as modified herein.[1/]

The Constructive Discharge of Ahmed T. Ahmed and Ali Alomari

Respondent excepted to the ALO's finding that there was no legitimate business reason for the September 9, 1975, work assignments and that these assignments varied from the normal

[1/]Respondent has requested that this matter be remanded to the ALO on the grounds that his Decision failed to set forth findings of fact, conclusions of law and the reasons for the conclusions. Respondent's request is denied, as we consider that the issues have been fully litigated. Swan Super Cleaners, Inc., 152 NLRB 163, 59 LRRM 1054 (1965), rev'd in part on other ground's, 384 F.2d 609, 66 LRRM 2385 (6th Cir. 1967).

business pattern.

According to Respondent's business records received in evidence, on the first work day after the election, September 8, 1975, the three Arab swampers spent three hours cleaning fields while the other two crews spent two hours each at that task. None of the crews received bonuses for this work. The other two crews then spent nine hours loading full boxes of grapes, for which they received a bonus of 1.5 cents per box. The Arab swampers were assigned to clean debris—concrete pipe—from a field for three hours, for which they received no bonus, and then to scatter empty boxes for three hours, for which they received a bonus of .25 cents per box.

The next day, September 9, Travis Pruitt, the swampers' foreman, assigned the Arab crew to scatter empties all day and the other crews to load full boxes. When the Arab crew told him that they would quit rather than accept such an assignment, he sent them to Louis Caratan. They told Caratan they did not want to scatter empties all day, and he replied that scattering was the only work he had for them. The Arab swampers then asked for their checks and left.

When an employee, faced with a new or different job assignment, quits before it is reasonable to conclude that the new job is more onerous than the previous assignment, the NLRB has refused to find a constructive discharge. Crystal Princeton, 222 NLRB 1068, 91 LRRM 1302 (1976). We cannot find here that the Arab swamping crew was justified in quitting on the morning of the second day of a new assignment which had so far resulted in only

slightly less bonus pay than that earned by the other swamping crews. Consequently, we do not adopt the ALO's finding that the Arab swamping crew was constructively discharged in violation of Section 1153 (c) and (a) of the Act. The Constructive Discharge of Martinez and Orosco

Respondent excepted to the ALO's finding that Martinez and Orosco were constructively discharged in violation of the Act. We uphold the ALO's finding.

Martinez and Orosco were both union members. Martinez testified that both he and Orosco attended union meetings. Martinez was an observer during the election, as Louis Caratan was aware. On the morning of the election, Martinez informed Caratan that he was serving as an observer for the union and that he was helping his companions in the union. Martinez' testimony in this regard was not denied by Caratan.

Respondent argues that there was no direct evidence of Orosco's union activity because he did not testify at the hearing and that union activity cannot be inferred from the fact that he and Martinez were closely associated. Even assuming that the record does not support a finding that the Employer knew about any union activities of Orosco, it does support an inference that Orosco was constructively discharged along with Martinez in order to conceal the Employer's anti-union motive in discriminating against Martinez. Wonder State Mfg. Co. v. NLRB, 331 F.2d 737, 55 LRRM 2814 (6th Cir. 1964). Whether Orosco was constructively discharged because of his own union activities or because of an effort by the Employer to justify its assignment of the weedpulling

job to Martinez, his constructive discharge is also a violation of the Act.

On September 18, 1975, about one and one-half weeks after the election, Martinez and Orosco were assigned to pull "careless weed", a weed with a bristly stalk capable of causing substantial irritation to the hands. They were not provided with gloves, hoes or water; Martinez testified that they worked approximately three and one-half hours, after which they returned to the camp because they were thirsty, and their hands were bloodied and inflamed. According to Martinez, they were unable to work during the remainder of the day because of the condition of their hands, and Martinez told this to a supervisor who came to the camp. On the following day, Martinez and Orosco were assigned the same task of pulling weeds. When they declined to do this work after their experience the previous day, Caratan told them that he had no other work for them, although the grape harvest was in progress and both men were packers. They collected their checks and left.

Martinez testified that, in his 14 years as a packer, he had never before been assigned to pull weeds, and that it was not the normal practice for packers to do this work. Respondent contends that Martinez[1] own testimony indicates that the job was not discriminatory, because he testified that, when told to get off the bus and report to Louis Caratan for a job assignment, he did not object, because it was his turn. It is clear from the context of this remark, however, that Martinez meant that it was his turn to be assigned to an odd job other than packing, not that it was his turn to do the specific task of pulling weeds, a job he had never

before been assigned to do.

Respondent submitted business records at the hearing to show that workers had been assigned to pull weeds without hoes in the past. These records are not probative. They show that on August 16, 1975, five workers were assigned to do weeding. The original entries concerning job descriptions were made by the workers themselves and were in Spanish. The descriptions and their English translations vary--in some the job is described as pulling weeds and in others as hoeing. It is impossible to conclude from these records whether on previous occasions workers pulled weeds with their bare hands or used hoes.

Respondent contends that it was essential to get the careless weed pulled at the time the assignment was made. He presented evidence at the hearing that the moisture content of the field created ideal conditions for pulling weeds and that the manner in which the milo crop was planted as well as the nature of the crop precluded the use of a hoe, harvester, or pesticide. We find, however, that other evidence produced at the hearing shows that the job itself was unnecessary. The weed is pulled before maturity in order to protect the next year's crop from contamination by the scattering of seeds. Caratan testified that nothing was planted in the field the year after the events in question because he had lost the lease on the property. He had known by midsummer of 1975 that the land was being sold, and testified that negotiations for a new lease had broken down at the time the assignment was made. Our inference that Caratan knew the job was unnecessary is supported by the fact that he could not recall that

anyone was assigned to complete the task after Martinez and Orosco refused to do so.

The evidence shows that Martinez and Orosco were assigned to do a painful job, which Martinez, at least, had never done before, under unpleasant conditions, a short time after the election at which Martinez had been a union observer. Although it was the middle of the harvest, these two packers were assigned for two days to pull weeds to prepare a field which the Employer knew he would not be using. Under these circumstances, we find that the assignment was an imposition of more onerous and unpleasant duties on these employees as a result of union activity, and that it was reasonable and foreseeable that they would quit rather than perform work which injured their hands, but which they were told was the only work available to them. We conclude that the job assignments of September 18 and 19 were constructive discharges in violation of Section 1153 (c) and (a) of the Act. The Discharge of Ramon Trevino

Ramon Trevino, an assistant foreman, was discharged on September 13, 1975.[2/] Respondent excepts to the ALO's finding that Trevino's discharge was in violation of Section 1153 (a) of the

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[2/] During the hearing, General Counsel amended the complaint to allege that Trevino was a supervisor and that his discharge was an unfair labor practice. The General Counsel and Respondent stipulated that Trevino was a supervisor, but the Charging Party objected to the stipulation. The ALO ruled that Trevino's supervisorial status would be an issue during the hearing. In the course of the hearing, the Charging Party submitted evidence on this issue.

Act.[3/] The Charging Party excepts to the ALO's finding that Trevino was a supervisor. On the basis of the record, and noting the stipulation of Respondent and the General Counsel as to Trevino's status, we agree that Trevino is a supervisor within the meaning of the Act.

It was established during the hearing that Trevino, at the request of fellow employees Rafael Martinez, Ernesto Orosco, and Elmundo Castillo went to UFW headquarters to review a Caratan employee list for the purpose of determining voter eligibility. Trevino testified that he had attended UFW meetings. He also testified that he did not engage in any union activity in 1975 and did not wear union buttons or insignia to indicate support for the UFW. He said that when the workers asked him if the UFW should represent them he told them it made no difference to him.

Supervisors within the meaning of the Act are not protected from discharge for union activity by Section 1153 (c). The discharge of a supervisor may be unlawful if it has an intimidating effect on nonsupervisory employees in the exercise of their rights. Talladega Cotton Factory, 106 NLRB 295, 32 LRRM 1479 (1953). Thus, the focus is on employees' rights to engage in union activity free from interference, coercion or restraint, rather than on any rights of the supervisor.

We cannot find, on this record, that Trevino's few

[3/]Respondent also contends that the addition of Ramon Trevino to the complaint was untimely and prejudicial. We do not agree. The charges alleged as to Trevino are within the scope of the original charges and were fully litigated at the hearing. NLRB v. Thompson Transport Co., 421 F.2d 154, 73 LRRM 2387 (10th Cir. 1970).

pro-union activities were well known to employees or that employees would know or assume that he had been discharged for union sympathies, and therefore be intimidated in the exercise of their own rights. Neither do we find that Trevino's discharge was part of a plan to interfere with the union activities of nonsupervisory employees. We therefore do not adopt the ALO's finding that the discharge of Trevino violated Section 1153 (a) of the Act.

The September 22, 1975, Work Assignment

Respondent excepts to the ALO's finding that field crews usually perform some bonus work even during leafing and that when viewed within the context of Respondent's anti-union animus, the September 22, 1975, work assignment was discriminatory. On the day in question, the Arab crew was assigned to pull leaves for eight and one-half hours while each of the other two crews did incentive work for eight and one-half hours.

After reviewing Respondent's crew business records for 1974 and 1975, we find that Respondent's exception has merit. Although the 1974 records tend to indicate that crews usually performed some incentive work on days they were assigned to pull leaves (nonincentive work), the 1975 crew sheets do not. On September 12, September 13, September 15 and September 16, 1975, the new crew (hired September 10, 1975) and the Mexican/Puerto Rican crew pulled leaves the entire day, eight and one-half hours, without any allowance for bonus work. The Arab crew on the other hand performed only incentive work on each of these days. The next working day when leaf pulling occurred was September 22, 1975, the day in question. On this day, as previously pointed out, the Arab

crew spent the entire day pulling leaves while the other two crews, after four consecutive days of leaf pulling, did incentive work the entire day. In light of these facts, we do not adopt the ALO's finding that the September 22 work assignment was discriminatory.

Ahmed Alomari's Speech Concerning Signers of Charge

On or about September 18, 1975, Respondent was served with a copy of an unfair labor practice charge against the Employer filed by the UFW. Respondent objects to the ALO's finding of a violation based on the fact that supervisor Muthana Alomari posted the charges on the kitchen wall of the Arab camp and that, after the posting of the charge, Ahmed Alomari made a speech concerning the signers of the charge. It is unnecessary to determine whether Muthana Alomari was a supervisor since he was clearly acting under Caratan's instructions at the time he posted the notice and is therefore Caratan's agent.

During the hearing Ahmed T. Saeed testified that foreman Ahmed Alomari had talked to some of the employees concerning the signers of the charge. According to Saeed, Ahmed Alomari stated that the signers of the charge wanted to wreck his job. Mohammed B. Ahmed testified that he had not heard Ahmed Alomari talk about the signers of the complaint but that it was his understanding that the signers of the complaint were not wanted by the company because they were Chavistas. Ahmed Alomari himself testified that he was not sure whether he had ever commented that the signers of the complaint were troublemakers.

We find that the posting of the charges, coupled with Ahmed Alomari's statement that employees who signed the charge were

trying to wreck his job was reasonably calculated to discourage use of and resort to the Board's processes by employees and therefore constituted unlawful interference within the meaning of Section 1153 (a) of the Act.

Identification of Ali Massaed as Paid Union Agent

Respondent excepted to the ALO's finding that the identification of Ali Massaed[4/] as a paid union agent created an impression of surveillance.

Louis Caratan testified that immediately after a speech[5/] he gave to a group of employees, Massaed made a heckling comment which irritated him and that, as a result, he told Massaed that he understood that the union was paying him $15 a week to agitate within the crew and asked him if he was still collecting the money. We do not find that this angry exchange of comments at a public meeting suggested or created the impression that the Employer was engaging in surveillance of employees' union activities. We do not adopt the ALO's finding that the Employer's remark violated Section 1153(a) of the Act.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the Respondent,

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[4/] On page 9 of his Decision, the ALO erred by referring to Ali Massaed as Ahmed T. Saeed.

[5/] The ALO found that Caratan's speech was given on September 22, 1975, the same day that the Arab crew was assigned to pull leaves for the entire day. The record does not support this finding. The exact date that the speech was given is not clear; there is only an indication that the speech occurred sometime after September 13, 1975, when the objections to the election were filed.

M. Caratan, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the UFW or any other labor organization by unlawfully discharging employees, or in any other manner discriminating against employees in regard to their hire, tenure of employment or any term or condition of employment, except as authorized by Labor Code Section 1153 (c).

(b) Discouraging use of and resort to the Board's processes by employees or in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 1152 of the Agricultural Labor Relations Act.

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

(a) Offer Rafael Martinez and Ernesto Orosco, during the next period when these employees would normally work, reinstatement to their former jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their termination.

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

(c) Execute the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages,

Respondent shall reproduce sufficient copies in each language for the purposes set forth hereafter.

(d) Post copies of the attached Notice at times and places to be determined by the Regional Director. The Notices shall remain posted for a period of 12 months. The Respondent shall exercise due care to replace any Notices which have been altered, defaced, covered or removed.

(e) Mail copies of the attached Notice in all appropriate languages, within 20 days from receipt of this Order, to all employees employed during the payroll periods which include the following dates: September 8, 1975, and September 22, 1975.

(f) Arrange for a representative of the Respondent or a Board agent to distribute copies of, and read, the attached Notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings 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. The workers are to be compensated at their hourly rate for time lost at this reading and the question-and-answer period. The Regional Director is also to determine any additional amounts due workers under Respondent's incentive system as well as rate of compensation for any nonhourly employees.

(g) Hand a copy of the attached Notice to each employee hired during the next 12 months.

(h) Notify the Regional Director in writing, within

20 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with this Order.

(i) It is further ORDERED that all allegations contained in the complaint and not found herein to be violations of the Act are hereby dismissed.

Dated: October 26, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

MEMBER RUIZ, Dissenting in Part:

I agree with the majority on all issues, except for its finding that Louis Caratan's speech identifying Ali Massaed as a paid union agent did not create an impression of surveillance.

The information conveyed by the statement, that a specific employee was receiving a specific amount of money from the union, was of a kind which employees would reasonably believe could only have been acquired by surveillance of union activities. The fact that Caratan revealed his knowledge of Massaed's activities during an angry public exchange with him does not mitigate the intimidating effect on employees of the impression of how such knowledge was likely to have been acquired.

I would find this statement to be a violation of Section 1153 (a).

Dated: October 26, 1978

RONALD L. RUIZ, Member

NOTICE TO EMPLOYEES

After a hearing where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act. The Board has told us to send out and post this Notice.

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

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

1. To organize themselves;

2. To form, join or help unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another; and

5. To decide not to do any of these things.

Because this is true we promise that:

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

Especially:

WE WILL NOT fire employees because of their support for the UFW or any other union.

WE WILL NOT discourage employees from filing charges with the Board.

WE WILL offer the following employees their old jobs back, if they want them, and will give them back pay for the time they were out of work: Rafael Martinez and Ernesto Orosco.

Dated: M. CARATAN, INC.

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.

CASE SUMMARY

M. Caratan, Inc. 4 ALRB No. 83
Case No. 75-CE-54-F

ALO DECISION

In his Decision, which issued on March 15, 1977, Administrative Law Officer CALO) Sheldon L. Greene made the following conclusions:

1. Respondent constructively discharged three employees, in violation of Section 1153 (c) and (a) of the Act, by assigning them to work which was less remunerative than that given to other crews and which materially varied from the usual pattern of work assigned to these crews.

2. The discharge of two UFW supporters for unexcused absence from work was consistent with company policy founded upon a rational business justification and therefore did not violate Section 1153 (c) and (a) of the Act.

3. The assignment of a field crew to nonbonus work, within the context of Employer's anti-union animus, was discriminatory.

4. The Employer's characterization of an employee, in the presence of other employees, as a paid union agent created an impression of surveillance and was a violation of Section 1153 (a).

5. The unexplained discharge of a supervisor who had engaged in union activities restrained and coerced employees from participating in such activities and violated Section 1153 (a).

6. The assignment of two employees to work which caused their hands to become bloody and inflamed was a constructive discharge in violation of Section 1153 (c) and (a).

7. The posting of an unfair labor practice charge and a statement by an agent of Respondent that the signers of the charge were trying to wreck his job violated Section 1153 (a)

BOARD DECISION

The Board affirmed the ALO's findings in paragraphs 2, 6, and 7, above. As to paragraph 1, the Board found that the employees were not justified in

quitting so soon after a new assignment which had so far resulted in only slightly less bonus pay than that received by the other crews. As to paragraph 3, the Board found that the assignment in question did not substantially differ from assignments given to other crews and was therefore not discriminatory. As to paragraph 4, the Board found that, in the context of an angry exchange at a public meeting, the remark in question did not suggest that the Employer was engaging in surveillance of employees' union activities. As to paragraph 5, the Board found that the supervisor's activities were not well known to employees, that his discharge was not part of a plan to interfere with the union activities of nonsupervisory employees, and therefore that his discharge did not coerce, restrain or interfere with employees in the exercise of their rights.

DISSENT

Member Ruiz, dissenting in part, would have found that Respondent's identification of an employee as a paid union agent created an impression of surveillance because, irrespective of the context in which the statement was made, it revealed information which employees could reasonably believe Respondent could have obtained only by surveillance of their union activities.

REMEDIAL ORDER

The Board ordered Respondent to cease and desist from its unlawful conduct, and to sign, post, mail and read to its employees a notice explaining its actions. The Board also ordered Respondent to offer reinstatement to the discriminatees and to make them whole for losses suffered.

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
FRESNO REGIONAL OFFICE

M. CARATAN, INC., Respondent/Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 75-CE-54-F

ADMINISTRATIVE LAW OFFICER'S FINDINGS,
CONCLUSIONS, AND RECOMMENDED ORDER

This matter came on regularly for hearing before Administrative Law Officer, Sheldon L. Greene, on January 24th, 1977 and concluded on February 3rd, 1977, at the Delano Community Center, Delano, California. Casimiro U. Tolentino appeared on behalf of the Agricultural Labor Relations Board General Counsel. Respondent was represented by Kenwood C. Youmans, of the firm of Seyfarth, Shaw, Fairweather, and Geraldson. United Farm Workers of America, AFL-CIO, having properly intervened, was represented by Stephen Hopcraft. Having considered the stipulations, testimony, and documentary evidence proffered during the hearing, and having considered arguments made in the briefs submitted following the hearing, the following findings and conclusions are hereby determined:

STIPULATIONS AND INTRODUCTORY FACTS

Respondent M. Caratan, Inc. is a California corporation engaged in agricultural production in Kern and Tulare Counties and at all pertinent times was an agricultural employer as defined by Labor Code §1140.4 (c). Respondent is primarily a grape grower and is among the top third of the grape producers in the Delano area.

Respondent was, at all pertinent times, the owner and operator of a labor camp known as Camp One, located on Cecil

Avenue in Delano, in which some of Respondent's employees reside. Luis Caratan was, at all pertinent times, the president of M. Caratan, Inc. His duties included overall direction of personnel. The following persons, in addition to Luis Caratan, were supervisors as defined in Labor Code §1140.4 (j): Milan Caratan, manager; Travis Pruitt, foreman; John Tarnoff, foreman; Ahmed Alomari, crew boss; Muthana A. Alomari, straw boss; Fermin Martinez, crew boss, and Ramon Trevino, assistant supervisor. Luis Caratan, Milan Caratan, Travis Pruitt, John Tarnoff, Ahmed Alomari, Muthana Alomari and Fermin Martinez were agents of Respondent in connection with any conduct relevant to the matters described in the complaint filed against M. Caratan, Inc. as subsequently amended.

United Farm Workers of America, AFL-CIO is, and was at all pertinent times, a labor organization within the definition of Labor Code §1140.4(f). Similarly, at all pertinent times, the Western Conference of Teamsters, Agricultural Division, together with its affiliated locals, was a labor organization within the definition of Labor Code 51140.4(f).

The Agricultural Labor Relations Board conducted a representation election on September 6, 1975, on the premises of Respondent, M. Caratan, Inc., among its agricultural employees pursuant to a direction and notice of election issued by the Regional Director of the ALRB, Case No. 75-RC-4-F.

The results of the election, made known on September 6, 1975, were as follows: UFW - 121 votes; no union - 41 votes, and 16 challenged ballots. The Western Conference of Teamsters was not on the ballot. Respondent and Western Conference of Teamsters subsequently filed objections. The election has not been certified and no determination has been made as yet regarding the objections.

Prior to the September 6th election, Respondent engaged in intermittent conflict with the UFW and its antecedent organizations over the issue of UFW representation of Respondent's employees. These episodes include an organizational strike against M. Caratan in 1965, which was resisted by Respondent, and a boycott of grapes marketed by M. Caratan in 1968, which

boycott was conducted on a nationwide basis and was terminated only in 1970 when all of the Delano area grape growers, including Respondent, entered into collective bargaining agreements with the UFW. In 1973 Respondent refused to sign a new contract with the UFW and the Union resumed organizing activities, including, but not limited to, picketing of Respondent. From 1973 to the election date, Respondent was under contract with the Teamsters. Prior to the election, Respondent manifested a "no-union" policy to its employees, and encouraged its employees to vote against the United Farm Workers.

Ali Salah, Ali Alomari and Ahmed T. Ahmed

All Salah, Ali Alomari and Ahmed T. Ahmed were known as the "Arab swamping crew," one of three 3-man crews whose primary function was to load full boxes of grapes and to scatter empty boxes for the use of the pickers. Additional functions assigned by supervisor Travis Pruitt included cleaning harvested fields of empty boxes, occasional hauling, and work with pallets.

Base pay for the swampers was $2.54 per hour for their primary work of loading and distributing boxes. They also received a bonus of l.5¢ per full box and .25¢ per empty box per crew. Usually the supervisor distributed the functions as evenly as possible between the three crews rotating loading full boxes, distributing empties and cleaning harvested fields as required to give each of the three crews an opportunity to earn similar amounts in bonus and base salary.

The usual practice of rotation of crews occurred whether the harvest was producing a high volume of 9000 or more boxes per day or as a result of transition from one field or variety producing only 4000 to 6000 boxes.

The Arab crew was highly regarded by their supervisor as very productive workers who carried out assigned tasks willingly and dependably. The crew had worked as swampers in previous years for Respondent.

Ahmed T. Ahmed was called "union" by Pruitt because of his outspoken support of the UFW. Ali Alomari, the son of the Arab crew foreman, Ahmed Alomari, was similarly an identified UFW supporter.

On the day of the election, following the announcement of the election results, Ahmed T. Ahmed was a prominent figure in an exuberant demonstration and march by the Arab crew in expression of their satisfaction with the union victory. They moved from the Arab camp, where they resided, to the Mexican camp chanting "Chavez si, Teamsters no."

Ahmed T. Ahmed's photograph appeared in the Los Angeles Times the following day showing him participating in the march with other Arab workers. The photo was seen by his supervisor Pruitt and Luis Caratan.

On the first work day following the election, September 8, 1975, the Arab crew was assigned to scattering empty boxes for three hours. They also cleaned up the field for three hours and cleared debris, such as broken concrete pipes, from a field on the instructions of Luis Caratan for an additional three hours. In contrast, the other two crews each worked for nine hours loading grapes, a cotal of 6146 boxes, followed by an additional two hours cleaning fields.

Cleaning debris, such as concrete or rocks, from the fields was usually performed by the irrigators.

On the day following the election, the Arab crew worked two hours less than the other crews and had only three hours of low bonus work in contrast to a full nine hours of high bonus work assigned to the other two crews.

The following morning the Arab crew appeared on the job ready for work, having filled the gas tank of the truck. Pruitt assigned them to scatter empty boxes for the entire day. When they protested the assignment, they were told by both Travis Pruitt and Luis Caratan that there were no other assignments for them.

They quit their jobs as a result that same morning without commencing work.

That same day the two remaining crews loaded grapes for eight hours, a total of 5549 boxes, and cleaned fields for an additional four and one-half hours.

The following work day, September 10, the two remaining crews and a new crew drawn from the Spanish-surname workers continued the transition from table grapes to juice grapes. All three crews loaded table and juice grapes, a total of 3977 boxes. All three crews also scattered 12,812 empty boxes in the juice grape fields, and one crew spent several hours cleaning the table grape fields of empty boxes.

The work assignments to the Arab crew on September 8 and September 9 materially varied from the usual pattern of work assignments to the swamper crews. The assignments were detrimental to the Arab crew and to that extent discriminated against them.

The preponderance of the evidence reflects that the business justification advanced by Respondent, that the assignment was necessary due to the transition from table grapes to juice grapes, was pretextual in that the assignment departs from usual practice even during transition stages since, even during such periods of reduced productivity, the work was normally completed by rotation of the swamper crews on any given day.

Mohamed T. Saeed and Ahmed Alharbi

A necessary process in the cultivation of certain grapes is the pulling of leaves from the vines to expose the grapes to additional sun. The purpose of leafing is to enhance the color of the grapes to increase their marketability.

The process must be completed approximately three to four weeks before the grapes are harvested. In 1975 the leafing coincided with the end of the Thompson seedless harvest and before the juice grape harvest gained its highest productivity.

The leafing process requires the diversion of grape pickers to leafing.

Because it is a non-bonus job which follows the high bonus table grape harvest and absenteeism is a problem, Respondent has for many years maintained a policy of termination of workers who fail to work in leafing without a valid excuse.

The termination policy during leafing is at variance with the normal termination policy which is to tolerate occasional lateness or absence without termination.

Mohamed T. Saeed and Ahmed Alharbi worked on September 11, 1975 as grape pickers in the Alomari crew. Both were known UFW supporters and activists. It is more probable than not that they were aware of the strict termination policy pertaining to leafing since it had been announced to the workers while they were present.

Saeed and Alharbi went to Bakers field by car on the night of September 11. Bakersfield is about 30 miles from Delano and is connected by freeway. On the way back, before midnight, after they had traveled for about 45 minutes, they had a flat tire on the freeway and, lacking a jack, testified that it was necessary to spend the entire night in the car. Saeed testified that the tire was changed the next morning, September 12, with the help of a passing motorist who lent them *a* jack and they arrived at the camp at 9:00 a.m. They remained at the camp until Ahmed Alomari, the crew supervisor, returned at 11:30 a.m. and terminated them for unexcused absence from work. On September 12, the day of their termination, and for the next three days, the Alomari crew worked the entire day at leafing.

Saeed and Alharbi did not have a valid excuse for failing to report for work at or shortly after 7:00 a.m., the commencement of the work day. Their termination was consistent with a policy which itself was founded upon a rational business justification. No showing was made that Respondent departed from the stricter termination policy during leafing periods.

It is more probable than not that notwithstanding the proximity of the termination to the election and Saeed and

Alharbi's manifested support for the UFW that the termination was founded upon a reasonable application of company policy.

The Ahmed Alomari Crew

The crew of workers supervised by Ahmed Alomari was made up of Arab-speaking personnel and was substantially engaged as grape pickers during the harvest.

A second crew similarly employed was made up of Spanish-speaking workers.

All grape harvesters received the hourly rate plus an incentive bonus based upon productivity for grape picking.

In addition to grape picking, the crews periodically performed other functions as directed, such as cutting canes from the vines and pulling leaves.

Cane cutters received a bonus as well but the overall income from cane cutting was significantly less than that received from picking grapes. No bonus whatsoever was paid for leaf pulling.

Following the election, on September 10, Respondent hired a new mixed nationality crew supervised by "Fareh".

The first two days that the Fareh crew was employed, September 10 and September 11, they spent the whole day, eight and one-half hours, working in the high bonus category, picking grapes.

In contrast, the Alomari crew spent only part of the time picking but devoted seven and one-half hours to cutting canes and six hours to pulling leaves over the two day period.

On or after September 18, 1975, the Agricultural Labor Relations Board served Luis Caratan with a charge of unfair labor practice signed by four memebers of the Alomari crew.

A supervisor, at Luis Caratan's direction, posted the declaration prominently in the Arab camp where it could be seen by the other workers.

Following the posting of the notice, Ahmed Alomari told some of the members of the Arab crew that the signers of the complaint were not wanted by the company because they are Chavez

supporters and that they were making his job difficult.

On September 22, the Alomari crew spent the entire day pulling leaves while the other crews each spent the whole day picking grapes.

On the same day, Luis Caratan brought the crew together in the field and advised them that it was his desire to have no union on the Caratan ranch. To that end he announced his intention to call for new elections.

Following that speech, in response to a hostile remark from Ali Massaed, a member of the crew and one of the UFW election observers, Luis Caratan asked Massaed if the UFW was still paying him to agitate the workers. Luis Caratan acknowledged the remark and stated that he was aggravated by Massaed's unsolicited comments during his presentation.

Respondent's business records reflecting the crew activity during the 1974 and 1975 harvests show that even during leaf pulling periods, crews usually spent part of the day doing incentive bonus work.

September 22 was a departure from the usual procedure in that one crew, the Alomari crew, spent the entire day doing non-bonus work while the other two crews spent the same time grape picking.

Luis Caratan's speech, in the context of the contemporaneous non-bonus work assignment, the posting of the unfair labor complaint, Ahmed Alomari's comments, and the labeling of Massaed as a paid agent of the UFW, had a cumulative intimidating effect on members of the Arab crew and acted as a restraint on their expression of their support for, and participation in, the UFW.

Isolated from surrounding events, the transient job assignments to the Arab crew would reflect the proper exercise of managerial discretion in the apportionment of work. But viewed in the context of Respondent's no union policy, the manifestations of pro-union sentiment of the Arab crew following the election, the recent election, the hiring of a. new crew following the election, and the unfair labor practice charge initiated by members of the Arab crew, and Luis Caratan's

contemporaneous speech, the work assignment of September 22 acted as a restraint on the exercise of the right of the crew members to support and participate in the UFW.

To the extent that Luis Caratan in his September 22nd speech implied that there was no place for UFW supporters on his ranch, the speech in itself carried the threat of reprisal for UFW supporters.

Similarly, the identification of Ahmed T. Saeed as a paid union agent, whether the product of anger or design, interfered with and restrained employees in the exercise of their rights to participate in a union. Workers were given to believe that the employer was privy to information regarding the extent of union activity of individual employees.

The belief that the union activists were known to the employer discouraged overt participation in union activities out of fear of discrimination by Respondent, in light of Respondent's active "no union" policy and its manifested intent to resist the preference of the employees for UFW representation.

Ramon Trevino

Ramon Trevino had been employed between 1969 and 1975 as the assistant to the crew foreman of the Mexican crew.

Prior to the election, Trevino, at the request of fellow employees Rafael Martinez and Ernesto Oroszco accompanied them to the UFW offices for the purpose of reviewing a list of M. Caratan Inc. employees to verify eligibility to vote.

On or about September 13, Trevino was terminated summarily without cause by Luis Caratan. Caratan's only explanation for the termination was, according to Trevino, that some people told Caratan bad things about him.

The natural consequence of the summary discharge of an assistant supervisor whose pro-union sentiments were known by at least some of the workers and who had been in the employ of Respondent for seven years and whose discharge occurred within a week of the election, was to discourage membership in, and support of, the UFW and to restrain and coerce employees

from participating in a labor union.

Trevino's review of the Caratan employee lists, and Caratan's subsequent identification of another worker as a paid agent of the UFW are convincing circumstantial evidence that the unexplained summary termination of Trevino was in retaliation for his support of the UFW prior to the election.

Rafael Martinez and Ernes to Oroszco

Rafael Martinez and Ernesto Oroszco were employed as grape packers in the 1975 harvest.

Both were highly regarded as packers. They were good friends and both had been involved in the UFW prior to the election, attending union meetings and visiting union headquarters.

They were paid $2.54 per hour as packers, plus a bonus for each box.

Martinez served as an observer for the UFW during the election having been chosen by his fellow workers.

Luis Caratan knew that he had served as an observer for the UFW.

On the morning of September 18, 1975, the crew foreman, Fermin Martinez, told them to leave the bus which transported the workers from the camp to the fields. Martinez and Oroszco were taken by Luis Caratan to a field of milo and directed to pull "careless weeds" by hand out of the milo.

The "careless" weed is a tall weed with a bristly stalk and a tap root. When mature it produces prolific seeds.

The milo had been planted on a leased field, six inches apart so that it was not feasible to remove the weeds by mechnical means without damaging the milo. The time of the removal of weeds such as the careless weed is important since the field must be moist enough to facilitate the removal of the weed but dry enough so that workmen can walk in the field. The field had been irrigated a few days before and the ground was right for the removal of the weeds.

The workers were not supplied with gloves, hoes or water.

The pulling of the weeds with their bare hands for a three to three and one-half hour period caused their hands to become irritated due to the adhesion and penetration of bristles from the stalks.

They returned to the camp on foot before lunch because their hands were irritated and they were chirsty. They were not assigned any work for the rest of the day but, in any event, were unwilling to work due to the inflamed condition of their hands.

The next morning they were reassigned to pull weeds in the milo by Luis Caratan who asserted that they had not completed the assignment.

They refused to resume the assignment stating that their hands were too irritated. Luis Caratan advised them that pulling weeds was the only job he had for them. Both workers quit and requested their checks.

In previous years, Martinez had worked for Respondent only until mid-September at which time he was usually employed as a foreman by Harry Carrion, an Exeter grower.

Weeding had previously been done by hand in and about the milo field during 1975 but the work records indicated that the weeds were hoed and cut on some occasions.

Requiring Martinez and Oroszco to hand pull bristly weeds for a sustained period of time without providing them with gloves or hoes and further without providing water discriminated against them with respect to their conditions of employment notwithstanding the existence of a valid business purpose to remove the weeds.

Ordering them to continue to pull weeds the following day despite the fact their hands remained irritated was a further instance of discrimination regarding the conditions of employment. The discrimination is punctuated by the fact that Respondent failed to prove sufficient business necessity for the task in that another worker was not assigned to do it after Martinez and Oroszco refused and quit.

DISCUSSION

The preponderance of the evidence reflects that the work assignments of the Arab swamper crew on September 8 and 9 were discriminatory and departed from usual business practices and were, therefore, violative of Labor Code §§ 1153(a) and (c). The September 22 assignment of the Alomari crew similarly departed from usual business practices and was discriminatory and violative of Labor Code §§ 1153(a) and (c) when viewed in the context of the contemporaneous "no union" speech made by Luis Caratan; the previous posting of the unfair labor practice charge made by members of the Alomari crew, and the allusion to the union ties of another crew member repeated before members of the crew by Luis Caratan.

The conditions of employment relevant to the work assignment of Rafael Martinez and Ernesto Oroszco to pulling weeds in the milo on September 18 and again on September 19 were violative of Labor Code §1153(c).

The discharge of Mohamed T. Saeed and Ahmed Alharbi was a justifiable implementation of the termination policy during leafing and was not discriminatory. The summary discharge of Ramon Trevino, a supervisor, was violative of Labor Code §1153(a) with respect to its foreseeable impact on other employees.

The record discloses transient incidents of discriminatory conditions of employment directed at some supporters of the UFW within approximately two weeks of an election in which the employees of Respondent had overwhelmingly opted to be represented by the United Farm Workers. The acts are framed on a background of Respondent's long-term animus against the United Farm Workers and the employer's articulated intent to resist recognition of the UFW by seeking a new election. The disparate treatment must be measured for its tendency to "interfer with, restrain, or coerce" employees regarding their rights to support and participate in a labor union (Labor Code §1153(a)) or to

discriminate regarding tenure or conditions of employment to "discourage membership" in a labor union.

The questionable conduct of Respondent falls into several categories:

1. Assigning disadvantageous, or less remunerative, jobs to workers;
2. Terminating an assistant supervisor, and
3. Conduct which, while not directed at any given worker, might have an impact on workers as a whole.

A further criterion for evaluating a particular job assignment is whether an employer is implementing a general policy of fairness between employees engaged in similar job categories and whether the particular assignment is justified by business necessity or purpose. A transient, anomalous disparity in a job assignment would not constitute unfair labor practice if cloaked by a legitimate business purpose. However, a transient, but notorious, disparity in job assignment occurring in the context of a protracted attempt on the part of the employer to resist a specific union and falling on overt union supporters could constitute an unfair labor practice if its foreseeable result was to either constructively discharge a union activist or intimidate other employees from engaging in union activities. Accordingly, the disparate treatment, though affecting only one or more employees adversely, could, nevertheless, constitute a violation of Labor Code §§ 1153(a) and (c) with respect to its effect on the remaining work force.

Similarly, the summary termination of a supervisor would violate Labor Code §1153(a) if the natural and probable result of the termination is the intimidation of existing employees from support of a labor union. This would be true even though the supervisor himself is not protected by the Agricultural Labor Relations Act. See Krebs and King Toyota, Inc., 197 NLRB #74,

80 LRRM 1570.

What constitutes a constructive termination is a question of fact. The occasional assignment of workers to jobs which are the normal and usual assignments they would perform, but which involve the payment of a smaller bonus or no bonus at all, would not constitute a constructive discharge absent a consistent pattern of discrimination between individual workers, or groups of workers, otherwise similarly employed. However, assigning a worker even for a day or two to a job which will result in easily avoidable physical discomfort, minor injury, and reduced income could, in the context-of a manifested anti-union animus, constitute a constructive discharge.

Proof of the employer's intent to discriminate or intimidate is not necessary, the intent will be presumed, if the natural and probable consequences of the employer's acts are to restrain or coerce workers in the exercise of their right to participate in union activities. See Radio Officers Union vs. NLRB, 347 U.S. 17, 33 LRRM 2417 (1959). Related circumstances which confirm the employer's active anti-union bias provide additional evidentiary support for the conclusion that the employer intended to produce the results which flowed naturally from his acts.

The affirmative implementation of a non-union policy by the employer colors his actions so that a job assignment to a known union activist could easily be construed by employees as retaliatory, and could have a tendency to inhibit employees from manifesting pro-union sentiments. Luis Caratan, in his testimony, acknowledged the reticence of many employees in expressing to him their support for the UFW. In imposing responsibility, Respondent will *be* held accountable for the acts of supervisors performed within the scope of their authority even without proof of specific prior authorization.

But not every termination of a union activist carries the stigma of discrimination. The unequivocal violation of a clearly articulated policy by a union activist resulting in the employee's termination would be within the employer's rights

if the termination was necessitated by a consistent application of that policy. Respondent having provided proof that such a strict termination policy existed only during leafing, the burden shifted to the General Counsel to show that the policy was not consistently applied. But, with reference to the termination of Mohamed T. Saeed and Ahmed Alharbi, such evidence was not forthcoming and the excuse for being late, proffered by the terminated employees, was not persuasive. The union activism of one or both employees would not shield them from the reasonable application of the employer's policies applied without discrimination.

DISCUSSION OF RECOMMENDED ORDER

Respondent has violated Labor Code §§ 1153(a) and (c). It is recommended that Respondent be ordered to cease and desist from further violations of the Act and that the Board take affirmative action to insure the effectuation of the Act in the future.

Since Rafael Martinez, Ernesto Oroszco, the crew of Ahmed Alomari employed on September 22, 1975, Ali Alomari, and Ahmed T. Ahmed were subjected to discrimination in the terms and conditions of their employment, Respondent should be ordered to offer similar employment to them prior to the 1977 harvest. The Board should ascertain any loss owing to the constructive discharge of Rafael Martinez and Ernesto Oroszco and Respondent should be ordered to compensate them for such loss.

The facts adduced reflect that the addition of Ramon Trevino to the complaint was timely and did not result in prejudice to Respondent. The issue of the discharge of Ramon Trevino was within the scope of the general charge. His termination occurred within the context of the post-election discriminatory acts and Respondent had ample opportunity during the entire hearing to meet it, notwithstanding the fact that the amendment was first formally made on the initial day of the hearing, inasmuch as the hearing ran for nearly two weeks.

The transient nature of the agricultural work force, the milti-lingual composition of the work force and problems of illiteracy make adequate notification of workers of an ALRB order difficult. Effective notification might be obtained by requiring Respondent to mail a notice of the order to all workers employed in 1975, 1976 and 1977 and that such notice be in English, Spanish and Arabic. Additionally, a copy of the notice should be given to each new employee hired in 1977 within two days of his employment.

A brief synopsis of the notice should be read to each employee in his native tongue at the time the notice is given to him so that he understands its import. In addition to reading the clearly worded synopsis to each employee in his native langugage, Respondent shall ask the employee if he understands the contents.

Additionally, the notice shall be posed in English, Spanish and Arabic at each of the residential farm labor camps maintained by Respondent for his employees. Such notice shall be posted in a conspicuous place such as the dining area and shall remain in place throughout the duration of the 1977 harvest.

Respondent shall advise the Board in writing, under penalty of perjury, of his compliance with the order.

O R D E R

Based upon the record, and the findings and conclusions, it is recommended that the following Order: issue:

(1) That Respondent cease and desist from any violation of Labor Code §§ 1153(a) and (c) and that Respondent specifically refrain from. any discrimination in job condition, assignment or compensation or from actually or constructively discharging, laying off, or in any other manner engaging in any act the natural and probable consequence of which is to restrain employees in the exercise of their rights to support and participate in a labor union.

(2) That Respondent refrain from, in any manner, interfering

with, restraining or coercing employees in the exercise of their right to support and participate in 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 conduct is authorized by Labor Code §1153(c) .

(3) Further, that Respondent offer employment to Rafael Martinez, Ernesto Oroszco, the crew of Ahmed Alomari as constituted on September 22, 1975, Ali Salah, Ali Alomari and Ahmed T. Ahmed to perform the same functions they performed during the 1975 harvest and that such offers be made to each of them at least ten (10) days prior to the commencement of the 1977 harvest.

(4) That Respondent cooperate with the ALRB, or its agents, upon request in furnishing any further information which will enable the ALRB to ascertain any other compensation due Rafael Martinez and Ernesto Oroszco as a result of the constructive discharge of both employees.

(5) That Respondent mail or deliver to each employee in Respondent's employ during 1975, 1976, and 1977 a copy of a notice to be prepared by the ALRB General Counsel's office summarizing the outcome of this case, the decision and order. The notice shall be translated into understandable Arabic and Spanish and shall be made available to each employee in both English and the employee's mother tongue.

(6) Additionally, Respondent shall distribute to each employee a copy of the notice in English and the employee's native tongue within 48 hours of employment, commencing 30 days following receipt of this Decision and continuing for 12 months thereafter. A synopsis of the notice in simple and understandable language prepared by the General Counsel's office shall be read to the employee by Respondent's agent at the time of such employment, and Respondent's agent shall further ask the employee verbally if the employee understands the import of

the notice. If the employee desires that Respondent's agent read the notice in its entirety, the agent shall do so.

(7) Respondent shall, moreover, post the Board's Order in a conspicuous place in each of the farm worker labor camps maintained by Respondent for its employees.

(8) Respondent shall advise the Regional Director of the Fresno Regional Office in writing, under penalty of perjury, within thirty (30) days after receipt of this Decision and thereafter at three month intervals for the duration of 1977 of Respondent's compliance with the Order.

It is further recommended that the remaining allegations of the amended complaint inconsistent with this Decision and Order, particularly paragraphs 12, 14 and that part of paragraph 13 pertaining to constructive discharge, be dismissed.

Dated: March 15, 1977

SHELDON L. GREENE
Administrative Law officer