

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MEL-PAK VINEYARDS, INC.,)	
)	
Respondents,)	Case No. 77-CE-101-C
)	77-CE-106-C
and)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	5 ALRB No. 13
)	
Charging Party.)	

DECISION AND ORDER

On May 19, 1978, Administrative Law Officer (ALO) Leonard M. Tillem issued the attached Decision and Order in this proceeding. Thereafter, the Charging Party, Respondent and General Counsel each filed timely exceptions with a supporting brief. The Charging Party and the General Counsel each filed a brief in reply to Respondent's exceptions,^{1/} and Respondent filed a brief in reply to General Counsel's exceptions.

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.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to

////////////////////
////////////////////

^{1/}We deny Respondent's Motion to Strike the Charging Party's exceptions for failure to cite to portions of the record which support its exceptions, in compliance with Section 20282(a) of the Board's Regulations. Tenneco West, Inc., 3 ALRB No. 92 (1977).

affirm the rulings, findings,^{2/} and conclusions of the ALO and to adopt his recommended Order, as modified herein. Dated:

February 20, 1979

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

^{2/}The ALO found that Rosa Lopez worked a total of five and one-half days for Mel-Pak (ALO Decision, p. 71. Lopez in fact worked only four and one-half days (May 31, June 2, June 3, June 6 and June 7). However, this discrepancy does not affect our decision.

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to send out and post this Notice.

We will do what the Board has ordered, and we also 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 threaten to refuse to hire or rehire any employee because he or she is a member or supporter of the UFW or any other union.

WE WILL NOT spy on you or interfere with you while you are talking to union organizers or are engaged in other union-related activities.

WE WILL NOT instruct you not to sign UFW authorization cards, or in any other manner interfere with any employee in the exercise of the rights described above.

Dated: MEL-PAK VINEYARDS, 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

Mel-Pak Vineyards, Inc.

5 ALRB No. 13
Case Nos. 77-CE-101/106-C

ALO DECISION

The ALO concluded that Respondent did not violate Section 1153(c) of the Act by discharging employee Rosa Lopez, finding that she was terminated because of her poor work performance and insubordination, notwithstanding Respondent's anti-union animus and knowledge of her organizing activities. The ALO noted that Respondent's tally sheets, which list the number of boxes picked by each team of workers daily, reveal a marked decrease in productivity for Lopez and her partner, Miguel Ceballos, on her last two days of work. He also found that Lopez on several occasions used profane language and provoked at least two arguments with her supervisor, Maggie Meza.

The ALO found that the General Counsel failed to prove that Mel-Pak supervisor Michael Castaneda discharged Lopez and Ceballos, then reinstated them when they said they would file charges with the ALRB.

The ALO concluded that supervisor Meza's remark, that if she had known Lopez and Ceballos were union supporters, she would not have hired them (an implied threat to discriminate in hiring based on union sympathies), violated Section 1153(a) of the Act.

The ALO found that Meza followed UFW organizers around and shouted to the workers that they did not have to sign authorization cards, and concluded that such surveillance and interference were in violation of Section 1153 (a) of the Act.

The ALO denied Respondent's motion to dismiss the complaint in its entirety based on the Charging Party's failure to comply with Section 20213 of the Board's Regulations, which provides that, "the Charging Party shall present declarations in support of the charge under penalty of perjury to the Regional Director," as declarations were prepared and submitted during the hearing and there was no prejudice to the Respondent.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALO.

REMEDIAL ORDER

The Board ordered Respondent to cease and desist from threatening to refuse to hire or rehire any employee because he or she is a member or supporter of the UFW or any other union, from spying on or interfering with employees while they are talking to union organizers or engaged in other union-related activities, and from instructing employees not to sign UFW authorization cards. The Board also ordered reading, posting, distributing and mailing of a Notice to Employees.

* * *

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

* * *

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Case No. 77-CE-106-C

Charging Party,

vs.

MEL-PAK VINEYARDS, INC.

Respondent.

_____ /

Jorge Carillo, appearing for the
General Counsel

Linton Joaquin, of Salinas,
California, appearing for the
Charging Party

Stacy D. Shartin, of Los Angeles,
California, appearing for Respondent

DECISION

STATEMENT OF THE CASE

LEONARD M. TILLEM, Administrative Law Officer:

This case was heard before me in Coachella, California, on August 31, September 1, 2 and 16, 1977. ^{1/} The order consolidating the cases and the first amended consolidated Complaint issued on June 14th. Case Number 77-CE-101-C was settled prior to the hearing by the parties. Case Number 77-CE-106-C was the subject of the hearing.

The Complaint alleges violations of Section 1153(a) and (c)

^{1/} All dates referred to herein are in 1977 unless otherwise stated.

of the Agricultural Labor Relations Act, herein called the Act, by Mel-Pak Vineyards, Inc., herein called Respondents or Mel-Pak. The Complaint is based on charges filed on June 8th, by the United Farm Workers of America, AFL-CIO, herein called the Union or U.F.W. Copies of the charges were duly served upon Respondents.

All parties were given full opportunity to participate in the hearing. After the close of the hearing the General Counsel and Respondent each filed a brief in support of their respective positions.

Upon the entire record, including my observations of the demeanor of the witnesses and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction.

Mel-Pak Vineyards, Inc., Respondent, is an agricultural corporation organized under the laws of the State of California. Respondent is engaged in the cultivation and harvest of table grapes on properties located in Riverside County of the State of California.

The Complaint alleges, Respondent admits, and I find that the Respondent is an agricultural employer within the meaning of Section 1140(c) of the Agricultural Labor Relations Act.

The Complaint alleges, Respondent admits, and I find the United Farm Workers of America, AFL-CIO, to be a labor organization representing agricultural employees within the meaning of Section 1140.4 of the Act.

The Complaint alleges, Respondent admits, and I find that at

all times pertinent herein Margaret Meza and Michael Castaneda were supervisors and agents of the Respondent acting in its behalf within the meaning of Section 1140.4(j).

II. Motion to Dismiss Due to Charging Party's Failure to File Supporting Declarations.

Midway through the hearing, Respondent made a motion to dismiss the Complaint in its entirety based upon the failure of the Charging Party to have presented valid declarations in support of the charges in compliance with Section 20213 of the Board's Regulations.

Section 20213 provides that:

"the Charging Party shall present declarations in support of the charge under penalty of perjury to the Regional Director ..."

The motion to dismiss was denied.

Respondent argues that Section 20213 is mandatory and failure to comply with it requires dismissal of the case. I disagree. Whether "shall" renders a statute mandatory depends on the intention of the legislature. Furthermore the use of the word "shall" may be construed to be merely directory. 34 Cal.Jur.2d, Section 157; Carter v. Seaboard Finance Co. 33 C.2d 564, 203 P.2d 758 (1949).

There is no indication that the legislature intended Section 20213 to be interpreted as mandatory. In the absence of stronger language prohibiting non-compliance or words withdrawing the power to act after a fixed time the presumption is that the section is merely directory. Cake v. Los Angeles 164 C.705, 130 P.723 (1913); Hollman v. Warren 32 C.2d 351, 196 P.2d 563 (1948).

Certainly it is desirable and important that the Charging Party comply with this directive of the Board. However in view of the fact that: a) the Respondent was not prejudiced in this case by the non-compliance; b) that the Charging Party did comply once Respondent pointed out the deficiency in the record; and c) that no new evidence or allegations were raised in the tardy declaration; I find that it is not in the interest of justice to dismiss the Complaint on this basis. Additionally, it is my sense of the matter from observations made during the hearing that Respondent has raised a procedural technicality rather than a crucial issue.

I would like to point out that had the Respondent been prejudiced by this omission my ruling or decision might have been different.

III. The Alleged Unfair Labor Practices.

The complaint alleges that Respondents interrogated and threatened to fire Rosa Lopez. It is alleged these acts interfered with the exercise of employee rights guaranteed by Section 1152 of the Act, thereby committing an unfair labor practice within the meaning of Section 1153(a) of the Act.

The Complaint further alleges that Respondent violated Sections 1153(a) and (c) by discharging Rosa Lopez because of her support of and activities on behalf of the Union.

Respondent denies the discharge of Rosa Lopez to have been unlawfully motivated and asserts legal cause for her termination. Respondent further denies engaging in unlawful interrogation of or unlawfully threatening to fire Rosa Lopez.

A. The Operation of the Farm

Respondent is engaged in the cultivation and harvest of five varieties of table grapes on farm land located in the Coachella Valley. The varieties grown and approximate acreage under cultivation are as follows: Pearlettes, 340 acres; Thompson Seedless, 160 acres; Cardinals, 40 acres; Beauty Seedless, 30 acres; and Exotics 20 acres.

The grape vines are planted in parallel rows and various viticultural practices are performed upon these vines during the year. The essential viticultural practices are: (1) pruning, performed in December; (2) thinning, performed in mid-March; and, (3) harvesting, performed in late May through early or mid-July.

Respondent's employees fluctuate from 45 to 300 depending upon the seasonal needs. The maximum number of employees are required during the harvest season. Harvest times vary for different varieties of grapes. The number of employees necessary to fill the harvest crews corresponds to the acreage under cultivation and size of the crop. The same employees do not necessarily work on each of the harvest operations.

Harvest employees are expected to pick and pack the grapes. Harvesters generally work in pairs or teams. The team picks the ripe grapes on either side of a vine as they progress along the rows.

Workers are paid by the hour as well as by the number of boxes picked. Therefore, a tally of hours and a tally of packed boxes is recorded for each worker. Each team is assigned an identification number which is marked on the outside of the packed boxes.

The supervisors keep track of the number of boxes picked and enter the total on tally sheets.

B. The Interrogation of and Threats to Fire Rosa Lopez.

In paragraph 5(b) of the Complaint, as amended, it is alleged that beginning June 6, 1977, Margaret Meza and Mike Castaneda interrogated and threatened to fire Rosa Lopez for her support of and activities on behalf of the Union.

Mr. Miquel Ceballos ^{2/} testified that on June 6th Mrs. Meza saw him wearing a U.F.W. button and told him that if she'd known he was a "Chavista" she would not have hired him. Later, according to Ceballos and Lopez, Meza repeated this same statement in front of Rosa Lopez.

Another worker, Robert Reyes, ^{3/} testified that sometime before Lopez was discharged he heard Meza shouting at Lopez: "If I had known you were a Union (sic), I would never have given you a job." ^{4/} Reyes testified that this statement by Meza was made during a vociferous argument between the two. He did not remember the exact date or time of the incident.

Rosa Lopez testified that Meza drove near where Lopez was working on June 6th and shouted insults at Lopez. According to the

^{2/}Testimony elicited at the hearing established that Mr. Ceballos was the discriminatee's work partner and boyfriend. Additionally, Mr. Ceballos was a U.F.W. supporter and former organizer.

^{3/}There is no indication in the record that Reyes had loyalties to either party, nor did he have any known reason to benefit from the outcome of these proceedings.

^{4/}Transcript P.572, 14-15.

testimony Meza said that all "Chavistas" were lazy. Lopez denied being lazy and shouted "Viva Chavista". According to Lopez, Meza yelled "Down with Chavistas".^{5/} Miguel Ceballos testimony corroborated this incident.

Both Lopez and Ceballos testified that Meza interfered with them when they were encouraging other workers to sign authorization cards. According to the testimony, Meza approached the group and told them that they did not have to sign authorization cards for the U.F.W.

C. The Discharge of Rosa Lopez.

Rosa Lopez was fired, on June 7, 1977. Lopez worked a total of 5-1/2 days for Mel-Pak.^{6/} On May 30, 1977, Miguel Ceballos telephoned Maggie Meza about work for himself and Lopez.

In response to Meza's query about their grape harvesting experience he admitted that they had little grape picking experience and had never packed grapes before. Meza told them to come to work the following morning, May 31st. She told Lopez she would teach them how to pack. All parties agreed this skill is not difficult to master.

It is at this point that the testimony of Margaret Meza and Rosa Lopez diverge. Each presents totally distinct and different versions of the events of May 31 through June 7. Only in the rudi-

^{5/}ibid P.365, 1-15.

^{6/}Prior to Ms. Lopez' employment at Mel-Pak she had been employed as a farm worker at other ranches in the Coachella Valley. Between 1971 and January 1977 Ms. Lopez was employed intermittently as a U.F.W. organizer. Ms. Lopez is presently 24 years old. She began doing farm work at the age of thirteen.

mentary facts is there any agreement, i.e.: (1) Rosa Lopez was hired May 31, 1977; (2) Lopez missed work on June 1, 1977; (3) Meza's crew did not work on Saturday, June 4th, or Sunday, June 5th; and (4) Lopez was fired on Tuesday, June 7, 1977, soon after Margaret Meza was served with a subpoena by Douglas Adair, a Union legal worker.

1. The Events of May 31 through June 6.

In accordance with the testimony I find most credible Lopez' first day of work was uneventful. Meza testified that during the day she taught Lopez and Ceballos how to pack the grapes in a manner which would not damage the grapes. Meza noted that they made some packing mistakes on the first day. These errors were not serious and are typical of inexperienced packers.

Meza testified that she did not have any further problems with Lopez' packing or with the "way the work was being done."^{7/} Margaret Meza did testify that during Lopez' first day of work she noticed the discriminatee "sitting down under the vines." Meza asked if Lopez was feeling badly and gave Lopez two aspirin. This is denied by Lopez.

The first day of work Lopez was "credited"^{8/} with picking twenty-nine boxes of grapes. The average number of boxes picked per

^{7/} Transcript, P.261, 9-14.

^{8/} Since teams are given a single identifying number there is no accurate way to determine how many boxes each individual member of a team actually picked. Each is simply "credited" with one-half the total.

worker on May 31st was thirty-eight.^{9/}

The following day, June 1st, Lopez testified that she was too sick to go to work. On Thursday, June 2nd, Lopez returned to the Mel-Pak fields and continued working on Margaret Meza's crew.^{10/} The testimony of Meza and Lopez concerning the events of this day are diametrically opposed. Meza describes in detail how Rosa Lopez continually loafed, sat under the grape vines and even told Meza that she did not intend to work.^{11/}

Lopez, however, contends she worked industriously. The evidence provided by the Respondent's tally sheets supports Lopez' testimony and discredits Meza's. On June 2nd, Ms. Lopez was credited with picking and packing forty-three boxes of grapes. The average that day was thirty-eight boxes per worker.^{12/}

Blanca Garcia,^{13/} another worker in Margaret Meza's 147 crew testified she saw Rosa Lopez sitting down "on the third day"^{14/} on at least three different occasions.

Generally the confrontations between Lopez and Meza occurred in the morning before starting time. Union organizers were present in the fields at these times. Garcia further testified that she heard Lopez start two separate arguments by saying to Meza "Are

^{9/}General Counsel Exhibit (GCX) 4.

^{10/}There was no indication in the record that Lopez was reprimanded by Meza or anyone else for missing work on June 1.

^{11/}Transcript, PP.264-271.

^{12/} GCX 4.

^{13/} and 14/ see page 10

you going to be after me again?" Meza would tell Lopez to get to work. Lopez would try to provoke a fight with Meza, challenging her to "fight me." ^{15/}

Garcia testified that she would on occasion hear Meza and Lopez arguing but did not see or hear how the arguments began. ^{16/} Garcia recalled seeing Rosa Lopez wearing a Union button and talking to Union organizers before the day of Lopez' discharge. However she could not recall the exact date.

Other testimony which helps to reconstruct the events of Thursday, June 2nd, Friday, June 3rd, and Monday, June 6th, came from General Counsel's witnesses Miguel Ceballos, Maurilio Urias, a U.F.W. organizer, and Scott Washburn, a U.F.W. organizer. All of these witnesses basically corroborated Rosa Lopez' testimony that she did not begin any overt Union organizing until Monday, June 6th. Commencing on June 6, according to Ceballos, both he and Lopez wore a

^{13/} Mrs. Garcia's testimony was important because of its credibility, She had neither loyalties nor affiliations with any of the parties in the matter. Additionally, there was no indication she would benefit from the outcome of these proceedings. At the time of the hearing she was not working for Mel-Pak Vineyards. She did not evidence any bias toward or prejudice against the U.F.W. She had worked under U.F.W. contracts previously and had at one time signed a U.F.W. authorization card. On cross-examination the General Counsel elicited that Garcia had also signed an authorization card for a competing Union. Mrs. Garcia's demeanor while testifying supports the conclusion that she was a credible and reliable witness.

For these reasons and due to the totally inconsistent and self-serving versions presented by Rosa Lopez and Margaret Meza, I rely heavily on the testimony of Mrs. Garcia in establishing the events of Friday, June 3rd, Monday, June 6th, and Tuesday, June 7th.

^{14/} The exact date to which Mrs. Garcia was referring is not clear from the testimony. Garcia did testify that she first noticed Rosa Lopez loafing four days before the day that Lopez was discharged. Therefore, it is logical to assume that Garcia observed Lopez for the first time on either Thursday, June 2nd, or Friday, June 3rd.

Union button, distributed authorization cards, leafletted and spoke to other workers on behalf of the Union. Ceballos testified that only after their Union affiliation and activities became overt did Margaret Meza begin to harass Rosa Lopez.

Perhaps the most reliable indication of Lopez' work and productivity on Friday, June 3rd, and Monday, June 6th, is in the tally sheets. On June 3rd, Lopez was credited with packing thirty-two boxes of grapes. The average for that day was thirty-nine boxes. On Monday, June 6th, Ms. Lopez was credited with nineteen boxes. The average that day was thirty-eight. ^{17/}

2. The Events of June 7.

The bulk of the testimony at the hearing concerned the events of this day. Several of the General Counsel's witnesses testified exclusively about their observations at Mel-Pak Vineyards on June 7th. Although the details of this day are in dispute, there is general agreement as to the sequence of the events.

In the early morning U.F.W. organizers arrived at Mel-
Union
Pak. Prior to the start of work a meeting, at which the/organizers were present, was held between the workers and Mel-Pak supervisors, Margaret Meza and Mike Castaneda. The purpose of the meeting was to discuss the grievance of certain workers concerning their lunch

^{15/}Ibid, P. 527, 1-11.

^{16/}On cross-examination, Garcia admitted that on these occasions she "presumed" it was Lopez who started the fight. The General Counsel cites this as evidence of "strong bias" against Lopez. (General Counsel's Post-Hearing Brief, P.16).

^{17/}GCX 4. No testimony was elicited from Rosa Lopez or Miguel Ceballos to explain this marked drop in productivity for Monday, June 6th.

break. Some of the workers felt that they would rather not have a half hour lunch break. This break was made mandatory by Mel-Pak and commenced on June 6th. The workers preferred to skip lunch and thereby finish work a half hour earlier.

Castaneda basically answered the workers with the comment that "rules are rules," and nothing could be done to rectify the situation. According to the testimony of Rosa Lopez, Miguel Ceballos, Scott Washburn, Margaret Meza and Mike Castaneda, Rosa spoke at this meeting. ^{18/} The preponderance of the testimony indicated that Rosa Lopez told the workers that this was another reason they needed a union; since without a union situations would arise when the wishes of the workers would be disregarded. Castaneda replied angrily that the Union had bad rules too, including dues and meetings.

Scott Washburn testified that at this point Meza asked Castaneda if they could fire Lopez and Castaneda replied, "No, nobody is going to be fired today ..." ^{19/} Castaneda related a simi-

^{18/} Mike Castaneda testified that Rosa said the Ranch didn't have the right to make everyone take a half hour lunch break. He told her those were the rules and she could leave if she didn't like them. He remembered Lopez speaking out at the meeting but didn't recall what she had said. Margaret Meza characterized Ms. Lopez as "getting mad and jumping on Mike." (Transcript, PP. 288, 24-25; P. 289, 24-25), Meza further testified that Lopez "cussed" both her and Castaneda. Castaneda warned her she would be terminated if the cussing didn't stop and if she didn't start working. Castaneda himself could not recall making these statements.

^{19/} Transcript, P. 179, 10-12.

lar version of this event in his testimony. ^{20/}

Castaneda then told the workers to begin working and the meeting ended. The U.F.W. organizers proceeded to their cars and left the vineyards.

Immediately after this meeting Meza directed Lopez and Ceballos back to a row that had already been picked. She ordered them to repick it. Meza testified that she did this because the row needed further picking. Ceballos and Lopez both testified they believed this was in retaliation for Lopez' pro-Union statements at the meeting. ^{21/} Ceballos and Lopez further testified that they picked only 1/4 of a box of grapes from the once-picked row. ^{22/} The repicking took five to fifteen minutes.

At lunch time on June 7th the Union organizers returned. In addition, Doug Adair, a U.F.W. legal worker, came onto Respondent's property to serve an A.L.R.B. subpoena on Margaret Meza. Adair testified that one of the organizers pointed Meza out. He approached Meza while she was sitting down on a box eating lunch. Detailed testimony, some repetitive, some inconsistent, was offered by both the General Counsel and the Respondent as to the manner in which the

^{20/} Castaneda testified that after Rosa Lopez spoke out at the meeting Margaret Meza said to him, "See what I told you. She's been that way with me ever since she started working." Castaneda replied, "Well as long as she does her work, I can't do anything about it." (Transcript, P.537, 14-17).

^{21/} The details of what actually happened at this time are confused. Ceballos and Lopez corroborated one another's testimony that they protested Meza's repicking order as discriminatory to Castaneda. Castaneda told them they were both fired. Ceballos then said they would file charges. Castaneda then told them to continue working. Castaneda and Meza both denied this incident.

^{22/} Blanca Garcia testified that it was not unusual to be ordered to "repick" a row of grapes. At most, 3-4 boxes of grapes would be gathered in a repick.

subpoena was served on Margaret Meza.

There is no dispute over the facts that the temperature was approximately 115°, that Meza's and Adair's tempers flared, and as a result an emotionally charged melee resulted.

Respondent argues that this was a deliberate effort on the part of the Union to arouse Meza's anger and create a situation which would discredit Meza in front of the workers.

General Counsel admits that part of the purpose in serving subpoenas in front of the workers is to demonstrate to them that the law does function to protect them, however denies any planned provocation. Both the General Counsel and Respondent elicited testimony to support their disparate interpretations of these events.

The credible testimony indicates that Adair touched Meza on the arm with the subpoena, that Meza refused the copy Adair offer to her, that Adair began describing, in detail, the consequences Meza would suffer if she disregarded the subpoena, and that Adair began to walk away. Meza then followed him shouting. Many workers were attracted to the scene including Rosa Lopez. She watched the events from the side of the road. At one point Meza yelled that she was an American citizen with rights and not a wetback. Rosa Lopez spoke out disputing the implication that the workers were wetbacks. Then a vociferous argument ensued between the two. ^{23/}

The argument ended when an A.L.R.B. van arrived on the scene. People crowded around the van trying to tell his or her

^{23/} All of the witnesses to this scene agree that Lopez and Meza shouted insults at each other. There is some disagreement as to how the argument was initiated and which of the two participants used profanity.

version of what had happened. Miriam Chaumont, an A.L.R.B. field examiner, was a passenger in the van. She testified, after being subpoenaed by Respondent, that she heard both Meza and Lopez using foul language. The participants calmed down. Chaumont and David Caravantes, an A.L.R.B. field examiner, who was driving the van, drove away. They returned ten minutes later and found Rosa Lopez sitting on the side of the road.

The testimony indicates that after the van left all the workers returned to work. Lopez and Ceballos returned to the row they had been working on before lunch. They were working less than five minutes when Margaret Meza came into the row and discharged Rosa Lopez. Ceballos asked if he was fired. He was told that if he wanted to work he could. He chose to continue working. He completed the harvest season.

Immediately after the argument ended, according to the testimony of Castaneda and Meza, Meza went to Castaneda and asked if she could fire Rosa Lopez. Castaneda checked the morning tally sheet. He determined that Lopez and Ceballos had picked only five boxes of grapes during the entire morning period (5 hours.) He then gave Meza permission to fire Rosa Lopez.

III. Analyses and Conclusions.

A. The Discharge of Rosa Lopez.

1. Introduction.

Section 1153(c) of the Act makes it an unfair labor practice to discriminate "... in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or

discourage membership in any labor organization."

The General Counsel has the burden to prove that the Respondent discharged the employee because of his or her union activities or sympathies. Due to the inherent difficulties of presenting direct evidence of a discriminatory discharge this charge is "normally supportable only by the circumstances and circumstantial evidence."

Kuramura, Inc. 3 ALRB No. 49 (1977) at 12; citing Amalgamated Clothing Workers of America, AFL-CIO v. NLRB 302 F.2d (C.A.D.C. 1962).

2. The Circumstantial Facts Surrounding Rosa Lopez' Discharge.

A preliminary factor in a finding that an employer has discharged an employee for union activity is the determination that the employer had knowledge of such activity. Lassen Canyon Nursery 4 ALRB No. 21 (1977); citing, NLRB v. Whittin Machine Works, 204 F.2d 883, 32 LRRM 2201, 2202-3 (CA.1, 1953). In this case the Respondent's knowledge of Ms. Lopez' support for the Union is not contested. Margaret Meza testified that by the time she fired Rosa Lopez she knew of Lopez' strong support for the Union.

Another circumstantial fact necessary to support a finding of unlawful discharge is the employer's animus toward the Union. Adam Dairy 4 ALRB 24 (1977), at 31. In this case the Respondent through its general manager, Ralph Melikian, admitted the corporation maintained a no-union policy. Furthermore, this policy was made known to the employees. However, a "no-union" policy alone does not support a finding of animus toward the Union. There is evidence which indicates Respondent's supervisors Margaret Meza and

Mike Castaneda harbored hostility for the Union. However,

"When a union-supporting employee is discharged for cause, the fact that the employer harbors an antipathy toward the employee grounded in anti-unionism does not make the discharge unlawful." Lassen Canyon Nursery 4 ALRB No. 21 (1977); citing Frosty Morn Meats, Inc. v. NLRB 296 F.2d 617, 49 LRRM 2159, 2162 (C.A. 5 1961)

The timing of Rosa Lopez' discharge does provide circumstantial evidence of what might be, if not refuted, an unlawful discharge. Lopez began overt Union support on Monday, June 6th, the day before her firing. On Tuesday, June 7th, Lopez was fired only minutes after her crew leader, Margaret Meza, was served by a Union legal worker with an A.L.R.B. subpoena.

3. Establishing Just Cause for the Discharge of a Known Union Activist.

If a prima facie case for unlawful discharge is presented, the Respondent has the burden to rebut with a showing of independent grounds for the discharge. Hansen Farms, 3 ALRB No. 43 (1977); Hemet Wholesale, 3 ALRB No. 47 (1977).

Two issues are raised in the current case: (1) whether the independent grounds for lawful discharge asserted by Respondent are sufficiently supported by the evidence; or whether Lopez' acts exceeded permissible boundaries and therefore were outside the scope of the protection of the Act; and (2) whether the moving cause for Rosa Lopez' discharge was her Union activities.

I find the Respondent's contention that there were adequate independent grounds for discharging Rosa Lopez to have merit.

Respondent's crew leader, Margaret Meza, testified that the reason for the discharge was Lopez' poor performance.

At the hearing, Meza responded simply to the question, "Why did you fire her?" with, "For not doing the work, for sitting under the vine." Blanca Garcia provided ample corroboration for Meza's testimony that Rosa Lopez was told several times to perform the required work. Mrs. Garcia testified that Rosa Lopez ignored Meza's requests which appear to have been legitimate ones. Additionally, Garcia saw Lopez sitting under the vines during working hours.

Rosa Lopez was fired at a time when her productivity had decreased markedly. On June 6th, Rosa Lopez was credited with half the average amount of boxes picked. On June 7th, Lopez was credited with picking and packing two boxes of grapes during five hours of work,

In Justus Company 199 NLRB 422 (1972), the Board found the discharge of a known union activist to be lawful when loafing on the job was alleged and proved by the employer.

In Respondent's Post Hearing Brief, counsel asserts three grounds for Lopez' firing: (1) loafing and poor work performance; (2) insolence and insubordination; and (3) confrontations with her supervisor.

I find that the testimony in the record does support all three of these grounds.

Blanca Garcia's testimony supports the allegation of extreme insubordination by Rosa Lopez. Garcia testified hearing Lopez shout "bad language" at Meza on four separate occasions. Mrs. Garcia heard Lopez initiate and provoke at least two arguments with Ms. Meza.

Numerous N.L.R.B. decisions have approved the discharge of known union adherents for insolence and insubordination to their supervisors. Golden Nugget, Inc., 215 NLRB 50 (1974); NLRB v. Prescott Industrial Products Co., 500 F.2d 6 (8th Cir. 1974); GTE Lenkurt, 215 NLRB 190 (1974).

The A.L.R.B. has recognized this tenet in Hansen Farms supra, by clarifying that the Act "was not intended to deprive management of its right to manage its business and to maintain production and discipline," at 26-27. Although the A.L.R.B. determined that the discharge in Hemet Wholesale 3 ALRB 47 (1977) was unlawful, the Board still recognized that N.L.R.B. precedent establishes:

"merely because an employee supports a union does not insulate him from discharge. Certain employee activities in behalf of a union exceed permissible boundaries and, accordingly, lose their protection." at 22 (fn.21).

All witnesses to the argument which precipitated Lopez' discharge agree that Lopez directed profanity toward Meza. All agree that Lopez deliberately became involved in the already heated situation caused by the service of process. Rosa Lopez herself testified that at the time of her involvement she knew her supervisor was very upset. The testimony is undisputed that Lopez aggravated the situation by her involvement. Furthermore, it is clear that Lopez' involvement consisted of shouting insults and attempting to provoke Margaret Meza to fight. ^{24/}

^{24/} Miriam Chaumont, the A.L.R.B. field examiner, was a competent and reliable witness. She testified she witnessed the Meza/Lopez argument and her perceptions were:

Q: "Did you think she was trying to provoke Margie (Meza) at that time?"

A: "Yes, I think she was trying to provoke her."

I find the Respondent's defense of just cause for discharge, on the basis of incompetent work and insolent behavior toward her supervisor, to be proven by the preponderance of the evidence.

B. Motive for the Discharge.

The existence of independent grounds for discharge does not preclude a finding for the discriminator if the motivation for the discharge arose in part from the employer's anti-union animus. AS-H-NE Farms 3 ALRB 53 (1977), Tex-Cal Land Management, Inc. 3 ALRB No. 14 (1977). The extent to which the discharge must be motivated by anti-union animus is not entirely clear.

Butte View Farms 3 ALRB 50 (1977) indicates that a discriminatory discharge can be sustained if anti-union animus is simply a motivating factor. However, the most accepted test applicable in this situation is

"whether the business reason or the protected activity is the moving cause behind the discharge." Adam Dairy 4 ALRB No. 24 (1978) at

31.

In other words, would Rosa Lopez not have been fired under these circumstances "but for" her union activity.

I am persuaded by the evidence that even if Lopez was not a union activist she would nevertheless have been fired. Rosa Lopez behaved in an intolerable manner. Her co-worker, Blance Garcia, testified that Lopez continually "sat under the vines." Mrs. Garcia found this behavior so unusual that she complained to her husband about it. ^{25/}

^{25/} Transcript, P. 489, 1-3

Furthermore, Blanca Garcia testified that she had never heard another employee direct foul language or insults toward Margaret Meza. Rosa Lopez did this repeatedly. All witnesses testified that no other employee except Rosa Lopez vocally involved themselves in the melee of the June 7th lunch break.

I am persuaded that Rosa Lopez was not singled out for discharge due to her union activity. Rosa Lopez' work performance and behavior toward her supervisor was the motivating cause of her discharge.

C. The Alleged Threats and Interrogations.

1. Mike Castaneda.

Rosa Lopez and Miguel Ceballos testified to one instance in which Mike Castaneda allegedly fired, then reinstated them. Castaneda denied this allegation. Margaret Meza who was allegedly present at the scene of this incident also denied its occurrence. Lopez and Ceballos offered no corroborating testimony from independent witnesses.

In essence, the testimony of Lopez and Ceballos directly conflicts with that of Castaneda and Meza.

"When faced with a direct conflict in the testimony where no additional evidence is offered to shed light on the truth of the allegation, the allegation must be dismissed."
S. Kuramura, Inc. 3 ALRB No. 49
(1977) P. 16.

Additionally, I find the allegation that Mike Castaneda acted in such a manner to lack credibility. Castaneda was well aware of the problems involved in the decision to fire an employee.

The testimony indicated that he was cautious and hesitated in giving his approval of the firing of Lopez. According to Scott Wash-burn, Castaneda resisted Meza's prodding to fire Lopez only minutes before the alleged incident. ^{26/}

In sum, I find the allegations of threats by Mike Castaneda to be unsupported by the testimony and evidence.

2. Margaret Meza.

The record is replete with testimony regarding Meza's aggressive behavior. More importantly it is clear from Meza's own testimony that she harbored an intense hostility for the U.P.W. ^{27/}

Rosa Lopez testified to several incidents in which Margaret Meza made disparaging comments to Lopez about the U.F.W. Lopez testified that Meza interfered with her attempts to help workers sign authorization cards on June 6th. Ceballos testified in direct corroboration to Lopez' testimony. ^{28/}

^{26/} Transcript P. 179, 10-12

Scott Washburn: "Maggie says to Mike, 'Can't we fire her, Mike? Can't we fire her?'
Mike says, 'No, Nobody's going to be fired today. '"

^{27/} Margaret Meza originally denied having any hostile feeling toward the U.F.W. However General Counsel brought out Meza's true feelings in cross-examination.

I found Meza to be very circumspect and uncooperative when responding to questions regarding her feeling about the U.F.W. For these reasons I cannot give credit to Meza's denials of making anti-Union statements and threats directed at Rosa Lopez.

^{28/} Transcript P. 106, 17-22.

Mr. Ceballos: "She (Meza) drove up in her car and parked right where a worker was signing and she drove along and saw we (Ceballos and Lopez) were there and she started yelling to the workers that they don't have to sign a card if they don't want to ..."

According to both Ceballos and Lopez, Meza berated them in front of other workers saying in effect that all "Chavistas" were lazy and didn't do their work. ^{29/}

In addition to the testimony of Ceballos and Lopez, testimony was taken from a co-worker, Roberto Reyes. As discussed earlier, Reyes testified that he heard Meza tell the union supporters that if she'd known they were "Chavistas" she would not have hired Lopez and Ceballos.

This is the most serious of Meza's statements. All of the workers knew that Meza had the power to hire and fire employees. Ralph Melikian, Meza's superior, testified that she had absolute hiring and substantial firing authority.

This statement constitutes a veiled yet clear threat. The threat, though directed to Lopez and Ceballos specifically, was made in front of other workers. It is the very kind of statement which is prohibited by Section 1153(a) of the Act.

Section 1155 of the A.L.R.A. permits an employee to communicate his or her views regarding unionism so long as the communication contains "no threat of reprisal or force, or promise of benefit." N.L.R.B. v. Gassel Packing Co. 395 U.S.575, 618-619 (1969)

Meza's statements to Lopez and Ceballos indicated at very least that there would be no future employment for "Chavistas" in her crew. This amounts to a threat of reprisal for having exercised Section 1152 rights. Arnaudo Bros., Inc. 3 ALRB No. 78 (1977);

^{29/} Transcript P. 95, 22-23; Transcript P. 363, 1-3

citing Coca-Cola Bottling Co. 210 NLRB 706 (1974).

Meza's interference with workers signing authorization cards amounts to another violation of Section 1152 rights. ^{30/}

"Employer's speech or conduct calculated to impress an employee with the idea that the employer has kept a close enough watch to enable him to know about ... union activities of his employees ... violates the National Labor Relations Board." Arnaudo Bros. supra at 16; citing Coca-Cola Bottling Co. supra.

Although Margaret Meza denies each of the above instances this is not a case of direct conflict of testimony without additional evidence. The totality of the circumstances, including Meza's strong anti-U.F.W. feelings, her behavior toward the U.F.W. process server, and her evasive and circumspect demeanor during testimony lend support to the General Counsel's allegations.

Both Miguel Ceballos and Roberto Reyes testified in support of Rosa Lopez' allegation of threats. I find their testimony more credible than Meza's uncorroborated denials.

I find that the Respondent has violated Section 1153(a) of the Act.

IV. CONCLUSION

I do not find that the evidence supports a conclusion that Rosa Lopez was discharged in violation of Sections 1153(c) and/or (a) of the Act.

^{30/} The complaint does not allege surveillance. However, this does not preclude a finding that such surveillance violated the A.L.R.A. See Rochester Cadet Cleaners, Inc., 205 NLRB 773 (1973).

I do not find that the evidence supports the conclusion that Respondent's supervisor, Mike Castaneda, violated Section 1153(a) of the Act.

I find that the evidence supports the conclusion that Respondent's crew leader, Margaret Meza, committed violations of Section 1153 (a) of the Act by threats and surveillance of Rosa Lopez while she engaged in protected activities.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 1153(a) of the Act I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

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

ORDER

Respondent, Mel-Pak Vineyards, Inc., its principals, officers, agents and successors shall:

Cease and desist from:

- (a) threatening employees with loss of their job or future employment because of their Union sympathies;
- (b) creating an impression of surveillance;
- (c) post in conspicuous places copies of the attached "Notice to Workers";

- (d) Issue the following NOTICE TO WORKERS (to be printed in English, Spanish, and Tagalog) in writing to all present employees, and mail a copy of said Notice to all of the employees listed on the master payroll for the payroll period encompassing June 7, 1977 (excluding employees who are current employees), and post such Notice, 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;
- (e) Have the attached NOTICE read in English, Spanish and Tagalog at the commencement of the 1978 harvest season on company time, to all those then employed, by a company representative or by a Board agent and to 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; and
- (f) Notify the Regional Director in the Salinas Regional Office within twenty (20) days of receipt of a copy of this order of steps respondent has taken to comply therewith, under penalty of perjury, and continue to report periodically thereafter until full compliance is achieved.

Dated: May 19th, 1978



Leonard M. Tillem
Administrative Law Officer

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. 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 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;
- (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 or do anything against you because of the union.

GENERAL COUNSEL'S EXHIBITS

- GC 1 A-G (see folder marked General Counsel's Exhibits Mel-Pak Ranches 77-CE-101-C, 77-CE-106-C)
- GC 2 Subpoena served on Margaret Meza
- GC 3 Telegram from attorney Shartin to U.F.W.
- GC 4A-4D Tally sheet of number of boxes picked by Margaret Meza's crew for payroll period 5-31-77 to 6-6-77
- GC 5A-5D Hours worked and pay for workers in Margaret Meza's crew for payroll period 5-31-77 to 6-6-77
- GC 6A-6D Hours worked and pay for workers in Margaret Meza's crew for payroll period 6-7-77 to 6-13-77
- GC 7A-7D Tally sheet of number of boxes picked by Margaret Meza's crew for payroll period 6-7-77 to 6-13-77
- GC 8 Tally sheet of number of boxes picked by Rosa Lopez for week ending 6-7-77

RESPONDENT'S EXHIBITS

R A Union leaflet

R B Subpoena to Margaret Meza (exhibit submitted in tattered condition)

R C U.F.W. leaflet urging workers to sign authorization cards