

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS DISTRIBUTORS,)	
)	
Respondent,)	Case No. 78-CE-3-E
)	
and)	
)	
UNITED FARM WORKERS OF)	5 ALRB No. 47
AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

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

On July 24, 1978, Administrative Law Officer (ALO) Paul D. Cummings issued the attached Decision in this proceeding. Thereafter, Respondent filed timely exceptions and a supporting brief, and the General Counsel filed a brief in response to the exceptions.

The Board has considered the record and attached Decision in light of the exceptions, response to exceptions, and supporting briefs, and has decided to affirm the ALO's rulings,^{1/}

^{1/}We find no error in the ALO's refusal to admit into evidence the Decision of the Administrative Law Officer and the transcript from Case Nos. 77-CE-12-E and 77-CE-19-E. Respondent failed to adequately specify which portions of these documents it wished to have admitted, as is required for administrative notice. See B. Jefferson, California Evidence Benchbook, Section 47.3, at 840 (1972). Moreover, Respondent neither argues, nor do we find, that it suffered any prejudice as a result of this ruling. Also,

findings,^{2/} and conclusions as modified herein, and to adopt his recommended Order as modified herein.

We agree with the ALO's conclusion that Respondent discharged Heriberto Silva, a known leading union activist, in violation of Sections 1153 (c) (d), and (a). This conclusion is supported by Silva's credited testimony relating the discharge to his participation in ALRB hearings,^{3/} the conflicting reasons given for his termination by supervisor John Martinez and owner Steven Martori, and the credited testimony of Enrique Zambrano indicating that Respondent also terminated Silva because he filed a charge

(Fn. 1 contd.)

the ALO permitted Respondent to relitigate matters which were previously litigated in the prior unfair labor practice case to the extent they were relevant to the instant case. We take administrative notice of our decision in Case Nos. 77-CE-12-E and 77-CE-19-E, Martori Brothers Distributors, 4 ALRB No. 80 (1978), and the Administrative Law Officer's Decision attached thereto, both of which found that Silva was lawfully discharged for insubordination in January 1977. Our conclusion regarding Silva in that case is in no way incompatible with our decision herein that Silva was discharged in January 1978 for engaging in protected activity.

^{2/}Respondent excepts to the ALO's credibility resolutions. We will not reverse an ALO's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that it is incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, 26 LRRM 1531 (1950); Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978). We find the ALO's credibility resolutions herein are supported by the record as a whole.

^{3/}It was stipulated that Silva testified at the ALRB hearing on Respondent's post-election objections, but Respondent excepts to the ALO's finding that Silva's testimony was adverse to Respondent. That Silva's testimony at an ALRB hearing was adverse to Respondent may readily be inferred from Steven Martori's statement to Silva that: "...the problem is how am I going to keep you working here after all the damage you have done to me in all the hearings." Moreover, it is apparent from the decisions of the Investigative Hearing Examiner and the Board in Martori Brothers Distributing, 4 ALRB No. 5 (1978), of which we take administrative notice, that Silva testified as a union witness and gave testimony in opposition to Respondent's post-election objections.

with the ALRB.

The ALO correctly found Respondent's ostensible justification for the discharge, Silva's alleged threats, to be a pretext. We note that the initial threats allegedly made by Silva against Steven Martori and his family did not prompt any discipline and that Silva was reinstated shortly after they were alleged to have been made. Martori's hearsay testimony that Silva threatened other employees, much of it double hearsay and without employee names, dates, or locations, is too unreliable to support a finding that such threats were made. Robert Veliz, an employee of Respondent and Martori's asserted source of information about these threats and the alleged recipient of some of the threats, was not called to testify and Respondent made no showing that he was unavailable. Martori's testimony that Silva, at an August 1978 ALRB hearing, threatened to "get" Martori is too ambiguous in the context of the hearing to support a finding that the threat was personal in nature. It is true that the hearsay and other testimony about the alleged threats is admissible to show that Martori believed that such threats had been made. However, we find that Martori's condonation of past threats and the statements attributed to Martori and Martinez indicate that Silva would not have been terminated but for his union and protected activities.

We disagree with the ALO's conclusion that Respondent violated the Act by its ejection of Silva from its fields. It is undisputed that Silva entered Respondent's property the morning of January 12, 1978, the day after his discharge, that Silva asked

for and was denied employment, that Steven Martori twice asked Silva to leave Respondent's property, and that Silva refused to leave until he had spoken with one of Respondent's employees about an unspecified subject. There is no evidence that Silva intended to take access on behalf of the UFW or that he was engaged in organizational or other protected activity at the time of his ejection. Although Silva testified that, after his refusal to depart, he was forcefully pushed off Respondent's premises by Steven Martori, Martori testified that he merely took an unresisting Silva by the arm and escorted him off the Respondent's property. The ALO made "no credibility resolution regarding this disputed testimony. Under these circumstances and absent evidence that Silva was engaged in protected activity at the time of his ejection, or that his ejection would otherwise reasonably tend to restrain employees in the exercise of their Section 1152 rights, we find no violation of the Act and accordingly dismiss this allegation of the Complaint.

ORDER

By authority of Labor Code Section 1160,3, the Agricultural Labor Relations Board hereby orders that the Respondent Martori Brothers Distributors, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against any of its agricultural employees because of their union membership, union activities, giving testimony or otherwise participating in hearings conducted by the Board,

filing of charges with the Board, or other protected activities.

(b) In any other manner interfering with, restraining, or coercing any employee in the exercise of rights guaranteed in Labor Code Section 1152.

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

(a) Immediately offer Heriberto Silva full reinstatement to his former position or a substantially equivalent position, without prejudice to his seniority or other rights and privileges to which he is entitled, and make him whole for any loss of earnings or other economic losses he has suffered as a result of his discharge, plus interest thereon computed at 7 percent per annum.

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

(c) Sign the attached Notice to Employees and, after translation of the Notice by the Regional Director into appropriate languages, provide copies of the Notice in sufficient numbers for the purposes set forth hereinafter.

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

(e) Mail copies of the attached Notice to Employees in all appropriate languages, within 30 days after issuance of this Order, to all employees employed by Respondent at any time since January 11, 1978.

(f) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice to employees in appropriate languages to the assembled employees of Respondent on company time. The reading(s) shall be at peak season, at such time(s) and place(s) as are specified by the Regional Director. Following the reading(s), the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act.

(g) Hand a copy of the attached Notice to Employees to each of its present employees and to each employee hired during the six months following issuance of this Order.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: July 18, 1979

GERALD A. BROWN, Chairman

RONALD . L. RUIZ, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing in which each side presented evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 1152 of the Agricultural Labor Relations Act. We have been ordered to notify you that we will respect your rights in the future. We are advising each of you that 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.

WE WILL NOT discharge, lay off, or otherwise discriminate against employees with respect to their hire or tenure of employment, because of their union membership or activities or because of their filing of charges with the Agricultural Labor Relations Board or because of their testimony in hearings conducted by the Agricultural Labor Relations Board.

WE WILL OFFER to reinstate Heriberto Silva to his former position and reimburse him for any loss of pay or other money losses he has suffered as a result of his discharge on January 11, 1978, plus interest on the total award, computed at 7% per year.

Dated:

MARTORI BROTHERS DISTRIBUTORS

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

Martori Brothers Distributors (UFW)

5 ALRB No. 47

Case No. 78-CE-3-E(R)

ALO DECISION

The ALO concluded that Respondent discharged employee Heriberto Silva because of his testimony in an ALRB representation hearing (see Martori Brothers Distributing , 4 ALRB No. 5) and because of his union activity, in violation of Sections 1153 (d), (c) and (a). In so holding, the ALO rejected Respondent's defense that it discharged Silva because of unprotected threats made by him against owner Steven Martori, his family, and other employees, finding that no personal threats were made by Silva and that Respondent's defense was pretextual. The ALO also concluded that Respondent violated the Act by forcefully ejecting Silva from its property the day after his discharge.

BOARD DECISION

The Board affirmed the ALO's conclusion that Silva was discharged in violation of Sections 1153(c), (d), and (a), noting that Silva was a known leading union activist, that Silva testified against Respondent in an ALRB representation proceeding, that at the time of his discharge Silva was told by owner/supervisor Steven Martori, "The problem is how am I going to keep you working here after all the damage you have done to me in all the hearings," that Martori and supervisor John Martinez gave conflicting reasons for Silva's termination, and that Martinez had told employees that Silva was going to be laid off because he had filed a charge with the ALRB. The Board also affirmed the ALO's finding that Respondent's defense of misconduct was pretextual, noting that some of the alleged threats did not prompt any immediate discipline, that Silva was reinstated after some of the threats, that the hearsay evidence regarding threats to employees was too unreliable to support a finding that such threats were made, and that the statements attributed to Martinez and Martori indicated that Respondent would not have terminated Silva but for his union and protected activities.

The Board concluded that Respondent did not violate the Act by its ejection of Silva from its field. The Board noted that there was no evidence that Silva was engaged in organizational or other protected activity at the time of his ejection, that Martori had twice asked Silva to leave voluntarily, and that an unresolved credibility dispute left open the question of the degree of force used in the course of the ejection.

The Board found that the ALO did not err in refusing to admit into evidence the ALO Decision and transcript from Martori Brothers Distributors, 4 ALRB No. 80, as Respondent had failed to adequately specify the portions of these documents it wished to have admitted. The Board also found that Respondent had not suffered any prejudice as a result of the ALO's ruling, noting

that the ALO had permitted relitigation of relevant matters. Finally the Board took administrative notice of its prior decision as well as the decision of the ALO in Martori Brothers Distributors, 4 ALRB No. 80, and concluded that its decision in that case and its decision in the instant case were in no way incompatible.

REMEDIAL ORDER

The Board issued a cease-and-desist order, and ordered the reading, posting, distribution, and mailing of remedial Notice to Employees. The Board also ordered Respondent to offer Silva immediate reinstatement to his former or a substantially equivalent job, and to make him whole for any loss of pay or other economic losses he may have suffered as a result of his discriminatory discharge, plus interest computed at seven percent per annum.

* * *

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

* * * * *

In the Matter of: *

MARTORI BROTHERS DISTRIBUTORS * Respondent, *

and *

UNITED FARM WORKERS OF AMERICA, * AFL-CIO *

Charging Party *

* * * * *

CASE NO.78-CE-3-E

STEVEN NAGANO, Esq.
of El Centro, California, for
the General Counsel

DRESSER, STOLL & JACOBS, by
CHARLEY M. STOLL, Esq. and RICHARD ANDRADE, Esq. of
Newport Beach, California, for Respondent

ANITA MORGAN of Calexico, California, and
HERIBERTO SILVA of Yuraa, Arizona for the
Charging Party

DECISION

STATEMENT OF THE CASE

PAUL D. CUMMINGS, Administrative Law Officer: This case was heard before me in El Centro, California on April 12 and 13 and May 23 and 24, 1978. The complaint as amended alleges violations of Sections 1153(a), (c) and (d) of the Agricultural Labor Relations Act, herein called the Act, by Martori Brothers Distributors, herein called Respondent. The complaint is based upon charges filed on January 12, 1978 by United Farm Workers

of America, AFL-CIO, herein called the Union, The charges and the complaint were duly served upon Respondent.

All parties were given full opportunity to participate in the hearing and after the close thereof, the General Counsel and Respondent each filed a brief in support of its respective position.

Upon the entire record, including my observation 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

I find that Respondent is a partnership engaged in agriculture in the Imperial Valley, California and is an agricultural employer within the meaning of Section 1140.04(c) of the Act.

I further find the Union to be a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint as amended alleges that Respondent violated Sections 1153(a), (c) and (d) of the Act by the discriminatory discharge on January 11, 1978 of Heriberto Silva, hereinafter called Mr. Silva, because of his activity on behalf of the Union and his testimony before the Agricultural Labor

Relations Board, herein called the Board, and because on January 12, 1978, Respondent, in the person of Steven Martori, grabbed Mr. Silva and carried him off Respondent's field in view of Respondent's employees for the same reasons.

Respondent denies that the termination of Mr. Silva and his ejection from Respondent's property were unlawfully motivated.

A. Respondent's Operations

Respondent grows and harvests lettuce on its property in California's Imperial Valley.

B. The Discharge of Mr. Silva

Mr. Silva testified without contradiction and I so find that he has worked in the lettuce fields for fourteen years, including those of Respondent during the 1966, 1967, 1968, 1969, 1976 and 1977 seasons. In the 1976 season Mr. Silva began work for Respondent on December 9 and worked until January 26, 1977. During this period he engaged in various activities on behalf of the Union. This included the distribution of Union buttons to employees of Respondent, the soliciting signatures on union authorization cards, holding meetings in the field among Respondent's employees, acting as an observer for the Union at a Board election involving Respondent and the Union, and testifying against Respondent at a hearing on objections to the election, which election led to the certifying of the Union as the bar-

gaining representative of Respondent's employees. He also was named president and delegate on behalf of Respondent's employees to a Union convention. Respondent stipulated that from the time of this election forward, it had knowledge of Mr. Silva's active support of the Union. It certainly knew he was a union observer at the election and that he gave testimony at the hearing on objections to the election. While it is true, as Respondent contends, that there is no direct testimony in the record of this case as to whether Mr. Silva's testimony was unfavorable to Respondent, it may clearly be inferred from the record that Mr. Silva's testimony was unfavorable to Respondent and I so find.

On January 6, 1977, Mr. Silva, who had been working for another company, went back to work for Respondent. Mr. Silva testified that he was hired by Juan Martinez in Calexico, at the solicitation of Mr. Martinez, who told him that the work was going to be very good and that Respondent needed persons like him to work there. Mr. Martinez testified that when he hired Mr. Silva he did not recognize him because he was wearing a beard. I find that Martinez not only recognized him but that they discussed whether Mr. Silva would have trouble with Steven Martori, manager of Respondent's operations and stipulated by the parties to be the employer. Mr. Silva's apprehensions in that direction were set to rest by Mr. Martinez.

Mr. Silva testified without contradiction and I so find that upon being rehired he continued his activities on behalf of the Union. He circulated a petition among the employees for signatures, which petition was directed to the

Board requesting it to certify the Union as the bargaining representatives of the employees. This activity was openly commenced on January 9, 1978 and was observed by Alfonso Reyes, Camerino Sandoval, and John Martinez, all of whom are stipulated by the parties to be supervisors of Respondent. While none of the supervisors read the petition, Mr. Silva told Mr. Reyes what the petition contained.

Mr. Silva also testified that on the morning of January 11, 1978, upon arriving for work, a group of employees asked him what they could do about getting paid for the repacking of lettuce from boxes that had been damaged by the rain. He told them there was a way but before going into it supervisor Camerino Sandoval came up to tell the employees they would be paid for such work. Mr. Silva contended that Sandoval knew of his participation in this matter, because he could hear what was being said, Steven Martori was nearby. Within minutes of this event, Mr. Silva encountered Steven Martori by the edge of the field and a discussion took place between them.

Mr. Silva testified as to this discussion in effect in the following manner. Mr. Martori asked him what he was doing there and he answered he had been working there for three days. When asked who had hired him, he answered Martinez. Mr. Martori then said he was going to talk to Martinez. Mr. Silva asked what the problem was. To which Mr. Martori is said to have answered, "You know what the problem is ... the problem is how am I going to keep you working here after all the damage you have done to me in all the hearings? Let the Union give you work." Mr. Silva replied, "I told him then I did not work

for the Union, that I supported the Union but that I made my living working out in the fields. He said that did not make any difference that he was going to fire me," After Mr. Martori talked to Juan Martinez, he returned to say that since Martinez had already given him the job, he could finish the day and then he was through.

Mr. Steven Martori testified that this was the first instance that he was aware that Mr. Silva had been re-employed and that he was very surprised. He had previously told other supervisors, but not Martinez, not to re-employ Mr. Silva after he had quit in 1977. Mr. Martori's version of the event is essentially the same as that of Silva except that nothing was said of Silva's participation in a hearing or Silva's Union activities. Mr. Martori does state that in answer to Silva's inquiry as to why he was being terminated, he answered, "I am not going to have a man who threatened me and threatened my family working for me."

He hadn't recognized him with a beard. He said that Mr. Martinez "... told me to let people go that I thought should go, like the troublemakers, the ones that didn't do their work well or the newer people." Mr. Martinez further testified that Mr. Martori told him to cut Mr. Silva down with the rest of the people that went out, because he was new and because of other problems between Mr. Martori and Mr. Silva. He testified that the whole world knew these problems which concerned the Board, that thing here before, when Mr. Silva had worked for the Company the previous year. As to this event, Mr. Martinez testified that Mr. Martori asked him why he had given Mr. Silva work and that

he answered he didn't have enough people and so he hired him. Mr. Martori then told him Mr. Silva was to be cut with the rest of the ten or eleven other employees being cut that day. These other employees were supposedly laid off because the work was slackening off for the rest of the season and Martinez also stated that he laid Mr. Silva off because there was not enough work and that Mr. Martori had left the laying off of Silva up to him.

Although it was company policy to lay off the newer employees first on a cut back, this policy was not followed in this instance. Newer employees remained on the payroll after Mr. Silva was terminated. This was stipulated to by the parties and evidence was given to this effect when Enrique Zambrano testified that he and his brother-in-law, neither of whom had worked for Respondent previously, came on the payroll after Mr. Silva and remained on the payroll after he was terminated.

Mr. Zambrano further testified that he was present when Juan Martinez laid off Mr. Silva and that Mr. Silva had pointed out to Mr. Martinez that he was not one of the newer employees. Mr. Zambrano stated that he heard Mr. Martinez say in the presence of other employees on the day Mr. Silva was terminated as they were finishing up that he was letting "the light complected one" go because he had caused problems before with the company and that he had submitted a complaint against the company and it was still going on and was going to cost the company millions of dollars." Mr. Zambrano testified that the employees knew one another by nicknames and that Mr. Silva was "Guerito", the light complected one. That is what he was called in the fields by everyone, including Mr. Martinez. Mr. Martinez said he did not

remember having ever made such a statement or having had ever referred to Mr. Silva as the light complected one. I credit Mr. Zambrano in all respects.

Concerning his reasons for terminating Mr. Silva on January 11, 1978, Steven Martori, hereinafter Mr. Martori, testified that Mr. Silva was terminated, not for lack of work, but because he did not want him working there. Mr. Martori felt that Mr. Silva was an unstable and potentially dangerous person who posed a threat to the working environment. Mr. Silva had threatened him, other employees, and his family. In support of this, Mr. Martori testified that on January 6, 1977 during a period when Mr. Silva was previously employed, he was called to the field by his cousin Ed Martori who told him Mr. Silva was causing a disturbance and was yelling, "We're going to get the Martoris." It seems Mr. Silva claimed to have the right to fold boxes rather than cut and pack. Because another man was then folding, Mr. Martori told Mr. Silva he could cut and pack or fold the following day, apparently recognizing a right Mr. Silva for whatever reason had. Mr. Silva persisted in demanding this right, whereupon Mr. Martori told him he was not going to argue the point and walked away. Later that day Mr. Silva went to the company where he pursued the point. He said that Mr. Martori was not running things right to which Mr. Martori replied that it was his company and he would run it his way. Mr. Martori then testified that Mr. Silva acted a though he was crazy, he rambled, changed from one subject to another until he was fired and asked to leave the office. He left. Ed Martori, the one who actually heard the remark characterized by Mr. Martori as a threat, testified that,

"He said the Martoris were fucked and that the Union was going to get the Martoris and he was going to get the Martoris and --just to that nature." Ed Martori also testified that he did nothing about it, although he was in charge, because Mr. Silva calmed down after a while and went back to his job.

Mr. Martori further testified with respect to threats made to him that Mr. Silva had said to him outside a hearing one day in March or April, 1977, "I'm going to get you." This threat was supposedly the same as others made concerning him by Silva. Mr. Silva did not say what he meant by these words. Threats supposedly made to other employees by Mr. Silva were not witnessed by Mr. Martori but stated to him by a long-time employee who had served as Respondent's observer at the election, a Robert Veliz. Since Mr. Martori was only testifying about what he was told someone else had heard, such evidence would not be acceptable to prove the truth of the matter stated, namely that Mr. Silva made threats to other employees. Whether Mr. Silva made threats to other employees is the essential point, not whether Mr. Martori might have thought he did because he believed Veliz. There is no evidence that he ever asked Mr. Silva whether he had made such threats.

Mr. Martori testified that on January 7, 1977, Mr. Silva was in the field with a Mario Pecheo handing out leaflets to employees after work had begun. Mr. Martori arrived and asked them to leave, whereupon Mr. Silva walked a few feet across an irrigation ditch, still on Martori property. When he was informed of this and asked to move Mr. Silva said, "Why don't you come over here and make me?" Martori then crossed the ditch and he and

Silva got into a long discussion, together with Mr. Martori's cousin Ed Martori and Maria Pecheo the subject of which was not related Later Mr. Martori was called away to his car phone. Respondent's growers association was attempting to work out some agreement whereby Mr. Silva could be returned to work to avoid unfair labor practices proceedings. After leaving the field Mr. Martori returned and paid Mr. Silva some money that was owed to him. Mr. Silva was then re-employed by Respondent and he returned to work the following work day. He quit four or five days later. No reason was given. Mr. Silva's threats, if such they be, do not appear to have amounted to much.

C. The Events of January 12 1978

Mr. Silva testified that on January 12, 1978, he returned to the field before work commenced and asked Juan Martinez for a job. He was told that only nine lines were needed and he had eleven lines. Mr. Martinez testified that he told Mr. Silva there was no work. He further stated that newer people who were cut off with Mr. Silva showed up to pick up their checks and since they were already there he let them work that day. It is not known whether they continued after that day. From the not refuted testimony of Mr. Zambrano, on the next day Juan Martinez asked him if he knew of any other trios that Respondent could employ, and if so to bring them to work with him. Mr. Silva was not given employment. Rather, Mr. Martori arrived soon after and, after twice asking Mr. Silva to leave company property, he escorted him from Respondent's property in view of all the emplo-

yees forceably, the testimony on this point differing only in degree. After some heated discussion, Mr. Silva then went to Respondent's office where he was issued his wages in the form of a check indicating that he had been laid off.

D. Discussion of the Issues and Conclusion

The determination to be made is whether Respondent terminated Mr. Silva because he was an unsatisfactory employee or whether it was because of his union activity and, if the latter, was he discharged or discriminated against because he gave testimony in a Board proceedings.

Contrary to the contentions of Respondent, I find the allegations of the complaint as amended to have merit and that Respondent committed the unfair labor practices as set forth in said complaint.

In NLRB v. Whiten Machine Works, 1 C.A. (1953) 204 F. 2d 833, 32 LRRM 2201, 2202, it is stated:

"When a charge is made that by firing an employee, the employer has exceeded the lawful limits of his right to manage and to discipline substantial evidence must be adduced to support at least three points. First, it must be shown that the employer knew that the employee was engaging in some activity protected by the Act. Second, it must be shown that the employee was discharged because he engaged in a pro-

tected activity [citations omitted]. Third, it must be shown that the discharge had the effect of encouraging or discouraging membership in a labor organization. . . . (citations omitted)."

There is ample evidence in this case to show that Respondent was aware of Mr. Silva's activity on behalf of the Union. He passed out leaflets in Mr. Martori's presence; he was a Union observer at the election; he testified against Respondent at the hearing on objections to the election; and Respondent's supervisors, particularly Alfonso Reyes, observed and were aware of his passing around among the employees a Union petition to the Board. Respondent knowledge will be imputed from that of its supervisors. Alabama Marble Co., 24 LRRM 1179; NLRB v. Whittin Machine Works, *supra*.

The General Counsel has established that Heriberto Silva, an agricultural employee of Respondent, an agricultural employer, was unlawfully terminated by Respondent in the persons of Steve Martori and Juan Martinez for his activities on behalf of the Union, a labor organization, because he filed charges and for his testimony against Respondent in a proceeding before the Board. Mr. Silva worked for Respondent for many years without any difficulty until the advent of activity on behalf of the Union in January of 1977, at which time Mr. Silva became an undesirable employee, as characterized by Steve Martori because of threats supposedly made to Mr. Martori, his family and his employees. The words testified to as being threats and in derogation of the Martoris did not appear to disturb either

Martori. Neither one did anything about it then, or even discuss it. As it happened, the thing that motivated Mr. Silva's termination was seemingly his own insistence on being fired. The next day when Mr. Silva challenged Mr. Martori to throw him off Martori property, this led to, not violence, but a lengthy four-way discussion on Martori property and the re-employment of Mr. Silva in the position he originally maintained was his right, that of being a folder. I find that Mr. Silva made no personal threats of any kind. Indeed, after Mr. Silva's occasional disturbed remarks, which were precipitated by an intrusion on his rights, were in every instance overlooked by Respondent, which did indeed rehire him on past occasions even after he had quit. In no event was Mr. Silva's conduct egregious enough to put him outside the pale of protected activity. Boston University v. NLRB, 1 C.A. (1977), 548 F. 2d 391, 392 and 393. In any event, what was set to rest in the interest of labor peace should not be resurrected and used as cause to support a subsequent discharge.

Although the discharge of an insubordinate union member is lawful, it may become discriminatory if other circumstances reasonably indicate that his union activity weighted more heavily in the decision to fire him than did dissatisfaction with his performance. NLRB v. Whittin Machine Works, supra. And a justifiable ground for dismissal is no defense to an unfair labor practice charge if such ground is a pretext and not the moving cause. Osceola Co. Co-Op Cream Assn. v. NLRB, 8 C.A. (1956), 251 F 2d 62, 66, 41 LRRM 2289.

In NLRB v. Ford Radio & Mica Corp., 42 LRRM 2620, 2622, it states ". . . While it is unnecessary for the General Counsel

to produce direct proof of the employer's actual state of mind (Radio Officers Union v. NLRB, 347 U.S. 17, 33, LRRM 2419 (1954), facts must be such as to uphold an inference of the employer's discriminatory motivation ..." I find that such an inference may be drawn here.

On January 6, 1978, Mr. Silva was rehired by Respondent in the person of Juan Martinez and he worked without incident until the morning of January 11, 1978 when he was recognized as a leader among his fellow employees, was asked to help them solve a problem, getting paid for the repacking of boxes of lettuce that had been soaked by the rain. His involvement was known to supervisor Sandoval and observed by Mr. Martori. Within minutes, Mr. Silva is met by Martori with "What are you doing here?", even though Mr. Silva had been working since January 6th. Mr. Martori claims he had not recognized him previously with his beard. As one would recognize Abe Lincoln with or without his beard, so one would recognize Mr. Silva. I have observed him with and without. If they were cutting sugar cane, I could understand how Mr. Silva would remain unnoticed, but it is difficult to see how he could remain unobserved in a row of lettuce, especially by the boss who visits the fields daily. In any event, Mr. Martori knew he was there on January 11, and proceeded to terminate him. In this termination, I credit the testimony of Mr. Silva as set forth above. This is supported by the testimony of Mr. Martinez as to what he was told to do by Mr. Martori and what he did do concerning this termination. This finding is also supported by that testimony of Mr. Zambrano as to the reason for the termination given

by Mr. Martinez to the employees. Mr. Silva, otherwise an employee in whom no one found any fault, was terminated when there was work to be done. He would not have been affected by the lay-off. He was not one of the newer employees. Whether viewed as a lay-off or a discharge, the action was discriminatory and done because of Mr. Silva's union activities, which included the giving of testimony against Respondent in a Board proceeding. Brunswick Balke Callender Co. 48 LRRM 1025; NLRB v. R.C. Can Co., 5 C.A. F. 2d , 58 LRRM 2214. I find it significant that Mr. Silva who was supposed to be a disruptive force was permitted to continue to work throughout the day of his termination. Also, he was the only employee discharged in the last eight years.

When Mr. Silva applied for work on January 12, 1978, instead of being re-employed as were others he was physically ejected from Respondent's property in violation of Sections 1153(a), (c) and (d) of the Act. Green Briar Nursing Home 201 NLRB 503, 82 LRRM 1249.

As Respondent has violated sections 1153 (c) and (3) of the Act as a derivative consequence he has also violated Section 1153(a) of the Act. Akimoto Nursery, 3 ALRB No. 73 (1977), Harcourt & Co., 98 NLRB 892, 29 LRRM 1439 (1952).

I further find that as a natural consequence of the acts committed by Respondent as set forth in this section above, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 1152 of the Act. Therefore, I find that Respondent did thereby engage in and is

engaging in unfair labor practices affecting agriculture within the meaning of Section 1153(a), (c) and (d) of the Act.

III. The Remedy

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

Having found that Respondent unlawfully discharged Heriberto Silva, I recommend that Respondent be ordered to offer him full reinstatement to his former job to commence at the start of the 1978-1979 lettuce season, such offer to be in the form of a letter sent to Mr. Silva within 20 days of the issuance of this decision. I shall further recommend that Respondent make whole Heriberto Silva for any losses he may have incurred as the result of its discriminatory actions against him by payment to him of a sum of money equal to the wages he would have earned from the date of his discharge to the date he is reinstated less his net earnings, together with interest thereon in accordance with the formula used in Sunnyside Nurseries, Inc., ALRB No. 42 (1977).

In order to remedy more fully Respondent's unlawful conduct, I shall recommend that Respondent make known to its employees employed for the 1977-1978 lettuce season and to its employees who are employed during the 1978-1979 lettuce season that it has been found in violation of the Act, that it has been

ordered to make Heriberto Silva whole for wage losses resulting from its unlawful acts, and that it has been ordered to cease violating the Act and not to engage in future violations.

The General Counsel requests that Respondent require a written apology be provided to Heriberto Silva. I deem it to be inappropriate to make such a recommendation.

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 recommendations:

ORDER

Respondent, the officers, agents and supervisors, and representatives shall:

(1) Cease and desist from:

(a) Discouraging membership of any of its employees in the United Farm Workers of America, AFL-CIO by discharging or in any other manner discriminating against individuals in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153(c) of the Act.

(b) Discharging or otherwise discriminating against any of its employees because that person has filed charges with or given testimony before the Board.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of self-organization to form, join or assist labor organizations, to bargain collectively through representatives of their

own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act.

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

(a) Offer Herberto Silva immediate and full reinstatement to his former or substantially equivalent job and make him whole for any losses he may have suffered as a result of his termination both in the manner described above in the section entitled "The Remedy"

(b) Preserve and make available to the Board and its agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and other records necessary to ascertain the back pay due.

(c) Mail to each employee employed during the 1977-1978 lettuce season copies of the Notice attached in English and Spanish hereto to that person's last known address on file with Respondent or at any current address furnished Respondent by the General Counsel or Charging Party.

(d) Post copies of the attached notice at times and places to be determined by the regional director in appropriate languages. Respondent shall exercise due care to

replace any notice which has been altered, defaced or removed.

(e) A representative of Respondent or a Board agent shall read the attached notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places 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 regional director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and question and answer period.

(f) Notify the regional director within twenty (20) days from receipt of a copy of this Decision of steps Respondent has taken to comply therewith, and to continue to report periodically thereafter until full compliance is achieved.

(g) Copies of the Notice attached hereto shall be furnished Respondent for distribution and posting in the appropriate language by the regional director.

DATED:

July 24, 1975



PAUL D. CUMMINGS

Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing, during which all parties presented evidence, an administrative Law Office of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act and has ordered us to notify all persons employed during the 1977-1978 lettuce season by us and all persons employed during the 1978-1979 lettuce season that we will remedy these violations, and that we will respect the rights of all our employees in the future. Therefore, we are now telling each of you:

1. We will reinstate Heriberto Silva to his former job and give him back pay for any losses that he had while he was off work.

2. We will not discharge or otherwise discriminate against any of our employees because they have filed charges or given testimony under the Agricultural Labor Relations Act.

3. Each of our employees is free to support, become or remain a member of the United Farm Workers of America, or any other union. Our employees may wear union buttons, pass out and sign union authorization cards or engage in other organizational efforts including passing out literature or talking to their fellow employees about any union of their choice provided this is not done at times or in a manner which interferes with the employee doing the job for which he has been hired. We will not discharge, lay off, change the working conditions of

or in any other manner interfere with the right of our employees to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act.

Signed:

MARTORI BROTHERS DISTRIBUTORS

By _____
(Title)

DATED: