Huron, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PAPPAS & COMPANY, Respondent, and ESTEBAN RAMIREZ GARCIA, Charging Party.	Case No. 78-CE-14-F 5 ALRB No. 52

DECISION AND ORDER

On December 13, 1978, Administrative Law Officer (ALO) Joel Gomberg issued the attached Decision in this matter. Thereafter, Respondent filed exceptions and a supporting brief and General Counsel filed a brief in reply to Respondent'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 attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1/] and conclusions of the ALO

1/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 Ranches Dos Rios, 4 ALRB No. 24 (1978). We find the ALO's credibility resolutions herein are supported by the record as a whole. In a number of instances, where the ALO failed to either credit or discredit testimony given, we are unable on the record before us to make credibility resolutions.

and to adopt his recommended Order, as modified herein.

Respondent excepts to the ALO's conclusion that employee; Esteban Ramirez Garcia, Ruben Olguin, Fernando M. Alvarez, Jose H. Alvarez, Anastacio Velasquez, Pablo Alonso Medrano, Ramon Ramirez Zavala, Jesus Robles, Ricardo Moran, Miguel Garcia, and Pedro Diaz were discharged on July 20, 1978, for engaging in a protected concerted work stoppage in violation of Section 1153(a) of the Act.

We agree with the ALO that when these employees walked out of the field, nine hours after starting their longest work day of the young harvest season, they were engaging in protected concerted activity. While it is true that differing accounts were offered regarding the precise reason for the walkout, we agree with the ALO's observation that the existence of multiple reasons for any job action reflects a "real world situation," and does not strip the concerted conduct of its protected status. See McGaw Laboratories, 206 NLRB 602 (1973).

We find credible the testimony that the employees refused to work overtime loading another truck in a new section that day for a variety of reasons, including exhaustion, the hot weather, dissatisfaction with the water, a desire not to work more than eight hours, a skin rash in the case of Jose H. Alvarez, and a belief that the remaining field would not produce sufficient piece-rate pay. Because the ALO did not resolve the conflicting testimony, we are unable to find whether the crew made a demand for "time-and-a-half" pay for overtime; however, we would not have reached a different result in either event. Moreover, the

testimony that Esteban Ramirez Garcia had come to work for Respondent in order to instigate a strike is entirely compatible with the conclusions reached herein. While a strike may have been one of Garcia's goals, the conditions of employment complained of by the employees were not thereby rendered groundless, and the preponderance of the evidence establishes that the employees were engaged in a refusal to work overtime, rather than starting a sustained strike, at the time of their walkout.

The ALO correctly concluded that the crew was discharged because of its protected concerted activity, and did not quit as Respondent contends. When the crew members walked out of the field, they clearly intended to return to work the following day. However, they were met in the field by supervisor Ben Zamudio, who told them that if they did not want to continue working that day, he would take them back to the camp and pay them off. Faced with these alternatives, the crew members would reasonably believe that they would be fired if they did not halt their concerted activity. That they agreed to be paid off rather than to cease their protected activity does not convert the intended or apparent discharge into a voluntary quit.

REMEDY

Relying on various cases involving discharged strikers, Respondent argues that its backpay obligation would not begin to run until the members of Respondent's crew applied for reinstatement. However, the employees discharged by Respondent were engaged in a refusal to work overtime on one day, rather than commencing a sustained strike, and it is apparent that they would

have returned to work the following day if they had not been discharged. Accordingly, they are entitled to back pay from the date of their unlawful discharge in the same manner as other employees discharged on the job site in violation of the Act. See Gulf-Wandes Corp., 233 NLRB No. 116 (1977) , enforced in pertinent part, NLRB v. Gulf-Wandes Corp., 101 LRRM 2373 (5th Cir. 1979).[2/]

In its brief, Respondent contends, for the first time, that this Board should deny reinstatement and back pay to all of the discharged employees because of misconduct engaged in by certain crew members after the discharge. In support of its contention, Respondent refers to testimony of misconduct which it offered at the hearing, not on the question of an appropriate remedy, but rather to show the crew's motivation for the walkout.[3/]

[2/]We note that the NLRB has recently abandoned the rule argued for by Respondent and now orders back pay to run from the date of the unlawful discharge of the striker, presuming, absent indications to the contrary, that the discharge was responsible for the failure to reapply. Abilities and Goodwill, Inc., 241 NLRB No. 5 (1979). Although Respondent contends that the reapplication and rehire of two members of the crew in question on July 21, 1978, shows that there was no appearance of futility, a finding of futility is not precluded by the fact that some employees subsequently made individual offers to return to work. F. M. Homes, Inc., 235 NLRB No. 67 (1978). Although not necessary to our conclusion, we find that there was an appearance of futility based on the circumstances of the discharge and the absence of any evidence that other crew members ever learned of the two rehires.

[3/]The only testimony addressing the asserted misconduct was given by supervisor Ben Zamudio and two relatives who assist him in his labor contracting business: Luis Zamudio, his son, and Miguel Zamudio, his half-brother. No witnesses were called by the General Counsel on the issue of misconduct, perhaps because the issue of misconduct was not raised by Respondent at the hearing, or perhaps because the ALO cut off further inquiry regarding the post-discharge

(fn. cont'd. on pg. 5)

Referring without citation or elaboration to "established principles of agency," and arguing that Anastacio Velasquez and Esteban Ramirez Garcia acted as spokespersons for the crew when they engaged in the claimed misconduct, Respondent contends that the entire crew must be held responsible for the actions of Velasquez and/or Garcia. Initially it should be noted that, according to Ben Zamudio, some unidentified members of the crew had left the camp prior to the incident and only four or five crew members were actually present in the area where the misconduct occurred. Of the employees named in the Complaint, as amended, only Pablo Medrano was identified by Ben Zamudio as being present, along with Velasquez and Garcia, at the time of the misconduct, and we find that Medrano did not authorize or ratify the conduct in question. Mere presence at the place of the misconduct is an insufficient basis for attributing responsibility. Coronet Casuals, Inc., 207 NLRB 304 (1973); Kayser-Roth Hosiery Co., Inc., 187 NLRB 562 (1970); Local 19, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO, 240 NLRB No. 45 (1979).

There is insufficient evidence to establish that Garcia committed any misconduct. While Respondent argues that Garcia threatened and pushed supervisor Ben Zamudio, the record reveals that this conduct was attributed to Velasquez and that the

(fn.3 cont'd.)

incident as unduly prejudicial and of only marginal relevance. In any event, only one side of this incident is before us on the record. We could, under these circumstances, defer the misconduct issue to the compliance stage. However, because we are able to resolve this issue on the merits by assuming arguendo that the misconduct occurred as testified to by Respondent's witnesses we shall do so.

testimony regarding it was stricken from the record as beyond the scope of the direct and cross-examination. Ben Zamudio's testimony that Garcia or Velasquez threatened employees does not adequately support a finding that Garcia threatened employees.

Testimony elicited by Respondent regarding Velasquez' purported misconduct may be summarized as follows: (1) Miguel Zamudio testified that Velasquez threatened to beat and kill those who entered the kitchen; (2) Luis Zamudio testified that when he tried to pacify Velasquez, Velasquez pushed him and then asked who he was; and (3) Ben Zamudio testified on direct examination that Velasquez, and later on cross-examination that either Velasquez or Garcia, threatened to harm employees who entered the kitchen. In addressing the issue of misconduct, we must be mindful that the employees were engaged in protected concerted activity at the time of the alleged misconduct,[4/] that a certain amount of impulsive behavior is to be expected in this context, and that threats may be rhetoric and not literally intended. See Coronet Casuals, Inc., supra; Hartmann Luggage Co., 183 NLRB 1246 (1970), enforced in pertinent part, NLRB v. Hartmann Luggage Co., 453 F.2d 178, 79 LRRM 2139 (6th Cir. 1971) .

Under the circumstances present in this case, we find that the misconduct testified to was not sufficiently egregious to warrant denial of reinstatement or back pay to Velasquez, Garcia, or any of the other crew members. The similarity of the threats

---

[4/]At the time of the alleged misconduct, Esteban Ramirez Garcia and Anastacio Velasquez were attempting to induce other employees to refrain from using the labor camp kitchen facilities which were not available to the crew because of the unlawful discharge.

testified to by Miguel and Ben Zamudio indicates that they may have been reporting the same general threat. There is no evidence that the threat(s) was (were) accompanied by any physical acts or gestures which would give added meaning to the words. On the contrary, as the forty to sixty workers who were the object of the claimed threat(s) clearly outnumbered the five or so fellow crew members of Velasquez who were present during the incident, it would be apparent to any reasonable person present that Velasquez was in no position to carry out the threat(s) even if he had wished to do so. Moreover, the threat(s) was (were) not made in the context of a labor dispute marked by pervasive or significant violence which would add to the coercive impact of the words used. And while most of the workers refrained from using the kitchen as requested by Velasquez and/or Garcia, there is no evidence that they did so because of fear generated by Velasquez' statement (s).

Similarly, we find the isolated pushing of Luis Zamudio by Velasquez to be insufficient to bar back pay or reinstatement for him or any of the other crew members. See Star Meat Co., 237 NLRB No. 132 (1978). No nexus was established between his threat(s) and the pushing incidents. Rather, it appears that the pushing of Luis Zamudio was provoked by his attempts to quiet Velasquez. Just how hard Luis Zamudio was pushed is not indicated in the record. There is no evidence that Luis Zamudio was harmed. The record does show that the pushing incident led to further conversation and not to further physical contacts.

ORDER

By authority of Labor Code Section 1160.3, the

Agricultural Labor Relations Board hereby orders that the Respondent Pappas & Company, 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 participation in protected concerted work stoppages, 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 Esteban Ramirez Garcia, Ruben Olguin, Fernando M. Alvarez, Jose H. Alvarez, Anastacio Velasquez, Pablo Alonso Medrano, Ramon Ramirez Zavala, Jesus Robles, Ricardo Moran, Miguel Garcia, and Pedro Diaz full reinstatement to their former positions or substantially equivalent positions, without prejudice to their seniority or other rights and privileges to which they are entitled, and make them whole for any loss of earnings or other economic losses they have suffered as a result of their 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 under the terms of Paragraph

2(a) 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 July 20, 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: August 13, 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 discriminating against, 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 orderd 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 who 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 participation in lawful work stoppages to protest working conditions.

WE WILL offer to reinstate Esteban Ramirez Garcia, Ruben Olguin, Fernando M. Alvarez, Jose H. Alvarez, Anastacio Velasquez, Pablo Alonso Medrano, Ramon Ramirez Zavala, Jesus Robles, Ricardo Moran, Miguel Garcia, and Pedro Diaz to their former positions and reimburse them for any loss of pay or other money losses they have suffered as a result of their discharge on July 20, 1978, plus interest on the total award, computed at 7% per year.

Dated: PAPPAS & COMPANY

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.

ALO DECISION

The ALO concluded that Respondent violated Section 1153(a) of the Act by unlawfully discharging 11 employees because of their protected concerted activity. The ALO found that the crew refused collectively to work overtime for a variety of reasons, each involving the terms and conditions of employment. The refusal to work overtime occurred on the first day of the cantaloupe harvest that the crew was asked to work overtime, after the crew had worked from 5:30 a.m. to 2:30 p.m., and after the crew had finished loading a truck and harvesting a. section. The ALO rejected the argument that the work stoppage was not protected concerted activity and that the crew had voluntarily quit.

The ALO concluded that two other employees were not unlawfully discharged. The ALO found that one employee quit his job in another crew after his brothers' crew was discharged, and that an employee who was absent from the discharged crew on the day of the discharge did not return to work after learning of the crew's termination.

BOARD DECISION

The Board affirmed the ALO's conclusion that the 11 employees were discharged because of their protected concerted refusal to work overtime. The Board found that the crew refused to work overtime for a variety of reasons, including exhaustion, the hot weather, dissatisfaction with the water, a desire not to work more than eight hours, a skin rash in the case of one employee., and a belief that the remaining work would not produce sufficient piece-rate pay. Moreover, the Board held that the existence of many reasons for the concerted walkout does not strip the employees' activity of its protected status. The Board rejected Respondent's contention that the crew voluntarily quit, finding that Respondent gave the crew a choice of stopping its protected activity or being paid off.

The Board rejected Respondent's argument that the crew was not entitled to back pay because the crew members had not requested reinstatement, reasoning that the crew was engaged in a mere refusal to work overtime and would have returned to work the following day but for the discharge. The Board also noted the recent decision of Abilities and Goodwill, Inc., 241 NLRB No. 5 (1979) which held that discharged strikers need not apply for reinstatement in order to be eligible for back pay.

The Board found no merit in Respondent's contention, raised for the first time in its exceptions, that the crew

should not be awarded back pay and reinstatement because of alleged misconduct. Although the issue was not fully litigated at the hearing, and could have been deferred to the compliance stage, the Board found that it could resolve the issue by assuming the facts to be as testified to by Respondent's witnesses. The Board found that most of the crew was absent at the time of the alleged misconduct and could not be charged with same. With respect to those present, Board found that the record indicated that only one employee engaged in misconduct, that said misconduct could not by agency principles be attributed to other crew members present, and that the one potentially culpable employee should not be denied reinstatement and back pay in light of the circumstances of the alleged misconduct, which entailed an isolated threat and an apparent harmless shoving incident.

REMEDIAL ORDER

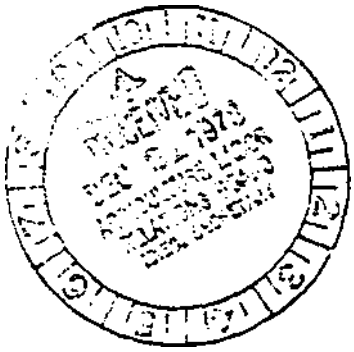
The Board issued a cease-and-desist order, and ordered the reading, posting, distribution, and mailing of a remedial Notice to Employees. The Board also ordered Respondent to offer the employees immediate reinstatement to their former or substantially equivalent jobs, and to make them whole for any loss of pay or other economic losses they may have suffered as a result of their discriminatory discharge, plus interest computed at 7% per annum.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of; PAPPAS & COMPANY, Respondent, and ESTEBAN RAMIREZ GARCIA, Charging Party.	Case No. 78-CE-14-F DECISION OF ADMINISTRATIVE LAW OFFICER

Ricardo Ornelas for the General Counsel

Darrell H. Voth, Dressler, Stoll & Jacobs, for the Respondent

STATEMENT OF THE CASE

JOEL GCMBERG, Administrative Law Officer: This case was heard by me on September 25, 26, 27, and 28, 1978,[1] in Fresno, California. The Complaint, which issued on August 18, alleges violations of Section 1153 (a)[2] of the Agricultural Labor Relations Act (hereafter, the "Act"), by Pappas and Company (hereafter "Respondent"), The Complaint is based on a charge filed on July 24 by Esteban Ramirez Garcia (hereafter "Esteban"). A copy of

---

1. All dates refer to 1978.

2. All statutory citations are to the Labor Code.

the charge was duly served on Respondent by mail on August 7.[3]

All parties were given a full opportunity to participate in the hearing. The General Counsel and Respondent filed post-hearing briefs pursuant to Section 20278 of the Board's Regulations.

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.

Respondent has admitted on the record that it is an agricultural employer within the meaning of Section 1140.4 (c) of the Act, and I so find.

II. The Alleged Unfair Labor Practices.

The Complaint, as amended on the record on the first day of the hearing, alleges that Respondent violated Section 1153 (a) of the Act by discharging eleven named members of a cantaloupe harvesting crew because of their concerted activities in protesting their terms and conditions of employment. Two additional employees, who were not working with the crew in question on July 20, the date of the alleged discharges, are also named in the Complaint as victims of Respondent's allegedly unlawful conduct.

Respondent denies that the employees were discharged or that they were engaging in concerted activities protected under the Act. Respondent asserts that the employees voluntarily quit

---

3. Respondent was served under a misnomer as "Pappas Ranch". This error was corrected through an amendment to the Complaint and Respondent acknowledged service on the record.

their jobs.

III. The Facts.

A. Background.

Respondent grows cantaloupes on the west side of the San Joaquin Valley. The employees involved in this case were hired in early July to harvest melons at Respondent's West Valley Ranch, near the intersection of Interstate Highway 5 and State Highway 198, east of Huron. Sam Bernal,(hereafter "Chato"), an admitted supervisor, had overall responsibility for the conduct of the harvest. He hired approximately half of the harvest labor force. Benny Zamudio, a labor contractor who heads Mid-Cal Labor Service, entered into a contract with Respondent to supply the other half of the workforce for the harvest. Although Chato had authority to supervise Benny's crews, Benny had full power to hire and fire his employees, as well as to direct and assign their work.[4] Accordingly, I find Benny to be a supervisor within the meaning of Section 1140.4 (j) of the Act.

When Esteban learned that Benny was hiring workers for the upcoming harvest, he and several other workers who had been regular members of his crew in previous years went to a labor camp near Respondent's fields to apply for work, Benny, who was operating the camp, hired the crew. Esteban, a very experienced, melon harvester, was to be the captain and spokesman for the crew.

---

4. Section 1140.4 (c) of the Act provides that employees of a farm labor contractor be deemed employees of Respondent for purposes of the Act.

Esteban's crew began work on July 10. Membership in the crew was not constant. Some regular members from past years did not begin work for about a week. Respondent's Exhibit 2 and Benny's testimony disclose that there was substantial turnover of workers in the melon harvest as well as movement by workers from one crew to another. For example, Esteban's crew worked more quickly than the average crew. As a result, at least one worker, Sergio Alvarez, found it difficult to keep up the pace and transferred to another crew.

Melon harvesting is extremely arduous work. The workers put picked melons into a sack which is attached to their chest and hangs from their back. Once the sack is full of melons it weighs between 75-80 pounds. The melons are then dumped into a truck at the end of the field. Because temperatures in the San Joaquin Valley often exceed 100 degrees during the summer, work begins early, at about 6 AM. Benny told the workers that their day would generally end about 2 PM.[5] The crew was paid on a piece rate basis, determined by feet of melons loaded into the trucks. Total earnings of the crew were divided equally among its members.

As the harvest progressed during the first week, with more ripe melons to be picked, Benny and Chato added on crews in a conscious effort to maintain a balance between the number of

---

5. Esteban testified that Benny promised the crew that it would finish its work day at 2 PM even if there were still ripe melons to be picked. Benny denied that he guaranteed a quitting time, because melons must be picked when ripe to avoid spoilage. No other witness corroborated Esteban's testimony and the General Counsel does not argue that a 2 PM quitting time was guaranteed.

workers and the amount of work to be done. Their aim was to ensure that the crews would be able to earn enough money to satisfy them without being overworked. Chato testified that working an extra hour at the end of the day in the melon harvest is difficult. Prior to July 20, work ended no later than 1 PM.

Each crew loaded its melons onto separate trucks. Each truck carried two 10 gallon cans of drinking water. Ice was put into the cans to keep the water cool. On July 19, at least during the morning, the drinking water for Esteban[1]s crew was hot. Manuel Vasquez Castaneda, a member of the crew, drank the water and, within a few minutes, became ill and vomited several times. He testified that he believed drinking the hot water caused his sickness. Manuel reported his problem to Esteban. Although he worked the remainder of the day, he continued to feel unwell and asked Benny to be paid off. Benny complied with his request. Manuel told Benny that he would return when he felt better. Other members of the crew also drank the hot water, but none of them became ill. Esteban testified that he asked Benny to see to it that ice was added to the water, to which Benny replied that it was none of his (Benny’s) business, Benny denied making the statement. The crew did, however, have cool drinking water later in the day.

B. The Events of July 20.

Work progressed on July 20 without any unusual incidents, until about 2 PM. According to Esteban, several of the crew members complained that they were exhausted and couldn't or

wouldn't continue working. After the crew finished its harvesting work in Section 34, it began to walk out of the field, having agreed not to work any longer that day. Jose Alvarez testified that he:

> talked to the captain of the crew (Esteban) because it was late, I feel exhausted, and because of the lack of water with ice. The weather was too hot, and then with some of the crew vie talked to the captain to tell Ben Zamudio that we were already exhausted. In other words, to tell -- to explain that we already make too much for that day, and not only myself but some other members of the crew too.(TR Vol. II, P. 57, 1. 4-10).

Although the record doesn't indicate that the crew had experienced any problems with the drinking water earlier in the day, Jose testified that, at about 2:15 PM, the crew checked the water and found that it was hot. This was apparently after the crew decided to stop working. In any event, Esteban told Benny later that the water was not the problem, because the men were already exhausted.

The weather was undoubtedly very hot. National Weather Service data for Fresno, about 50 miles from the fields, discloses that the temperature was 103 degrees at 2 PM. (GC Ex. 2). The 20th was the first day in which the crew had been required to work during the peak heat of the day.

It is not clear from the record whether the crew knew when it decided to stop working that, if it had continued, it would have been asked to work in Section 21. Section 21 had been picked for the first time on July 18, according to Respondent's records, although the crew members who testified for the General Counsel, Esteban, Jose, and Pedro Diaz, were sure that it had been picked for the first time on July 19. Ordinarily, a field is not picked

for two days after it is "broken", that is, walked through by a harvesting crew for the first time. Because of the crew's mistaken belief that Section 21 was not due to be picked again for at least another day, some of the members were opposed to working there, because, as Jose put it: "we were just going to go to the other field where there was no melons, and we were Just going to get tired." (TR Vol. II, P. 65, 1. 12-15).

As the crew walked out of Section 34, Chato heard some members complaining about the water, and asked an assistant to check out the matter. He began to drive over to the crew, but saw Benny driving by and signalled to him. Chato testified that he then drove to Section 21 to prepare for the work to be done there. Esteban, Jose, and Pedro testified that Chato remained by Section 34 when they walked out.

Benny approached the crew and asked what the problem was. Esteban replied that the men were exhausted and there was no cold water. Benny replied that the water problems could be taken care of. Esteban said the men would not work any more because of their exhaustion. By this time, Benny had told the crew there was work to be done in Section 21. Benny testified that Esteban said the crew would not work any more unless it was paid time and a half for overtime. Esteban testified that he actually said that the men would not work <u>even</u> <u>if</u> the got time and a half. According to Esteban, workers never refused to work overtime on a piece work basis.

Benny asked again if the crew would continue working. The crew refused. According to Esteban and Pedro, Chato, who was sitting in his pick-up, told Benny to "take them (the crew) to hell. They are not worth shit." Jose testified that

Chato was present, but that he did not hear Chato say anything. Benny, Chato, and Buenaventura Castaneda, a member of the crew who testified for Respondent, denied that Chato was even present at the edge of Section 34.

Esteban, Jose, and Pedro testified that Benny then told the crew to get into the back of his pick-up truck so that he could take them back to the labor camp. After they arrived at the camp, Benny told the men to pack their belongings because he was paying them off and they would have to leave. Benny and Buenaventura Castaneda's accounts differ markedly from those of the General Counsel's witnesses. According to Buenaventura, who said that he was tired but could have continued working, Benny

> said that if we didn't want to continue working, that he want us --to take us back to the camp. Then when we got to the camp, I'll pay you off. Then Esteban say, "Yes. You pay us off." (TR Vol. III, P. 163, 1, 13-16).

Benny testified that he asked the men if they wanted to be paid off and that their replies were affirmative.

Regardless of when the issue of payment was first raised, once back at the camp Benny proceeded to pay the men in cash. Several crew members demanded to be paid by check, so Benny phoned his son Luis and told him to bring the company checkbook to the labor camp. Luis testified that his father said he needed the checkbook because "he (Benny) let go of a crew and wanted to pay them off." (TR Vol. IV, P. 46, l.17-18). Benny admitted making this statement, explaining that the men "had asked for their time, so I had to let them go," (TR Vol. IV, P. 107, 1. 15). Benny denied firing the crew.

Esteban's crew was the only one to refuse to work on the afternoon of the 20th. The remaining thirteen crews completed the harvesting work in Section 21. Later in the afternoon, when the other crews which lived at the labor camp returned, Esteban , another crew member, Anastacio Velasquez, and Benny became involved in a heated argument in the presence of a large number of workers. Esteban pulled a union card out of his wallet and told the crowd that he was there to organize a strike.

Sergio Alvarez, who worked in a different crew on the 20th, was also paid off by Benny. According to Sergio, Benny told him that he was fired. Benny testified that Sergio told him that he was quitting because his brothers in Esteban's crew were leaving, and he wished to go with them. I find Benny's testimony to be more credible than Sergio’s on this issue.

Manuel Vasquez Castaneda returned to Huron several days later in order to return to work with Respondent. He testified that he learned from someone whose name he could not remember that Esteban’s crew had been fired. Manuel then decided not to bother to return to the fields to ask for his job back.

DISCUSSION, ANALYSIS, AND CONCLUSIONS

The General Counsel contends that in refusing to work after 2:30 PM on July 20, Esteban's crew was engaging in "concerted activities for the purpose of ... mutual aid or protection", a right guaranteed by Section 1152 of the Act, The Respondent argues that the crew's true motivation for the

work stoppage was not, as the General Counsel would have it, exhaustion or lack of adequate drinking water, but an unwillingness to work in a field which the crew believed would not be sufficiently remunerative or, in the cases of Esteban and Anastacio Velasquez, because of a desire to create a strike among Respondent's employees. Some members of the crew, such as Buenaventura Castaneda, simply went along with their leaders.

It is not necessary, in order to determine whether the crew was engaged in concerted activity protected under Section 1152 of the Act, to divine any single "true" motive for the walkout. An amalgam of reasons was advanced by General Counsel's witnesses, including exhaustion, lack of adequate drinking water, a skin rash (in the case of Jose Alvarez), extreme heat, the fact that it was late and, at least implicitly, that it was not economically worthwhile to harvest the melons in Section 21, While much of this testimony was confused or inconsistent, especially the reliance on the water problem, the asserted reasons for leaving the field, taken together, reflect dissatisfaction with, and a protest against, certain terms and conditions of employment which required the crews to work more than eight hours during the day and to work during the hottest part of the day. That the reasons for the walkout may have differed somewhat from one worker to the next reflects a real world situation. Ironically, if Benny's testimony is to be credited over that of the crew members, it becomes even more clear that the motivation for the work stoppage was economic in nature: the employees wanted more money for overtime work. Nor is it necessary for

employees, particularly if they are unrepresented, to articulate expressly to their employer at the time of a walkout their reasons for doing so, for their activity to be protected under the Act. And they need not present a specific demand to their employer; the act in itself is a signal that the employees wish to better their working conditions. NLRB v, Washington Aluminum. Co., 370 U.S. 9 (1962).

The NLRB and the courts have decided a number of cases involving the refusal of employees to work overtime. In First National Bank of Omaha v. NLRB, 413 F. 2d 921 (8th Cir. 1969), a group of bank clerks refused to work overtime one afternoon. They returned the nest morning but were not reinstated. The court held that:

> employees have the same right to engage in concerted activity to bring about a change in overtime policy as they do. to bring about a change in wages or other working conditions... The test is whether the employees have assumed the status of strikers. They cannot continue to work the regular hours of employment and refuse to work overtime. 413 F. 2d at 925.

In a case arising after Omaha, on facts similar to those presented here, the NLRB held that:

> a single concerted refusal to work overtime is a protected strike activity; and that such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer. Polytech, Inc., 195 NLRB 695, 696 (1972).

The workers in Polytech. like those here, were hired with the understanding that they would be called upon at times to

work more than eight hours a day. They were unrepresented and therefore lacked the benefit of more structured processes for protesting working conditions. The Polytech employees informed their supervisor that they were tired and would not work anymore. As in the present case, the record in Polytech was barren of any evidence that the workers had engaged in any previous work stoppages or that their decision to walk out included any discussion of future plans to do so. Although the General Counsel does not argue that the members of Esteban's crew were strikers, relying instead on the safety aspect of their work stoppage, it is clear that by their refusal to continue to work the employees assumed the status of economic strikers. I therefore conclude that the walkout was concerted activity protected under Section 1152 of the Act.

The only remaining issue, which is considered central by both parties, is whether the termination of the employment relationship between Esteban's crew and Respondent constitutes a discharge or a voluntary quit. The General Counsel argues that the workers were discharged by Benny upon their return to the labor camp, apparently on Chato's orders. Respondent contends that the workers decided to quit after Benny refused their demand for additional overtime compensation. Viewing the testimony of Respondent's own witnesses in a manner most favorable to Respondent leads irresistibly to the conclusion that the crew was discharged. The credible testimony of Buenaventura Castaneda discloses that, after the crew refused Benny’s

request to continue working, Benny told, the workers that he was going to take them back to the labor camp and then pay than off, The fact that some of the crew members agreed to being paid off is of no significance because Benny had already made his Intention quite clear. Benny's statement to his son Luis that he had let go of a crew is strong confirmation of his intent. Benny's subsequent testimony that he had to let the crew go because the men had asked for their time finds no support in the record. Benny's own recollection of his discussion with the crew was that he asked the men if they wanted to be paid off, not that any of the workers had raised the subject first.

To the extent that there is any ambiguity in Benny's statements, the test is whether they would reasonably lead the workers to believe they were being discharged. NLRB v. Hilton Mobile Homes, 387 F. 2d 7 (8th Cir. 1967); see also Elam v. NLRB. 395 F, 2d 611 (DC Cir. 1968). Here, there is no evidence that the employees communicated any intention to quit their employment with Respondent; rather they clearly indicated that they did not want to work beyond 2:30 PM because of their dissatisfaction with working conditions. Respondent's argument that the employees had a motive to quit because they wanted to instigate a strike actually lends support to the employees' position. Whether they or the General Counsel realized it or not, by refusing to work overtime they created a labor dispute within the meaning of Section 1140.4 (h) of the Act. Employees generally go on strike for a reason and certainly a strike is inconsistent with voluntarily quitting.

The entire contest of the events of July 20 indicates that the crew would have returned to work the next morning had they been given the opportunity. Although it is not necessary to establish a violation for the General Counsel to demonstrate a motivation for the discharges, Benny testified that he wanted to remove the crew from the fields to avoid the risk of demoralizing the other crews and precipitating a more widespread walkout. I conclude that the members of Esteban's crew were discharged because of their protected concerted activities in violation of Section 1153 (a) of the Act.

I cannot agree that Respondent committed any unfair labor practice with respect to Sergio Alvarez or Manuel Vasquez Castaneda. Sergio quit his employment voluntarily because his brothers had been fired. There is no credible evidence that he could not have continued working for Respondent had he chosen to do so. Mr. Castaneda admitted that he quit voluntarily. He was not employed by Respondent on July 20. Upon hearing that Esteban's crew was no longer working, he decided not to apply to be rehired. There is not a shred of evidence in the record to establish that Respondent would not have rehired Manuel because of the discharge of Esteban's crew, I conclude that the charges pertaining to Sergio Alvarez and Manuel Vasquez Castaneda should be dismissed.

THE REMEDY

Having found that Respondent violated Section 1153 (a) of the Act by discharging employees Esteban Ramirez Garcia,

Ramon Zavala, Jose Alvarez, Fernando Alvarez, Ruben Olguin, Pablo Alonso Medrano, Anastacio Velasquez, Jesus Robles, Miguel Garcia, Pedro Diaz, and Ricardo Moran because they engaged in protected activities, I shall order that Respondent immediately offer these employees full reinstatement effective with the beginning of the 1979 cantaloupe harvest and make them whole for any loss of earnings they may have suffered as a result of the unlawful action against them, by payment to then of a sum of money equal to what they would normally have earned as wages from the date of their discharge until Respondent offers them reinstatement, in accordance with Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from interfering with, restraining, or coercing employees by discharging or in any other manner discriminating against employees for striking or engaging otherwise in protected concerted activity, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 1152 of the Act.

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

(a) Offer Esteban Ramirez Garcia, Ramon Zavala, Jose Alvarez, Fernando Alvarez, Ruben Olguin, Pablo Alonso Medrano, Anastacio Velasquez, Jesus Robles, Miguel Garcia, Pedro Diaz, and Ricardo Moran full reinstatement to their

former positions, effective with the beginning of the 1979 cantaloupe harvest, and make them whole for any loss of earnings each of them may have suffered by reason of the unlawful action against him, in the manner set forth in the section of this Decision entitled "The Remedy".

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(c) Post copies of the attached Notice to Workers at the commencement of the 1979 cantaloupe harvest for a period of not less than 60 days at places to be determined by the Regional Director of the Fresno Regional office.

(d) Mail copies of the attached Notice to workers, in English and Spanish, within 20 days from receipt of this Order, to all present employees, to all employees employed during the 1978 cantaloupe harvest, and to all employees hired during the period prescribed for the posting of the Notice. The notices are to be mailed to each employee's last known address.

(e) Have the attached Notice to Workers read in English and Spanish on company time to the assembled employees of Respondent by a company representative or by a Board agent, at times and places specified by the Regional

Director, and accord said Board agent the opportunity, outside the presence of supervisors and management, to answer questions which employees may hare regarding the notice and their rights under Section 1152 of the Act.

(f) Notify the Regional Director of the Board's Fresno Regional office within 20 days from receipt of a copy of this Decision and Order of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

IT IS FURTHER ORDERED that the allegations contained in the complaint not specifically found herein to be violations of the Act shall be, and hereby are, dismissed.

DATED: December 13, 1978.

AGRICULTURAL LABOR RELATIONS BOARD

By 

JOEL GOMBERG
Administrative Law Officer

NOTICE TO EMPLOYEES

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

1. The Agricultural Labor Relations Act is a law which gives all farm workers these rights:

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

2. Because this is true we promise you that:

WE WILL NOT do anything in the future that interferes with your rights under the Act, or that forces you to do, or stop doing, any of the things listed above.

WE WILL NOT discharge or otherwise discriminate against any employee because such employee exercised any of such rights.

3. The Agricultural Labor Relations Board has found that we discriminated against Esteban Ramirez Garcia and the employees in his crew by discharging them because they acted together to protect one another. We will reinstate them to their former Jobs and give them back pay plus 7 percent interest for any losses that they suffered as a result of their discharge.

Dated: PAPPAS & COMPAHY

By: _____
(Representative (Title)

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

DO NOT REMOVE OR MUTILATE.