Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TENNECO WEST, INC., Respondent, and GRACIELA MELGOZA AND MARIA GUADALUPE PIMENTAL, Charging Parties.	)	Case No. 80-CE-8-D 7 ALRB No. 12

DECISION AND ORDER

On August 26, 1980, Administrative Law Officer (ALO) Thomas Burns issued the attached Decision in this proceeding. Thereafter, General Counsel and Respondent each timely filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and supporting briefs and has decided to affirm the ALO's rulings, findings,[1/] and conclusions and to adopt his recommended Order, except his recommendations that the Board extend an apology to Respondent and that litigation costs and attorney's fees be awarded to Respondent.

We find that the complaint herein was issued with

[1/]The Board has adopted the ALO's finding that the discharge of Graciela Melgoza was not discriminatory in nature and therefore finds it unnecessary to consider whether Anita Macias is a supervisor within the meaning of the Act.

reasonable cause to believe the allegations therein were true. 8 Cal. Admin. Code section 20220. We find also that the conduct of the litigation by the General Counsel, however inept, was not frivolous. Accordingly, we do not reach the question whether this Board has authority to award litigation costs and attorney's fees to a respondent exonerated of unfair labor practices alleged in a complaint, a question left open in S. L. Douglas (July 26, 1977) 3 ALRB No. 59.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: May 27, 1981

RONALD L. RUIZ, Member

JOHN L. McCARTHY, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Tenneco West, Inc. Case No. 80-CE-8-D
7 ALRB No. 12

ALO DECISION

The ALO concluded that Respondent did not violate section 1153(c) and (a) of the Act by discharging Graciela Melgoza and Maria Pimental. The ALO found that Melgoza's severing of grape canes was an intentional destruction of company property, and that her firing by Respondent was therefore motivated by legitimate business reasons.

No evidence was introduced by General Counsel to support the charge filed by Maria Pimental. The ALO recommended dismissal of the complaint, finding that General Counsel did not meet his burden of establishing a prima facie case of discriminatory discharge.

The ALO recommended that litigation costs and attorney's fees be awarded to Respondent because it was forced to prepare a defense to a case that amounted to a frivolous prosecution. To support his conclusion that the case herein was frivolous, the ALO cited the lack of evidence presented as to Maria Pimental's discharge, the failure of the Regional Office's investigator to properly investigate the charge before filing the complaint, and the inadequate case presented by the General Counsel as to the allegation regarding Graciela Melgoza.

BOARD DECISION

The Board affirmed the ALO's conclusion that Respondent did not violate the Act by dismissing Graciela Melgoza and Maria Pimental.

The Board rejected the ALO's recommendation to award litigation costs and attorney's fees to Respondent. The Board found that the General Counsel's issuance of the complaint was based on his reasonable belief that the allegations therein were true, and that the conduct of the litigation by the General Counsel was not frivolous. The Board did not reach the question whether it has authority to award litigation costs and attorney's fees to a respondent exonerated of unfair labor practices alleged in a complaint, a question left open in S. L. Douglas, 3 ALRB No. 59.

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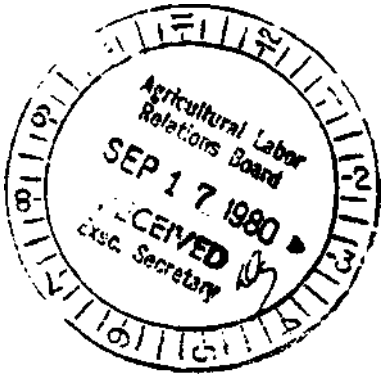
BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

STATE OF CALIFORNIA

TENNECO WEST, INC., RESPONDENT, AND GRACIELA MELGOZA AND MARIA GUADALUPE PIMENTAL, CHARGING PARTIES.	CASE NO. 80-CE-8-D



John Patrick Moore, of Delano, California
for the General Counsel

Howard A. Sagaser and Bruce D. Bickel of Fresno, California
Attorneys for Respondent

DECISION

Statement of the Case

THOMAS PATRICK BURNS, Administrative Law Officer: This case was heard before me in Delano, California, on June 17, 18 and 19, 1980.

The matter herein is based on unfair labor practice charges filed by Graciela Melgoza and Maria Guadalupe Pimental on January 29, 1980, against Respondent, TENNECO WEST, INC. (hereinafter Respondent or Employer).

A complaint was issued by the ALRB on May 8, 1980, alleging that:

"On or about Juanuary 28, 1980, Respondent through its agents, Anita Santos Macias and Marvin Kirland, discriminatorily dischaged Graciela Melgoza and Maria Guadalupe Pimental because of their concerted activities and support for and on behalf of the United Farm Workers of America (UFW)."

"By the acts referred to (above) sic. Respondent has discriminated in regard to the terms and conditions of employment and interfered with rights to the terms and conditions of employment and interfered with rights protected by Section 1152 of the Act.

Respondent has thereby engaged in unfair labor practices within the meaning of Section 1153(c) and 1153(a) of the Act."

The Respondent answered said Complaint, denying any violation of the Agricultural Labor Relations Act and asking for a clarification of the charges. Respondent subsequently filed a request for a Bill of Particulars and had received a response from the General Counsel; however, Respondent maintained that that response was inadequate.

A Pretrial Conference was held on June 10, 1980, in Delano, California before Administrative Hearing Officer, Kenneth Cloke. Various issues were discussed and agreements were made concerning discovery matters. A transcript of that Hearing is available. The parties were unable to resolve the case in chief at the Pretrial Conference and it continued for hearing before me, to begin June 17, 1980.

All parties were represented at the hearing and given a full opportunity to participate in the proceedings. There were no parties as Intervenors. The United Farm Workers of America were not represented in the proceedings and had not appeared to have participated in any of the actions leading to resolution of the issues, though there was reference made during the Hearing to the fact that one of the complaining parties had once contacted the Union to tell them she had been dismissed and to ask what action to take. She had been advised to return to work to find out the reasons for her discharge.

General Counsel presented one witness, i.e., Graciela Melgoza, at the Hearing. Respondent presented eight witnesses at the Hearing. General Counsel then called one of Respondent's witnesses as a rebuttal witness under 776 of the Evidence Code as an adverse witness. Maria Guadalupe Pimental did not appear at the Hearing.

Based upon the entire record, including my observations of the demeanor of the witnesses, and after consideration of the exhibits submitted at the hearing and the written arguments submitted by General Counsel and counsel for Respondent, I make the following findings of fact and conclusions.

FINDINGS OF FACT

I. Jurisdiction

I find, and Respondent admits, that Respondent is a company engaged in agricultural operations in Kern County, California. It is now, and has been at all times material herein, an agricultural employer within the meaning of Labor Code Section 1140.4(c).

II. The Alleged Unfair Labor Practices

General Counsel sought to establish that one Anita Santos Macias was a Forewoman for Respondent and that as such she fell under the description of supervisor within the meaning of Section 1140.4 (j) of the Act.

He further attempted to establish that the Charging Parties named herein had engaged in concerted activities and support for, and on behalf of the United Farm Workers of America. Apparently because he did not present any evidence in support of his contention on behalf of Maria Pimental, he made no argument on her behalf.

General Counsel maintains that Anita Santos Macias had knowledge of the alleged concerted activity of Ms. Melgoza. He then attributes such alleged knowledge to the Employer under the theory of her agency as an alleged supervisor.

General Counsel assents that Graciela Melgoza was discharged in retaliation for her role in the concerted activity. The concerted activity he alleges was the payment to a local radio station for the airing of certain grievances against Anita Santos Macias, and the attempt to get others to contribute to such payment.

Respondent alleges that Anita Santos Macias is not now and never has been a supervisor as defined by the Act. It alleges further that the Employer is not responsible for what may or may not have occurred between the two employees if one was not its agent.

Respondent alleges further that two employees were discharged for destroying company property, i.e., cutting and twisting off vines that should not have been removed. Graciela Melgoza was one of those two. The other person named in the complaint, but for which no supporting evidence was submitted or argued was Maria Pimental, who was discharged for twisting off the vines and thus destroying company property. In answer to Respondent's assertion of a justification for dismissal, General Counsel alleges that the broken and twisted vines were manufactured evidence.

Respondent further argues that the ALRB should have to pay its attorneys' fees and costs because it alledgedly failed to fulfill its obligation to make a thorough investigation of the case at the outset, and thus put the Employer to great cost and difficulty by prosecuting a case that could have been shown to have no merit from the outset. General Counsel denies that an inadequate job of investigation was done and asserts that the only basis for having to pay attorneys' fees would be if the case were frivolous, which he maintains it was not.

A. The Employer.

The Employer, being the Ducor Ranch operation of TENNECO

WEST, INC., and hereinafter sometimes referred to as the "Ducor Ranch", conducts a vineyard business. It cultivates and harvests a variety of grapes. It operates on a year-round basis with seasonal layoffs.

1. David Lopez. David Lopez is the Employer's manager and holds the highest position at the Ducor Ranch. He has been with the Employer for ten years and has held the office of manager of the Ducor Ranch for two and one-half years. While his duties include responsibility for all operations of the Empoyer, he is directly responsible for firing employees.

2. Willie Vaught. Mr. Vaught has been associated with the Employer for almost eight years, and in his present position he is in charge of all labor, new planting, development and harvesting at the Ducor Ranch. In the absence of David Lopez, Mr. Vaught serves as assistant manager for the Employer. Prior to the pucrhase of the Ducor Ranch by the Employer, Mr. Vaught had worked at the Ducor Ranch for approximately thirteen years.

Mr. Vaught has an extensive background in the grape industry. He has been connected with it for approximately twenty years. His father was a grape farmer, and Mr. Vaught has participated in all aspects of viticulture, including tying, pruning, harvesting, as well as supervising tying crews, pruning crews and harvesting crews. In addition to his present position with the Employer, Willie Vaught has served as a field formean and has been in charge of the cannery, juice packing, new planting and development at various times for the Employer.

In his present position with the Employer, Willie Vaught is the only person besides David Lopez who has authority to fire an employee. If a foreman wants to fire someone on the crew, the foreman must come to Mr. Vaught, as labor supervisor, or David Lopez for permission.

3. Marvin Kirkland. Mr. Kirkland has been serving as a crew foreman at the Ducor Ranch since 1967, and has been with the Employer since its purchase of the Ducor Ranch in 1970. He has been involved in agriculture most of his life and has been continuously serving as a crew foreman for the last thirteen years. As a crew foremand Mr. Kirkland has sole responsibility for hiring the crew members and assigning them to their various jobs. It is Mr. Kirkland who has the sole duty to make out the time cards for the members of his crew. Mr. Kirkland does not have the authority to fire any member of his crew. If he wishes to fire a member of his crew, he would contact his superiors, Willie Vaught or Dave Lopez.

There are many specific duties which Mr. Kirkland has as crew foreman. These duties are solely his own and are not delegated to any assistant or helper in his crew. For instance, Mr. Kirkland is responsible for insuring that there is proper water for his crew, for the decision when his crew members are to leave at the end of

the day, and for distributing the equipment to his crew. His helper, Anita Macias, does not perform any of these functions.

Mr. Kirkland is always present to supervise his crew, and he has no recollection of any time when his helper, Anita Macias was in charge of the crew in his absence.

Also, Mr. Kirkland has the authority to authorize time off for a crew member. This is another decision which is solely his own, and such authority does not extend to his helper, Anita Macias.

Marvin Kirkland speaks very limited Spanish. Consequently, his communication with the Spanish speaking members of his crew is limited, and he often cannot speak to them in Spanish. Therefore, Mr. Kirkland has Anita Macias serve as his translator. Graciela Melgoza testified, "(Marvin Kirkland) is the one that says everything, (and Anita Macias) interprets when he wants something."

B. The Employees and the-Work.

1. Crews. Both Charging Parties were members of Mr. Kirkland's crew. The Employer gives its job assignments on a crew basis, and everybody in the crew does the same type of work at the same time. There are approximately thirty-five people in Mr. Kirkland's crew during the tying season.

The crew normally begins the year in January tying vines. When this job is finished, as determined by Willie Vaught, there is a temporary layoff. Then, normally in April, the same crew returns to the Ducor Ranch to remove suckers from the vines. After the suckering work is finished, the crew begins the process of pulling leaves from around the bunches. Then the crew begins tipping and thinning the grapes, and this continues until shortly before harvest time. Harvest usually begins in the latter part of July or first part of August and normally ends in October. When Mr. Kirkland's crew is finished harvesting grapes at the Ducor Ranch, the crew begins a harvest at the J.D. Martin Ranch. While the J.D. Martin Ranch is not in anyway connected with the Employer, it is the identical crew of Mr. Kirkland which moves from the Employer's ranch to the Martin Ranch where they continue to work under his supervision. Following the harvest at J.D. Martin Ranch, there is a layoff until tying begins again at the Employer's ranch.

2. The Pruning and Tying Process.

Starting in December, special pruning crews begin pruning the vines. After the vines have been pruned, then other crews follow and tie the pruned vines.

With respect to the tying process, there are normally five or six canes protruding from each vine which must be straightened out onto the supporting wires. The canes are wrapped around the

wire and held to the wire with a "twist-em." The end of the cane must not be twisted off because the vine will bleed which creates a problem with the future growth of the vine and results in crop loss. At the beginning of each tying season, Mr. Kirkland's crew is given specific instructions about the tying process. In particular, they are told to save all of the canes and to try to avoid breaking any canes.

At the start of the 1980 tying season, Mr. Kirkland instructed his crew that they were to tie all of the vines and not to cut any. They were instructed that the canes were left for the specific purpose of crop growth. The crew was cautioned to handle the canes carefully to avoid even accidental loss. The tiers have absolutely no discretion with respect to the canes. For instance, if a crew member sees a piece of cane that is dead or non-functional, the crew member is not allowed to clip or leave the cane, but rather must wrap and tie it. It is not the tiers function to determine whether or not a cane is too dry to tie. During tying season, the crew members are not supposed to carry clippers with them.

One of the Charging Parties, Graciela Melgoza, testified that the crew members were told at the beginning of each season that they are not to break the vines during the tying process. Ms. Melgoza also testified that she carries small shears with her while tying vines, and these shears are capable of cutting canes.

During the tying season, the crew members are paid on an hourly basis, and there is no piece rate involved. This contrasts with the harvest season when the crew members are paid an hourly rate plus a box bonus rate.

Mr. Kirkland's crew does not do the yearly pruning of the vines. His crew is not responsible for this task, and it is performed by another crew usually three to five weeks in advance of his crew starting the tying process. Willie Vaught is responsible for the pruning crews. He has used the same eight crews for pruning for almost thirteen years, and he did not use any new crews during the pruning of December, 1979.

Pruning usually begins in the month of December. The Employer waits until the vines become dormant so that the canes will not bleed when they are cut. If, during the pruning process, a bad cane is left, or a cane is damaged so that it has very little life left in it and can do nothing but suck some of the juices out of the vine, Mr. Kirkland wants his crew to nonetheless tie down the cane exactly as the pruners left it. As he stated, it is not for his crew "to decide if it was proper, or if it should be left or not. They're not experienced pruners, they're tiers."

After the vines are pruned, the Employer has a machine that shreds the discarded canes into little pieces. Following the shredding process, the canes are disked into the ground.

When the vines are pruned, they do not bleed, because they have entered into the dormant stage. By January, when the tying begins, the plants have usually left the dormant stage, and if cut will bleed.

3. The Specific Rows in Question.

The Employer's vines which were growing in Section N, Block 5, Row 66 and Row 75, were pruned in December, 1979. When the vines were pruned at that time, they did not bleed because the vines were dormant.

4. Transferability.

Although Mr. Kirkland's crew ordinarily remains the same, it is possible for people to transfer from one crew to another. The normal procedure would be for a crew member to make his desire for a transfer known to his foreman and then the foreman would relay this information on- to Willie Vaught. In Mr. Kirkland's crew, a crew member would initially contact him with respect to a transfer.

5. Anita Macias.

Anita Macias is an assistant in the crew to Marvin Kirkland. Shis is paid 30 cents per hour more than the other crew members. She cannot hire or fire employees and she cannot authorize crew members to take time off. She cannot fill out time cards, does not take care of water for the crew, and does not distribute equipment. There has never been a day when Ms. Macias was in charge of the crew, though the Charging Party disagreed. She lacks the authority to suspend employees, lay employees off, recall employees or promote employees. Likewise, she does not have any authority to discipline any member of the crew if they are, for instance, tying vines improperly. If Ms. Macias believes a problem exists, she tells Mr. Kirkland who investigates the problem and makes his own determination with respect thereto.

Graciela Melgoza testified that Ms. Macias would, during the grape harvest, assemble the crew, give instructions on how the work was to be done, inspect the picked grapes to see whether they had been cleaned and whether they had been picked ripe, weigh boxes, and correct work done by those who had erred.

During the tying of the vines, there was testimony that Ms. Macias would check work done and call back workers to redo improperly done work. Anita Macias' job was also to assign workers the rows they were supposed to work in and, if she felt it necessary, would ask a worker to help someone who hadn't finished his row.

Company supervisor Marvin Kirkland testified that Ms. Macias did not do the daily work tasks like pruning or tying vines; that

she did not participate in the daily process of tending to the vines. He further testified that Ms. Macias was paid 30 cents more per hour than the other people. Mr. Kirkland added the description of part of Ms. Macias' job in the grape picking as going from table to table checking the work that was done. He added that in the tying of vines, she would direct the workers to the rows in moving the crew and had the power to assign workers to the row she felt that a particular worker should work in.

The primary capacity in which Mr. Kirkland uses Ms. Macias is as an interpreter. While Ms. Melgoza also stated that Ms. Macias designates the vines to be worked on during tying and havest season, Ms. Melgoza admitted that this is not Ms. Macias' decision but that rather the designation is made by Mr. Kirkland or Mr. Vaught.

When Mr. Kirkland gives instructions to his crew, he does so on a group basis. For instance, he will give instructions and a demonstration on how to tie a vine. He does so in English, and then he requests Anita Macias to explain the same process in Spanish. This procedure is repeated several times throughout each season for each job.

During the harvest season, Ms. Macias has no decision making authority to judge bad packs, waterberries, mildew or some reason why the box must be repacked. If she does see a problem with the packing, she would merely call it to Mr. Kirkland's attention. Her statements to the employees represent a passing on of information. Inspectors employed by the United States Department of Agriculture inspect the grapes to insure quality and have the ultimate authority to require that boxes be repacked.

Ms. Macias has no authority in disciplinary matters. She may bring what she believes is improper conduct to the attention of Mr. Kirkland, but she has no input at all with respect to recommending what should be done about it. Mr. Kirkland independently investigates the alleged misconduct and makes his own determination of whether or not discipline is warranted. Mr. Kirkland does not discuss disciplinary measures with her and does not seek any guidance or input from her on the issue of how to deal with the workers in disciplinary problems.

During the tying season, Ms. Macias walks across the rows behind the crew members to observe whether the job is being done properly. She is an experienced worker in grapes with approximately twenty years' experience. I have taken into consideration the testimony of Ms. Melgoza to the effect that Ms. Macias made people redo work, reprimanded and criticized them for poor work performance as well as her assembling and giving orders to the crew. I find that in so doing she was a mere conduit for her own supervisor and was acting in a routine nature with no effective power.

6. Graciela Melgoza.

Ms. Melgoza, a Charging Party, began working for the Employer

about 1975 and continued her employment up until her termination in January, 1980. All during her employment with the Employer, she worked in Marvin Kirkland's crew. At the time of her termination, she was working with the crew in the tying process.

Ms. Melgoza makes a practice of bringing a radio into the field. She regularly listens to a United Farm Workers radio program which is broadcast at 10:00 a.m. on Wednesdays. She testified that the program discusses the problems of farmworkers and that she plays the radio loudly when the program is on.

Ms. Melgoza never served as a pruner for the Employer. During her time with the Employer, she did participate in the tying process. Prior to her discharge, she had been disciplined in the sense that she was instructed that she had not been tying the cane to the wire properly.

Ms. Melgoza testified that she had a personal dislike for Anita Macias. Despite this personality problem, there was no evidence presented that Ms. Melgoza ever requested a transfer to a different crew, though she had been informed by Dave Lopez, the Ducor Ranch manager, that she had the right to request a transfer.

7. Maria Guadalupe Pimental.

Almost no evidence was presented by the General Counsel with respect to the second Charging Party, Maria Pimental. The evidence did indicate that she was a member of Marvin Kirkland's crew. With the rest of the crew, she was involved with the tying process on January 28, 1980. On that day she worked in Row 75 of Section N, Block 5. Maria Pimental was not involved in an alleged conflict that Ms. Melgoza had with Anita Macias.

There was no evidence presented on the issue of whether Maria Pimental had an affiliation with the United Farm Workers Union or engaged in any protected concerted activities. General Counsel makes no argument on her behalf in his closing brief.

C. The Radio Broadcast.

Many workers played their radios while working in the field. One particular UFW-sponsored radio broadcast aired prior to the harvest of 1979, led to a discussion between Ms. Melgoza and Ms. Macias. The program was critical of supervisors in general and discussed foremen at companies other than the Employer. Ms. Macias expressed a contrary view about supervisors. While Ms. Melgoza indicated agreement with the broadcast, she also indicated a neutral attitude toward the UFW when she stated that "the Union didn't do anything to me,because I had never worked under a contract for them. And that if they had never done anything good for me, they also never done anything bad to me."

During the harvest season of 1979, Ms. Melgoza decided to go to the radio station and request that a program criticize Anita Macias. She discussed the matter with her co-workers, and it was decided that she and her cousin would go to the radio station. Initially it was contemplated that many people in the crew were going to share in the expenses for sponsoring the program. Ms. Melgoza discussed with three other women the content of the radio program.

Ms. Melgoza went to the people in charge of the Wednesday morning radio program and told them she wanted something said about the way Anita Macias was treating the workers, particularly that the people who came from Coachella allegedly could get jobs immediately when they gave her presents. She also wanted the broadcast to include statements about Ms. Macias' preference to certain employees, the fact that she would allegedly humiliate them, and the fact that allegedly she would not allow them to go to the restroom in groups of two. Ms. Melgoza paid an unspecified sum so that the references about Anita Macias would be broadcast.

The broadcast occurred on August 8, 1979. The broadcast contained music and a few minutes of actual speaking. In addition, the intended text for the program indicated that there would be a tribute to Emiliano Zapata, an announcement of a UFW rally, a report on Cesar Chavez, comments on the election at M. Caratan Company Ranch, comments on union contracts with six Delano ranchers, and comments on negotiations with Tex-Cal. (Respondent's Exhibit F.)

With respect to Ms. Macias, it appears the broadcast stated that she treated people preferentially (for example, her daughter-in-law), and that she used to push the people, that she used to help the ones she liked, and that she refused to let people go to the restroom in groups of two. Comments were also made that Ms. Macias would humiliate the workers by reprimanding them and stating that they were not doing the job correctly. It also stated that she was accepting bribes from workers from Coachella.

Graciela Melgoza heard the Spanish broadcast while she was picking in a row. She stated that her radio could not be heard by others in different parts of the row. There was no evidence that Willie Vaught heard the broadcast. In fact, he testified that he was not even aware of any such Wednesday broadcast sponsored by the UFW. Willie Vaught does not speak Spanish. Marvin Kirkland indicated that he was aware of the program but that he never listened to it. While Anita Macias did mention the fact of the broadcast to Mr. Kirkland, there is no evidence that she personlly heard the broadcast. Ms. Macias apparently briefly discussed the broadcast with Mr. Kirkland and mentioned that she had been named in the program without any greater detail. After the broadcast, Anita Macias never stated to Mr. Kirkland that she felt that Melgoza should be fired or disciplined for the broadcast.

Nothing was said during the broadcast with respect to who paid for the program or which individuals related the information to the announcer. About one week after the broadcast, there was a conversation between Anita Macias and Ms. Melgoza. Ms. Melgoza speculated that one of her co-workers told Ms. Macias that Ms. Melgoza had sponsored the broadcast. Ms. Melgoza testified that during the conversation, Anita Macias stated that she knew that Ms. Melgoza was the one who was behind the program. Ms. Melgoza testified that she denied any involvement and told Ms. Macias that she had nothing to do with the program. She further stated that "she didn't even know who to be aware of, because her very own friends were the ones that spoke against her. Then that began regarding she said she was going to fire us. I told her that if she fired me what good would that do."

After the broadcast, Ms. Melgoza actually experienced less difficulty with Anita Macias than prior to the broadcast. Ms. Melgoza testified that after the broadcast, Ms. Macias "finally let us alone." By the end of the 1979 harvest season, Anita Macias was ignoring Ms. Melgoza. Though Ms. Melgoza stated she continued to have trouble with Anita during the remainder of the harvest season (1979) it appears that it was her assumption that the inspectors (U.S. Government) were checking her at Anita's request. She admitted though that she did not know whether Anita had sent them to check her boxes for dirty grapes.

Graciela Melgoza was not fired or retaliated against in August of 1979, after the radio broadcast. She also continued to work for the Kirkland crew with Anita Macias at the Martin Ranch following the end of the 1979 harvest at the Employer's Ducor Ranch. Anita Macias did not fire Ms. Melgoza after the radio broadcast. Nor did Ms. Macias threaten to personally fire Ms. Melgoza during the time spent at the Martin Ranch. There was no evidence of retaliation against the crew as a whole after the radio broadcast. At no time was anyone in Mr. Kirkland's crew told that they could not play the UFW broadcast in the fields.

D. The Termination For Intentional Destruction of Company Property.

The testimony of both Marvin Kirkland and Anita Macias with respect to their discovery of the damaged canes was substantially identical. On January 28, 1980, in the afternoon about 30 minutes before quitting time, they became aware of problems in the manner in which the vines were being tied by certain employees. Ms. Macias and Mr. Kirkland were walking across the rows, checking the work of the crew as is the normal procedure. They came to one row and observed a lot of freshly cut canes on the ground. It was easy to notice the freshly cut canes because the ground had been clear. Anita Macias picked up some of the cut canes and matched the ends to fresh cuts on the vine. It was easy to determine the fresh cuts, because the newly cut vines were bleeding at that point. The bleeding effect on the vines with fresh cuts was different from the vines which had cuts that had been made by the pruners one month

earlier. The cuts made by the pruners had sealed over so there was no longer any bleeding. While the vines are normally supposed to have five to six canes, these particular vines which had been freshly cut had as little as three canes. As the canes are the fruit bearing portion of the vine, their destruction creates a significant crop loss.

On January 28, as is normally the situation, there was only one person tying vines in each row. The person who was working in the row which had cut canes was Graciela Melgoza. Mr. Kirkland had Ms. Macias summon Ms. Melgoza and asked her why she was cutting the canes. Anita Macias translated the question in Spanish to Ms. Melgoza, who made no response. Instead, she merely turned away and walked back to where she had been working farther down the row.

Mr. Kirkland and Anita Macias continued their inspection of the field and came across another row where they noticed that numerous canes had been twisted from the ends of the vines. The vines were twisted off where they should normally not be twisted off. The worker in this row was Maria Pimental. The same procedure was followed where Maria Pimental was summoned and asked the question why she was twisting the vines. Her reply was that "everybody's doing it." In both the conversations to Ms. Melgoza and Ms. Pimental, Anita Macias acted as the Spanish translator.

The cutting damage to the vines was done to Section N, Block 5, Row 66 and the twisting damage was done to Section N, Block 5, Row 75. The vines in the rows of other workers were examined and except for an occasional break, there was no bleeding. There was no comparable damage in any of the other rows.

The damage was discovered close to quitting time, which was about 3:30 p.m. At that time, Mr. Kirkland went to the Employer's Office and Anita Macias went home. At no time prior to departing did-. Anita Macias ever tell Mr. Kirkland that she thought that Ms. Melgoza should be fired for cutting the vines, or that Ms. Pimental should be fired for twisting the vines.

After quitting time, disturbed about the damage he observed in Rows 66 and 75, Mr. Kirkland returned to the Employer's Office and talked with David Lopez. Mr. Lopez was busy so he called Willie Vaught in so that Mr. Kirkland could take him to the rows and show him the damage.

Mr. Vaught and Mr. Kirkland went out to Rows 66 and 75. There Mr. Vaught saw the bleeding and recognized that it was not normal, because the bleeding from the pruning would have already sealed up by this time. He examined the canes and found that there was fresh bleeding and the canes on the ground in Row 66 would match the cuts on the vines. He found some twenty to twenty-five canes on the ground in that row. The cutting of the canes in Row 66 was very unusual because cutting was never done by the

tying crews. In Row 75, he found that numerous canes had been twisted off and there were at least some ten to twenty canes in this condition. He found that this amount of twisting was unusual. When Mr. Vaught viewed the damage in Row 66 and Row 75, he did not know which employees had been working in these rows. Based on his experience and what he saw/ he concluded that the acts done in both Row 66 and Row 75 were deliberate.

Up until that time, Mr. Vaught had not heard Mr. Kirkland say anything about intentional destruction of Employer's property.

Mr. Vaught gathered some of the damaged canes and brought them back to the office to show Mr. Lopez. When Dave Lopez examined these cut canes from Row 66, he found a considerable amount of bleeding.

Mr. Kirkland testified that he was confident that no one other than the individual employees working in respective Rows 66 and 75 were responsible for the damage. He stated that no one else entered the rows because he could see anybody in the field. He had a good vantage point and there were no leaves in the vineyard at this particular time so there was nothing to block out his view, and the vines were not dense. Furthermore, the damage extended over quite a distance and would have involved quite a bit of time. Mr. Kirkland testified that he had never seen vines damaged to this extent, and he could think of no reason why canes would be cut during the tying process.

The General Counsel tried to elicit testimony from which it could be inferred that the damage in Rows 66 and 75 was committed by Anita Macias. He was unsuccessful in getting any testimony to support that contention. There is considerable direct testimony and circumstantial evidence to the contrary. First, Ms. Macias stated that she did not cut any of the canes. Secondly, Ms. Macias was not carrying any clippers with her on that day. Thirdly, as discussed above, Mr. Kirkland stated that the rows were visible to him and he saw nothing suspicious. Fourthly, Ms. Melgoza admitted cutting canes herself. Finally, when confronted with the damage by Ms. Macias and Mr. Kirkland, Ms. Melgoza did not register any surprise and did not suggest that it was done by someone else.

Messrs. Kirland, Vaught, and Lopez all testified that the decision to terminate was based solely on the conclusion that the damage was done intentionally. They alleged that the intentional destruction of company property was the sole reason Ms. Melgoza and Ms. Pimental were discharged.

Mr. Lopez made the decision to terminate the employees based on the evidence brought back by Mr. Vaught and Mr. Kirkland and their conversation. Mr. Vaught did not know who the affected employees were until the decision to terminate. At the time he decided to recommend to Mr. Lopez that the employees be fired, Mr. .Vaught did not know that any of the employees sponsored a radio broadcast made by the UFW. Also, at the time the decision

was made to terminate the employees, he did not know whether either of the two employees being fired had ever made disparaging remarks about any supervisor or other employee. He alleged that his sole ground was based on the rule that prohibits destruction of Employer property. (See GCX2)

The final decision in the whole matter was made by David Lopez, who relied upon the information furnished him by Willie Vaught.

After the decision to terminate the two employees was made, Mr. Lopez asked Mr. Kirkland to tell the employees they were fired. Mr. Kirkland attempted to reach the employees by telephone. When he called Ms. Melgoza, he reached her residence, but the party answering was her sister. Instead of stating that she was fired, he left word that she should not come to work the next morning. Because of his limitation in speaking the Spanish language, he then had Anita Macias call and leave the same message. He also called Ms. Maria Pimental and advised her husband that she had been terminated because of destroying vines.

The reason that Kirland spoke to Ms. Melgoza's sister was that Ms. Melgoza was not home. He stated that he did not go into great detail because he did not want to leave a sensitive message with a third party.

On January 29, 1980, Mr. Kirkland and Ms. Macias were in the field and were confronted by both Graciela Melgoza and Maria Pimental who had ignored the telephone message and had come to work. Mr. Kirkland advised them that they were not working. He told Ms. Melgoza, through interpreter Anita Macias, that she was fired.

Maria Pimental's husband, who also worked for the Employer, confronted Mr. Vaught the same morning. Speaking in English, he asked if Mr. Vaught would give his wife one more chance. Mr. Vaught responded that he did not know at the time of termination that it was Mr. Pimental's wife. He further stated that the employee would have been fired regardless of whose wife she had been,

On the morning of January 29th, David Lopez was also confronted by Ms. Melgoza, Ms. Pimental and Mr. Pimental. Mr. Lopez speaks Spanish and he conversed with these three individuals in that language. He told Ms. Melgoza that she had been discharged for cutting the canes and that she knew better, and that she should not have been doing it. She indicated to him, as her response, that other people were doing it. She did not deny that she had cut the vines.

E. Evidence of Damage to Vines.

1. Eye Witnesses.

Besides Mr. Kirkland, Anita Macias, and Mr. Vaught, Mr. Darrell

Valdez inspected the damaged vines in January, 1980. On January 30, he took Polaroid pictures of vines in Rows 66 and 75. When in Row 75, he saw that many vines were frayed and appeared to have been twisted. Also, from these frayed ends he saw bleeding sap. In Row 66, he noticed that many of the vines had been cut and many canes were two to three inches in length rather than the normal length of approximately five feet. When in Row 66, he saw 17 canes that were cut and bleeding. In Row 75, he saw approximately 39 canes that had been twisted and had bleeding sap.

2. Polaroid Photographs.

Of the Polaroid photographs, introduced as Exhibits D1-D3, only D3 was admitted into evidence. While the photographer, Mr. Valdez, was not able to fully capture the loss of sap which he observed on that day, the photograph of D3 does show a cane that has been cut off. The bottom photograph on D3 shows a fresh cut as depicted by the white fiber at the cut cross-section.

3. 35 Millimeter Photographs.

The 35 mm. photographs, admitted as Exhibits Cl through C6, were taken by Mr. Van Kopp, Employer's employee, during the last week of February. The photographs are of vines in Rows 66 and 75. Mr. Vaught testified that the top photograph on Cl evidences an improper cut. Photograph C2 depicts an improper cut that a pruner would not normally leave. Photograph C3. shows a cane that has been cut in a practice that is not normal pruning procedure. Photograph C4 shows contrasting cuts—one that is old and one with sap starting to flow down the end of it. Photograph C5 shows that a cane has been broken off. Photograph C6 also depicts a cane that has been twisted off.

4. Physical Evidence.

On January 28, 1980, Mr. Vaught picked up several canes from the ground in Row 66. The canes were admitted into evidence as Respondent's Exhibit E.

F. The Alleged Failure of ALRB Investigators To View The Damaged Vines.

The evidence showed that, prior to bringing the charges to a filed complaint, the investigator for the Agricultural Labor Relations Board, hereinafter "ALRB," did not avail himself of the opportunity to inspect evidence preferred by the Employer.

The Employer's corporate counsel, Suellen H. Anderson, testified that she contacted the ALRB's investigators and stated that the charges lacked sufficient information to determine the nature of the incident being referred to. Consequently, she contended that she was unable to begin her own investigation of the charges. As late as the second week after the date of discharge,

Ms. Anderson asserts she was still not aware of the dates of the alleged concerted activity or what constituted the alleged union activity. Though ALRB investigator, Pulido, conferred with Ms. Anderson on several occasions, at no time was Ms. Anderson provided with information about the alleged concerted activities or the dates of such activity. Ms. Anderson testified that investigator, Pulido, had advised her that the allegation was being dismissed and that he found no evidence in support of the concerted activity allegation.

Mr. Pulido also refused to inspect all relevant evidence. Ms. Anderson allegedly made many requests to Mr. Pulido to inspect evidence which the Employer was offering. These requests were made by telephone and in writing. In particular, Ms. Anderson offered to show Mr. Pulido the damaged vines. She testified that she wanted him to inspect these vines because they were the Employer's best evidence and so that he could compare the subject vines with normal vines and draw his own conclusion. At no time did Mr. Pulido ever inspect the damaged vines. In fact, no ALRB agent ever inspected the damaged vines. No explanation was given by the General Counsel at the hearing why the ALRB agents repeatedly refused to inspect the damaged vines. Mr. Pulido was present throughout the hearing, but was not called to testify in contradiction of the assertions.

In response to a request for the Employer's policies and rules regarding termination, Ms. Anderson additionally explained that since Mr. Pulido appeared to be confused with respect to the written warning system, she offered to show him warnings to substantiate that fact. To clear up confusion on the part of the ALRB with respect to written warnings, Ms. Anderson offered to show Mr. Pulido the operation of their written warning system. He declined to investigate that matter. In response to the comments of one of the ALRB's agents that the employees should have been warned and not discharged, Ms. Anderson offered to show Mr. Pulido the discharges but he declined to view that documentation. The Employer went to great effort to protect the safekeeping of the canes retrieved by Mr. Vaught on January 28, 1980. At all times the canes were kept in the Employer's safe. Additionally, photographs were taken of the damaged vines.

CONCLUSIONS OF LAW

I. Are Marvin Kirkland and Anita Santos Macias Supervisors within the meaning of Section 1140.4(j) of the ALRA?

There is no dispute that Marvin Kirkland is a supervisor within the meaning of the Act. Respondent admitted his supervisory status in its Answer, although it .denied that his technical title was "foreman." The record also abounds with testimony of his supervisory status. The only dispute with regard to the supervisory issue is whether Anita Macias (or "Annie") is a supervisor within the meaning of the Act. Looking at the record as a whole, my conclusion is that Ms. Macias is not a supervisor and that the

respondent is, therfore, not bound by her acts as an agent of the company.

The law relevant to the issue of Ms. Macias' status is as follows:

Section 1140.4(j) of the ALRA provides that:

> "The term 'supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 2(11) of the NLRA defines supervisor in essentially indentical language. In connection with this definition, General Counsel asserts two principles. The first is that it "is to be interpreted in the disjunctive . . . and the possession of any one of the authorities listed in Section 2(11) places the employee invested with this authority in the supervisory class." Ohio Power Co. v. NLRB (CA 6) 176 F 2d 385, 387, cert, den. 338 U.S. 899. The second principle is that section 2(11) "does not require the exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification." Ohio Power Co. v. NLRB, supra, at 388.

General Counsel argues that the fact that one supervisor in charge of one part of the production works under other supervisors, is bound by carefully formulated rules, and must receive approval of superiors before acting does not preclude supervisorial status. NLRB v. Budd Mfg. Co. (6th Cir., 1948) 169 F 2d 571, 22 LRRM 2414. He contends that the possession of authority to use independent judgment in one of the specified authorities is enough. NLRB v. Brown and Sharpe Mfg. Co. (1948) 169 F. 2d 331, 334, 22 LRRM 2363. General Counsel says that a higher rate of pay, director of other employees' efforts, reporting employees who do not do good work, and possession of greater skill than other employees are factors which support a finding of supervisorial status. Con-Plex Division of U. S. Industries (1972) 200 NLRB 466, 468, 81 LRRM 1548 (1972). He contends that one who instructed other employees, who told employees to redo work which was done wrong, who was considered to be a supervisor, and who issued warnings, was found to be a supervisor. Paoli Chair Co. (1974) 213 NLRB 909, 920, 87 LRRM 1363.

General Counsel also asserts that other relevant factors in determining supervisorial status are: relative earnings, the power to transfer, hire, discharge, assign and direct work, the

authority to excuse absences, validate time cards, and report to management regarding the quality of production. Dairy Fresh Products, 3 ALRB No. 70.

I agree with General Counsel that the Ohio Power case holds that investment in anyone of the enumerated powers of authority affects the determination of the supervisory class, however, since that decision there have been numerous seeming exceptions, as I will note by citation of certain cases to follow. The point to note, however, is the degree of authority, not its mere existence. In each case the question must be asked whether the exercise of such authority was a routine nature, or if it requires the use of independent judgment. It is clear from the NLRB cases cited hereafter that independent judgment does not mean merely "making a statement, or taking an action, without checking with the supervisor." If that were the case then the majority of workers would be supervisors. The quality of that independent judgment is vital. That is, the" degree to which the judgment is independent of guidelines and direction.

Further, General Counsel's reference to the existence of the power regardless of the amount of time has been overcome by other cases to be cited hereafter which show that temporary assignments do not a supervisor make.

Respondent cites Doctors Hospital of Modesto, Inc. 489 F 2d 772, 776 (1973). "Leadman or straw boss who may give minor orders or directives or supervise work of others is not necessarily a part of management and a 'supervisor' within the National Labor Relations Act Section 2(11) as amended 29 USCA 152(11)."

In that case the NLRB was found not to have abused its discretion where certain nurses could assign and direct auxiliary personnel such as LVNs & Nurses Aides, and that they periodically relieved nurses found to be supervisors.

Respondent argues that the cornerstone case under the ALRA which sets forth the parameters of who is a supervisor is Yoder Brothers, 2 ALRB No. 4 (1976).

> "The evidence reflects that the employees in question here are mainly crew leaders responsible for quality control within each crew. They do not have independent authority to hire, fire, or discipline workers. They are paid on an hourly basis, at a higher rate than regular workers. There are salaried supervisors who have overall control of the work force, who direct the crew and the crew leaders on where to work, and who investigate any complaint made by a crew leader with regard to an individual worker. On this record it cannot be concluded that the employees are supervisors within the meaning of the Act."

I agree with Respondent Counsel that the facts in the instant case are similar to the factors set forth in Yoder. Anita Macias did not have independent authority to hire, fire or discipline the workers. Her function, in part, was for purposes of quality control in checking the performance of the various crew members. Above her was Marvin Kirkland, an admitted supervisor, who had an array of authority which she lacked. She is paid on an hourly basis slightly, higher than the other employees, but that has been true of other lead persons not found to be supervisors.

General Counsel's reference to the Budd case notes: "The fact that one supervisor in charge of one part of the production works under other supervisors, is bound by carefully formulated rules, and must receive approval of superiors before acting does not preclude supervisorial status." He is correct in the citation in so far as he interprets the holding. The court further stated, however, that "supervisors exercise a good deal of discretion in carrying out their orders." It was the opinion of the court that such was the basis in fact which brought the supervisors under the Act, i.e., the degree of discretion in carrying out their orders.

General Counsel's citation of NLRB v. Brown and Sharpe Mfg. Co. (1948) 169 P 2d 331, 334, 22 LRRM 2363 is misleading when taken out of context. The case does not stand for the principle that certain persons, namely Time-study Men, were in fact supervisors. On the contrary they were found not to be supervisors and the Board noted that "Congress meant to embrace within the scope of Section 2(11) of LMRA, which defines a 'supervisor', only employees with authority to use their independent judgment with respect to someone or more of the specific authorities enumerated in the Section."

The case goes on to hold that even though the Time-study Men do exercise independent judgment in the exercise of such authority as is conferred upon them, and do testify at hearings held on grievances by higher management they do not participate in the adjustment of grievances nor" effectively recommend such adjustments I am not persuaded by General Counsel's citation of Conplex Div. of U.S. Industries (1972) 200 NLRB 466, 468, 81 LRRM 1524.

> "Leadmen on employer's crews were supervisors within meaning Section 2(11) of LMRA, it appearing that (1) They had authority to make recommendations affecting employer-employee—relationship of men on crews, (2) Their responsibility in directing efforts of their crews was more than routine or clerical in nature, and (3) They received higher pay than other crew members and had skills not prossessed by rank and file employees, such as ability to read blueprints." (My emphasis.)

It is evident that Ms. Macias responsibilities in directing efforts of the crew was not more than routine in nature and she did not possess special skills.

Paoli Chair Co. (1974) 213 NLRB 909, 920, 87 LRRM 1363. "Leadman

> Employee described by chair manufacturer as 'leadman' in its upholstery department is supervisor within meaning of LMRA, it appearing that he instructs department workers to redo improperly upholstered chairs and is required to witness issuance of written warnings to workers. Even if employee is not supervisor within meaning of the Act, he is agent of employer within meaning of Act, it appearing that he occupies special position and that workers reasonably believe him to be a conduit to and from upper level of supervision."

The very same case held that another person was not a supervisor within the meaning of the Act though he was an inspector. It was found that the inspector neither responsibly directs other lumberyard employees in performance of their work nor possesses any other indicia of statutory supervisory status.

Ms. Macias actions were more like an inspector in that she checked to see whether the crews were doing what they had been instructed to do. I will comment later herein on whether an employees belief that one - is a supervisor makes it so.

General Counsel asserts that because the Charging Party testified that Anita Macias replaced Mr. Kirkland when he was away, it. was evidence she was a supervisor. I accept Mr. Kirkland's testimony that he was not away. In any case such brief substitutions would be irrelevant here.

In Cannonsburg General Hospital Assoc. and Pennsylvania Nurses Assoc. 244 NLRB No". 141 (1979) , the Board overruled the Hearing officer and found that a Nurse who spent as much as 17.4 percent of her total working hours substituting for her supervisor was only an acting relief supervisor and though she held all of the duties of the supervisor during vacations and other absences her limited role was insufficient to warrant the conclusion that she was a supervisor within the meaning of the Act.

In Pine Manor, Inc. dba Pine Manor Nursing Home and Michigan Licensed Practical Nurses Assoc. 238 NLRB No. 217, Sept. 1978, L.P.N.s who were classified as charge nurses, were not supervisors where they merely gave routine work directions to nurses aides. Usually the directions given by the L.P.N.s to the nurses aides were the result of their training, the needs of the patient or specific orders of a patient's physician. Otherwise, the nurses aides' duties were standard and required little supervision. Moreover, the L.P.N.s could not hire or fire employees, and they disciplined employees only on minor matters. Furthermore, the L.P.N.s could not grant time off, except for illness, or permit overtime, and they called in replacements for absentees from a predetermined list.

Machine Tool and Gear/ Inc. and International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW 237 NLRB No. 172.

"An employee was a leadman and not a supervisor, since all authority which he exercised over other employees in directing or assigning work originated from management officials and were within the employer's guidelines. The employee's authority did not require the use of independent judgment."

John Cuneo of Oklahoma, Inc. and Road Sprinkler Fitters Local No. 669, 238 NLRB No. 200 (Sept. 1978).

"Although an employee served as a working foreman on about half of the jobs on which he worked, he was an employee rather than a supervisor since his use of independent judgment in performing his duties was very limited. The working foreman could allow small amounts of overtime, hire casual workers, layoff or transfer employees from a job, orally reprimand employees/ record hours on time sheets and purchase supplies. However, the hirings and layoffs were made pursuant to the prior authorization of management and only sporadically. Moreover, the oral reprimands had no effect on an employee's employment status, and keeping time records and purchasing supplies were merely routine functions."

This case also tends to weaken General Counsel's contention that reference to Ms. Macias as a second boss, by Mr. Vaught, made her a supervisor. In fact people have been called foremen and working foremen and still not found to meet the requirements of the Act to be supervisors. It is not the title given, it is the degree of authority which makes the difference.

Victory Electric Cooperative Assoc. Inc. and Local Union 304 International Brotherhood of Electrical Workers 230 NLRB No. 179. "A general foreman was not a supervisor within the meaning of the Act, and thus was included in a bargaining unit of other employees. The general foreman was merely a leadman who operated as a conduit for orders and directions from higher management, but did not participate in formulating labor policies. He could assign work within set job priorities, but could not fire employees or adjust employee grievances. Moreover, the general foreman's superior approved hirings, wage increases, overtime and time off, and approved employees' time sheets."

Plastics Industrial Product, Inc. 139 NLRB No. 90, 51 LRRM 1438 (1962).

"In this case three leadmen were assigned to the operation of specific machines. Like the other machine operators they are hourly paid, although they receive about 30 cents an hour more, and they have the same fringe benefits as the other operators. The leadmen spend more than 90 percent of their time in the operation of their machines. In the remaining time they assist new operators, and help operators on their shift if they have difficulties with their machines. They may assign operators to particular machines, but such assignments are sometimes changed by Sidlow (General Manager).

The leadmen may make recommendations regarding an operators work, and their recommendations are given 'serious consideration'. Such recommendations are apparently limited to the progress being made by other new operators. Also Sidlow conducts an independent investigation with regard to a leadman's recommendation.

It is apparent, therefore, and we find, that the leadmen do not have the authority 'effectively to recommend' within the terms of Secion 2(11) of the Act. They also do not possess any of the other indicia of supervisory authority as defined by the Act."

In American Diversified Foods Inc. dba Arbys and. Hotel, Motel, Cafeteria Employees and Bartenders' International Union, AFL-CIO Local No. 58, 247 NLRB No. 9, (January, 1980).
The Board found that shift managers were not supervisory or managerial employees. They were without effective authority to hire, fire, transfer or discipline employees. The shift managers lacked meaningful discretion in assigning positions. Thus the shift managers functioned only -as leadmen in the absence of management to insure that their shifts operated smoothly within the narrow confines of company policy.

Amerace Corporation, Esna Division and International Assoc. of Machinists and Aerospace Workers, AFL-CIO, 225 NLRB No. 159 (August, 1976).
An employers group leaders were not supervisors within the meaning of the Act, since they performed very limited supervisory functions at the departmental level. A departmental supervisor was usually present when the group leaders were on duty. They and the employees under them performed laregly unskilled work and their limited authority derived from assigning or directing this work.

Ball Plastics Division and International Union, Allied Industrial Workers of America, AFL-CIO, 228 NLRB No. 7. "Group leaders in a company's vacuum and shipping departments were not supervisors, even though they trained employees and issued verbal reprimands. The group leaders received prior approval before issuing reprimands, played no formal role in discipline, did not make job evaluations or recommend merit increases, and could not grant time off, hire or fire. Rather, the group leaders were primarily engaged in the operation of production machines. Their training functions and routine maintenance of quality and quantity control are often associated with leadmen, as well as with supervisors."

Elastic Poly Horizons Corp. and Amalgamated Clothing and Textile Union AFL-CIO, 228 NLRB No. 92.
An employee who worked as a company's put-up and inspection department was found not to be a supervisor. The employee did obtain work assignments in the form of shipping orders from the office, was responsible for getting shipments out, granted permission to work overtime, granted time off, and initiated time cards, but merely was a conduit for management and did not possess customary supervisory authority.

General Counsel contends that even if we were to accept the respondent's attorney's version of Ms. Macias' role as a translator or mere mouthpiece, we must conclude that the company was bound by her acts nonetheless. He says the company is thus admitting that, because Ms. Macias spoke Spanish, it was dependent on her for communication with the crew. General Counsel asserts that even at this level, she must be considered an agent, and the company bound by her acts. He claims that it can be concluded that in the eyes of the crew, she was being held out as an agent and supervisor by the company.

General Counsel cites as follows: Because of the cloak of authority which was given to the supervisors by the respondent, it must be concluded that they were, at all relevant times, acting on its behalf as its agents. See Paul W. Bertuccio, 5 ALRB No. 5. And, a supervisor's knowledge of employees' activities is routinely imputed to the employer. Perry's Plants, 5 ALRB No. 17, at p. 24, citing NLRB v. Alabama Marble Co. (1949), 83 NLRB 1047, 24 LRRM 1179; NLRB v. MacDonald Engineering Co. (1973) 202 NLRB No. 113, 82 LRRM 1646. Finally, the ALRA provides that an agricultural employer shall be bound by the acts of its agents. Labor Code Section 1165(b).

Anita Macias, in her role as translator, had a certain degree of visibility that the other crew members did not have. The law recognizes, however, that such a facade will not characterize one as a supervisor. For instance, in Dairy Fresh Products Co., 2 ALRB No. 55 (1976), the ALRB stated:

> "In agriculture labor, given the cultural and language diversity that abounds between employer and employee and among employees themselves, it is perhaps inevitable that some employees will possess a higher visibility insofar as the dissemination of work orders and/or employee inquiries are concerned. Such a higher visibility is insufficient to render that employee a supervisor within the meaning of the ALRA. Even if that employee of higher visibility were to engage in minor coordination or supervision of the work order, he or she would not necessarily, for that reason alone, become a supervisor within the meaning of the ALRA.

Dairy Fresh Products, 3 ALRB No. 70 holds that, "Employees' impressions are only 'evidence and not an independent factor in finding supervisory status.' Other relevant factors include, but are not limited to, relative earnings, power to transfer, hire, discharge, assign and direct work, excuse absences, validate time cards and report to management regarding the quality of production as well as adjusting grievances.

Likewise, the mere fact that Anita Macias instructed and

corrected other employees or the fact that other employees may have regarded her as a supervisor is not determinative. In Rod McLellan Company, 4 ALRB No. 22 (1977), the issue was whether or not four people were supervisors. All four shared the following common factors: (1) they instructed and corrected other employees; (2) they were paid hourly wages; and (3) other employees regarded them as supervisors. However, the ALRB held that those factors did not indicate the exercise of independent judgment. The Board went on to find that two of the four people did not act as supervisors because they did not have authority to perform these additional tasks: (1) seeking out plants in the nursery for filling customer orders; (2) checking on work performance of other employees; (3) exercising independent judgment and making work assignments; and (4) effectively recommending hiring and discharging.

In the present case, the independent authority of Anita Macias was limited to her instruction of the crew members when she detected a problem. On her own, she could only give instructions on the proper techniques. She could not discipline the other employees, nor could she fire them. Even to the extent that she could be viewed as directing the location of their work, this was a matter that was dictated by the actual supervisors, such as Mr. Kirkland or Mr. Vaught.

Except for the fact that she could offer instruction, Ms. Macias had authority which was identical to all the other crew members. The mere fact that an employee may give assistance to other employees or instruction on how to perform their work duties does not make her a supervisor. Plastics Industrial Product, Inc., 139 NLRB No. 90, 51 LRRM 1438 (1962).

As stated by Mr. Kirkland, his major use of Ms. Macias is as a translator. In Sam Andrews' Sons, 2 ALRB No. 23 (1976), the ALRB held that a worker who was used as a translator but had no other independent authority to direct workers or fire and hire was not a supervisor. As in the Sam Andrews' case, Ms. Macias is a translator but has no independent authority for hiring or firing.

Summary of Findings as to Whether or not Anita Macias was a supervisor within the meaning of the Act.

I find that Ms. Macias was not a supervisor within the meaning of the Act for the following reasons:

a) She did not have authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline other employees.

b) Her authority to assign was limited, e.g., as to which rows a person should go to to help another person.

c) Her responsibility to direct the employees was within the strict confines of directions given to her by her own supervisor. Such direction as she did perform was primarily based upon the fact that she was fluent in Spanish and could translate the intentions of the employer.

d) She did not have authority to adjust grievances, or effectively to recommend such action.

e) The fact that she was paid 30 cents per hour more than other workers was not significant enough to set her apart as a true supervisor. She was paid extra to act as an assistant.

f) She is not left alone with the crew and is therefore under constant supervision herself. The testimony conflicted on this point, but even if it were found that she was left alone the few times that Charging Party alleges, it would be insufficient to justify classification as supervisor as the cases hold that such temporary assignments do not change the status of the employee to that of supervisor.

g) Her inspection of the work of others and telling persons to redo it, is a routine function, and does not constitute independent judgment within the meaning of the Act. It does not call for unusual or special talents and could be performed by any other person assigned the same tasks and motivated to do so.

h) The fact that she did not herself perform the tasks of the workers she was assigned to check and inform of her supervisors orders, does not transform her into one with higher authority or independent judgment any more than persons of the same rank performing different tasks would be found higher than one another.

i) The fact that Charging Party or even others may have concluded that she was a supervisor because she held a position of higher visibility does not make her a supervisor nor does it cloak her with more authority than was intended by the employer.

j) The title to which she may have been referred does not determine the level of her authority. She could be called boss or foreman or other similar elevating designations, and still she would not be a supervisor within the meaning of the Act unless she had the authority to go with the title. She did not have such authority.

k) Ultimate authority to require that boxes of grapes be repacked lay with the Inspectors from the United States Department of Agriculture. There was no evidence that Ms. Macias exercised such authority or even influenced the U.S.D.A. inspectors.

l) Finally, taken as a whole, after hearing all testimony and comparing the actions and duties of Ms. Macias with those set

forth in pertinent ALRA and NLRA cases it is apparent to me and I so find that Ms. Macias does not exercise such authority as to be considered more than routine or clerical in nature. It does not require the use of independent judgment.

II. Requirements for Establishment of Prima Facie Case of Discriminatory Discharge.

To establish a prima facie case of discriminatory discharge in violation of Section 1153(a) and (c) of the Act, the General Counsel must prove by a preponderance of the evidence that the employee was engaged in protected activity, that respondent had knowledge of the employee's activity, and that there was some connection or causal relationship between the protected activity and the discharge." Jackson & Perkins Rose Company, 5 ALRB No. 20, at page 5. (My emphasis).

A. Did Graciela Melgoza Engage in Concerted and Union Activities While Employed by Respondent?

During Graciela Melgoza's employment with the respondent, some of the crew members used to listen to a weekly radio program sponsored by the United Farm Workers Union in which farmworker problems were discussed. At one point, during the harvest of 1978, Ms. Melgoza alleges she had a conversation with Anita Macias about the UFW program. On that occasion, while the crew was gathered, some persons allegedly gave their opinions about the program. At that point, Ms. Melgoza made it known to Ms. Macias that she defended the program, felt that it was correct and that what the UFW speakers said in the program was true even if they were critical of supervisors. At that point, according to Ms. Melgoza, Ms. Macias expressed hostility to the men on the radio program and called them, according to testimony, "Sons of so-and-so". Ms. Melgoza made clear her position as supporter of the program's stance.

In 1979, during the harvest, Ms. Melgoza alleges she and others began to have problems with the way Ms. Macias was dealing with the workers. She began to collect money in order to have her grievances aired on the weekly UFW program, so as to let everyone know what she perceived Ms. Macias was doing to herself and others. Discussed were things like favoritism and preferential treatment, humiliation of workers in reprimands, refusal to allow people to go to the bathroom in twos, bribery, and others. During the harvest, Ms. Melgoza alleges that she and other workers discussed the idea and what the content of the program should be. Ms. Melgoza and her cousin decided they would be the ones to carry the message to Tony Banuelos of the UFW, the person who conducted the radio program. The testimony showed that this was, in fact, done. It was further testified that the grievances against Ms. Macias were aired during the harvest of 1979. Respondent's counsel argues that the mere fact of participation with the radio broadcast itself does not indicate a union affiliation on the behalf of Ms. Melgoza.

At best he says, it indicates that she chose the radio broadcast as a vehicle for publicizing her own personal grievances against Ms. Macias.

Respondent's counsel says that nowhere in the record is Graciela Melgoza found to endorse or espouse the philosophies of the UFW. He admits there is evidence that on one occasion she did agree with the comments that were being made on the program with respect to overall treatment by foremen.

Respondent's counsel contends that the only references made by Ms. Melgoza in her testimony with respect to the UFW indicates an indifference to it on her behalf. She stated that since she had never been in the UFW, it had never done anything good for her nor had it done anything bad for her. Respondent's counsel claims that if she were affiliated or supportive of the UFW, her attitude would not have been so cavalier.

He further argues that even if it is assumed that she was in support of the UFW by reason of her use of the radio broadcast, it is doubtful that the actual broadcast itself constitutes "protected" concerted activity. He cites Morris, The Developing Labor Law (1971) at pages 124, 125, which states that concerted activities must have lawful objectives and must be carried on in a lawful manner. Counsel maintains the statements made on the radio broadcast were at least unsupported, undocumented innuendoes based on rumors, and may well have constituted slanderous statements damaging Ms. Macias' personal and business reputation. There is nothing in the record to show either the truth or falsity of the statements.

Respondent's counsel cites Joanna Cotton Mills Co. v. NLRB, 176 F 2d 749, 24 LRRM 2416 (4th Cir. 1949). In this case, an employee harbored personal resentment against his foreman and originated and circulated a petition demanding his discharge. The Court in Joanna Cotton Mills held that the discharge of the employee for this reason was not unlawful.

Respondent's counsel asserts the facts in the present case are even more egregious. He says that Ms. Melgoza chose to voice her personal criticism of Anita Macias in a most public manner and included statements about which she did not have any personal knowledge and which in some cases were totally false. Although she accused Ms. Macias of accepting bribes from the Coachella workers, Ms. Melgoza had no personal knowledge supporting this serious accusation and admitted at the hearing she was relying upon rumors. Counsel contends that if the law punishes such statements as slander, it would certainly not recognize those same statements as any type of "protected" concerted activities. He says there must be a lawful objective of the concerted activity before it is protected. His argument is that just as a physical assault and battery upon a supervisor is not protected concerted activity, neither is a slanderous and libelous attack by an employee upon her fellow employee protected concerted activity.

It is not possible to determine without further evidence whether the statements were in fact defamatory. That was not responded to by Respondent in its defense. I therefore conclude that one may not set aside the acts of the employee as not concerted protected activities where there is no separate showing of the illegality of such statements.

As to whether the actions were concerted it is evident that Ms. Melgoza acted jointly with her cousin and made an effort to involve others by trying to collect money to pay for the broadcast. The acting in concert is fulfilled by her joining with at least one other person. It would be protected activity if she were acting in concert to improve working conditions. Such appears to be the case. If, rightly or wrongly, the employee believed she could improve the conditions of employment for herself and others by paying for a UFW radio broadcast, then she was engaging in protected activity by so doing. It does not matter that the act may be futile, foolish or ineffective. It is the doing of the act which is important.

In S. & F. Growers, 4 ALRB 58 it was held that the discharge of an employee who intervened on behalf of his brother, who was engaged in a dispute with his supervisor, was found to violate the ALRA. Because the subject matter of the dispute (the proper level of lemons required to constitute a full bin) had been an issue between labor and management on prior occasions, the dischargee's actions were held to be contemplative of group action and therefore protected concerted activity.

In Sam Andrews' Sons 5 ALRB 68 it was found that an employee's refusal to work overtime was part of a concerted protest over employee's working conditions.

Summary of Conclusions as to Whether or Not Ms. Melgoza engaged in Concerted Protected Activity.

I find that Ms. Melgoza did engage in concerted protected activity by carrying out what she believed was the will of herself and other workers to improve her working conditions.

B. Did the Employer Have Knowledge of the Concerted Activity by Graciela Melgoza?

General Counsel asserts that one week after the main broadcast regarding Ms. Macias' treatment of the workers, Ms. Macias had a conversation with Ms. Melgoza about it, according to the testimony. At that point allegedly Anita Macias angrily pointed out that she knew very well that it had been Ms. Melgoza who had directed the program towards her. Ms. Macias, allegedly threatened to fire Ms. Melgoza as a result of it. Ms. Melgoza claims she defended herself by asking what good would it do to fire her and that

Ms. Macias should be wary of everyone because no one liked her. General Counsel argues that the testimony clearly establishes that the employer, through its agent Macias, had knowledge of the concerted activity of Graciela Melgoza.

Respondent's counsel contends that the General Counsel failed to show that Employer knew the employees were engaged in the activity. He points out that the decision to terminate Graciela Melgoza and Maria Pimental was made by Willie Vaught and David Lopez. The hearing record is completely void of any indication that these men were aware of the radio broadcast and, particularly, that Ms. Melgoza or Ms. Pimental were involved with it.

There is no evidence that either Mr. Vaught or Mr. Lopez were given any information in this regard. Mr. Vaught testified that he was not aware of any such radio program, and there is no evidence that Mr. Lopez was aware of the radio broadcast.

Even though one supervisor may have knowledge of an employee's activities, such knowledge cannot be imputed to another supervisor that performed the action in question.

In NLRB v. Whitefield Pickle Co., 374 F 2d 576, 581, 64 LRRM 2656 (5th Cir 1967} the Court noted that the NLRB was not warranted in finding that employer violated Section 8(a) (3) of LMRA by discharging an employee on the alleged pretext of absenteeism. The court stated that a low-rating supervisor's knowledge of union activities could not be charged to the company officials responsible for the discharge. In the instant case Anita Macias is not actually a supervisor according to my finding herein. Nevertheless, if she were found to be a supervisor she would clearly be what the court referred to as a low-rating supervisor. In such instance there would be no way to infer her knowledge, if any to the company officials who did discharge Ms. Melgoza.

Delchamps, Inc. v. NLRB, 585 F 2d 91, 99 LRRM 3386 (5th Cir. 1978) held that the NLRB was not warranted in finding a grocery store operator violated Section 8(a) (3) of LMRA when it discharged a cashier who failed to follow employer's policy of calling the manager in event of a dispute between the cashier and a customer, where the supervisor, who discharged the cashier, was not aware of her union activities at the time of the discharge. Although employer's other supervisors were aware of the cashier's union activities there knowledge could not be imputed to the discharging supervisor.

Respondent's Counsel also offers the citations of Santa Fe Drilling Co. v. NLRB, 416 F 2d 725, 731-32, 72 LRRM 2399 (9th Cir. 1969); Joe Magio, Inc., 4 ALRB No. 37 (1978); and Robert H. Hickam, 4 ALRB No. 43 (1977).

Summary of Findings as to Whether or not Employer was Aware.

I find that Employer had no knowledge of any protected activity on the part of the Charging Parties.

C. Did General Counsel Prove Any Causal Connection Between the Alleged Concerted Activity and the Discharge?

The Complaint alleges that Graciela Melgoza and Maria Pimental were discriminatorily discharged because of their concerted activities and support for the UFW. Since this is the key issue in the General Counsel's case, he has an affirmative burden of proof which he must satisfy with respect to the reason for termination. A mere suspicion that an employee might have been discharged for union activity or concerted activity because of the Employer's hostility to the union is insufficient to prove discrimination. Banner Biscuit Co. v. NLRB, 356 F 2d 765, 53 LC ¶11,052 (8th Cir. 1966); NLRB v. South Rambler Co., 324 F 2d 447, 48 LC ¶18,603 (8th Cir. 1963); Traveleze Trailer Co., Inc., 163 NLRB No. 43 (1967). Rather than merely raising an inference, the General Counsel must make a clear showing that anti-union animus was the dominant motive for discharge. Kawano Inc., v. Agricultural Labor Relations Board, 106 Cal. App. 3d 937, 952, ____ Cal. Rptr. ____(1980).

In NLRB v. Fibers International Corp. , 65 LC ¶11, 738 (1st Cir. 1971), the Court discussed this standard and said that in order to show a "dominant" motive, the General Counsel must present evidence which indicates that the employer's controlling or effective motive for his action was his anti-union animus.

In present case, all the evidence weighs against establishing that anti-union animus or anti-concerted activity animus, if any existed, was the major contributing factor to the discharge.

If the trier of fact receives testimony, under oath, that union activity or protected concerted activity was not the basis for discharge, and where there are other grounds which support the discharge, the testimony cannot be disregarded merely because of a suspicion that the delcarants giving the testimony are lying. There must be impeachment or substantial contradiction or inconsistent circumstances on the exact point before an inference that protected concerted activity was the basis for discharge can arise. NLRB v. Stafford Operating Co., 206 F 2d 19, 32 LRRM 2559, 2562 (8th Cir. 1953), cited in Merc v. Cafana Cleaners, Inc., 95 LRRM 2646, 2649 (Mich. CA 1977).

David Lopez, Willie Vaught, Marvin Kirland and Anita Macias all testified that the discharge was due to the employees' intentional destruction of the Employer's vines.

In showing that the anti-union animus was the dominant motivation, the General Counsel must establish that the anti-union attitude

or the anti-protected concerted activities attitude had a "causal connection" with the discharge in terms of time and place. See, e.g., Hansen Farms, 3 ALRB No. 43 (1977); Howard Rose Co., 3 ALRB No. 86 (1977).

In Clothing Workers v. NLRB, 564 F 2d 434, 95 LRRM 2821, 2824 (D.C. Cir. 1977), the court stated:

> When good cause for discharge or suspension is clearly established, the burden is on the Board to show that anti-union animus was the motivating factor. (Citations omitted.) The burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one. (Citation omitted.) The mere existence of anit-union animus is not enough. (Emphasis added.)

Where good cause for an employer's action is shown, the fact that anti-union animus existed on the part of the employer does not even make the discharge unlawful unless it is shown that there was a "causal connection" between the anti-union attitude of the employer and the action taken. NLRB v. Florida Steel Corp., 586 F 2d 436, 100 LRRM 2102, 2111 (5th Cir. 1978).

In the present case, the General Counsel has failed to prove any causal connection bewtween the alleged concerted activity and the discharge. The radio program was broadcast on August 8, 1979, and the termination did not occur until almost six months later on January 28, 1980.

I do not find that the alleged union activity was the dominant reason for the termination. Ms. Melgoza continued to work in the same crew as Anita Macias all during the six month interval. There was no showing that the Employer had an adverse reaction to the radio broadcast. If it had, it might seem that such a reaction would result in a termination of Ms. Melgoza during a shorter time span after the radio broadcast. To the contrary, however, Graciela Melgoza continued to work at the Ducor Ranch for the Employer for "the remainder of the harvest season.
In addition, she remained in Mr. Kirkland's crew for the harvest season at J.D. Martin Ranch. Beyond that, after the layoff in December, Ms. Melgoza was again in the Kirkland crew and working for the Employer when the tying season began in January. Additionally, Ms. Melgoza had the option of changing crews, an option which she did not exercise.

This does not appear to me to be the type of conduct which would be expected of an employer which was harboring a hostile attitude toward an employee for union or concerted activity.

An indication that there was no causal connection between the discharge and any alleged union or concerted activity is the fact that there is no evidence that any kind of retaliation at all was exhibited between the time of the 1979 radio broadcast and the date in which the vines were destroyed almost six months later. In fact, Ms. Melgoza herself testified that she had fewer problems with Anita Macias after the radio broadcast than before. She testified that Ms. Macias left her alone and ignored her.

General Counsel responds to this position as follows:

"Admittedly, the discharge occurred months after the confrontation and threats by the forewoman about the concerted activity. However, the lapse of this time period cannot preclude a finding of discriminatory discharge given the context and actions of the employer. In dealing with a similar issue, Sahara Packing Co., 4 ALRB No. 40, at p. 15 held:

> 'While the time of employer actions can be an important factor in determining motivation, it is one which must be seen in context. Barraza and Acosta finished out the lettuce season. But the completion of that season cannot serve to insulate the employer from charges; especially where, as here, the first opportunity which would not raise an almost irrefutable inference of discrimination occurred, with respect to Acosta, when he sought work for the Melon harvest. In Barraza's case, since it did not appear to be his practice to work in that harvest, the first opportunity was in November. The fact that he was briefly re-employed attenuates matters only slightly, since his illness and denial of re-employment followed his hiring so closely. In other words, in the context of this case, it would be misleading ot place undue emphasis on the time periods involved and forget that, in seasonal employment, re-employment is generally the first opportunity for more subtle discrimination to occur. As for the argument that Acosta and Barraza no longer posed a threat, the simple answer is that, as long as objections were either possible or pending, there existed the possibility of a new election where they would be a threat. But even if matters had proceeded to a point where the UFW was completely out of the picture, retaliation for protected activity remains a possible explanation for employer behavior.'"

It is an apt citation, but I find that in the context of the instant case the time factor is important and that there could easily have developed other earlier instances when employer could dismiss Ms. Melgoza. If what General Counsel later alleges, that the evidence was manufactured is true, why not manufacure the evidence sooner than later?

Summary of Findings as to Whether or Not There was Any Causal Connection Between Concerted Activity and the Discharge.

I find that there was no causal connection between the concerted activity of Ms. Melgoza and the discharge. There was no evidence offered, though there was also no indication that she was even known to be engaging in concerted activity.

A Prima Facie Case of Discrimination was Not Established.

I had found earlier that there was concerted protected activity on the part of Ms. Melgoza. I found also that the Employer was unaware of such activity. I make this further finding of no causal connection between the concerted activity and the discharge of either charging party. Accordingly, the burden does not shift to Respondent to defend itself by showing a legitimate basis for the dismissal. It is not required at this point that Respondent show no discriminaton.

I find that the General Counsel has not shown by substantial evidence that in the absence of union activities Respondent would have treated the employees differently. I find no evidence of anti-union or anti-protected activity animus in this case.

NLRB v. Winter Garden Citrus Products, 260 F 2d 913. 43 LRRM 2112. (5th Cir. 1958}.
"It is not and never has been the law that the Board may recover upon failure of the respondent to make proof. The burden is on the Board throughout to prove its allegations, and this burden never shifts. It is, of course, true that if the Board offers sufficient evidence to support a finding against it, a respondent, as stated in the quotation first above, stands in danger of having such a finding made unless he refutes the evidence which supports it. But it is wholly incorrect to say or suggest that the burden of showing compliance with the act ever shifts to the respondent. The burden of showing no compliance is always on the Board. Even in cases of actual discharges, cases in short which the respondent has taken affirmative action against an employee, this is true, as this court has many times held."

NLRB v. Whitfield Pickle Co., 374 F 2d 576, 64 LRRM 2656. "When employer fires union sympathizer, General Counsel must show by substantial evidence that in absence of union activities, he would have treated the employee differently."

"To invoke provision of unfair labor practice statute governing discrimination in regard to hire or tenure of employment to encourage or discourage membership in labor organization, anti-union motive need not be dominant, and all that need be shown by NLRB is that employee would not have been fired, but for anti-union animus of employer."

"In choice between lawful and unlawful motives for discharge

of employee, record taken as whole must present substantial basis of believable evidence pointing toward unalwful one in order to establish violation of NLRA."

Waterbury Community Antenna Inc. v. NLRB, 587 F 2d 90, 99 LRRM 3216.
"There is nothing inherently discriminatory or destructive about discharge of single employees for cause, even if that employee is a union activist; employees who are active in union affairs, do not thereby obtain special immunity from ordinary employment decisions."

"Substantial evidence was lacking to support determination of NLRB that employer violated NLRA by discharging one of its employees because of his union activities; rather evidence demonstrated that employee would have been discharged regardless of such union activities."

If Prima Facie Case Had Been Established Burden Would Have Shifted.

If General Counsel had met the burden of establishing the prima facie showing, then it would have become respondent's burden to produce a justification or valid reason for the discharge. Arnaudo Bros., Inc., 3 ALRB No. 78. In such an instance, once respondent had carried its burden and established a valid reason for discharge, then, we should analyze the facts as a whole to determine what the "moving reason" or "but for" cause of the discharge was. Hemet Wholesale, 3 ALRB No. 47; S. Kuramura, Inc., 3 ALRB No. 49; Tex-Cal Land Management, 3 ALRB No. 14; Abatti Farms, Inc., 5 ALRB No. 34.

As indicated in earlier findings, I do not find that the burden shifts as there was no showing by General Counsel of a prima facie case. Nevertheless, I will make further findings in response to General Counsel's contention that the burden has shifted. Should my earlier findings be held incorrect by the Board, or by a court on appeal, I submit the following additional findings.

Was the Evidence of Cut and Broken Vines Manufactured by Respondent?

General Counsel argues that the evidence of broken and cut vines offered by Respondent was actually manufactured, in that he alleges Employer actually cut its own canes and then photographed them in order to convince us that it was done by the dismissed employees. Following is a copy of the argument made by General Counsel in his closing brief. Following that is my statement of findings as to the points raised therein.

General Counsel's Argument:

Testimony of Manufactured Evidence

"Respondent called Wilburn (Willie) Vaught as an expert witness to testify about the alleged damage. He testified that it takes from one week to ten days for a cut cane to turn from a fresh brown to gray after the cut (TR Vol. III, p. 11). He testified that the pruning is normally done after a freeze because the vines are then dormant, so that when cuts are made by pruners, the vines do not "bleed" (TR Vol. III, p. 5). Mr. Vaught stated that in 1979, because of an unusually mild winter, the vines did not freeze until December, that the vines were still dormant in January of 1980, and that some pruning did take place in January (TR vol. III, p. 6). This fact immediately leads to the conclusion that, even if Ms. Melgoza had cut the canes in January, they wouldn't have bled because the vines were still dormant, raising serious questions about the respondent's proposed justification for discharge.

During the last week of February, Stanley Van Kopp took several pictures of representative samples of the damaged vines, at the company's request (TR Vol. II, p. 96). These 35 mm. pictures were introduced into evidence as respondent's exhibit Cl-C6 (TR Vol. II, p. 197), as proof of willful damage done by Ms. Melgoza.

Mr. Vaught, the company's expert, in comparing two cuts photographed in respondent's C2, noted that the old cut, a dark gray one, was cut in January, supporting the conclusion that the row that Melgoza had worked on was pruned in January (TR Vol. III, p. 14). It also supports the conclusion that it does take only one week or so for a fresh cut to turn gray. Upon comparing the fresh cut in the same picture, he testified that the fresh one was a month later (TR Vol. III, p. 14). Because the photograph that he was referring to was taken in the end of February 1980, the fresh cut that he talked about had to have also been done during the middle to late February, or at least three weeks after Ms. Melgoza had worked on the row! The question emerges as to who cut those vines in late February?

Mr. Vaught testified about other pictures taken at the end of February as well. In describing a damaged vine pictured in respondent's C-l, he testified that he could tell from the picture that from the coloration of the cane, it was a fresh cut! (TR Vol. III, pp. 8-9.) Referring to the vine in respondent's C-4, Mr. Vaught testified that the cut was top fresh of a cut to run gray because of the presence of sap that would take eight to ten days to dry up (TR Vol. III, p. 19). In describing the damage to a vine in respondent's C-5, the testimony ran thusly:

Q. What would you estimate, from looking at the color of that cane, what the age of the shredding was, the damage there to that cane?

A. The breakage? That was probably – that would have been a feshly broke cane, that wasn't done at pruning time.
Q. A freshly broke cane?
A. Correct.
Q. About how old?
A. I would say four or five hours from the picture.

(TR Vol. III, p. 22, lines 16-24.) Referring to respondent's C-6 Mr. Vaught's testimony was that the alleged damage pictured there could have been done at any time (TR Vol. III, pp. 20-21).

Mr. Vaught supplemented his testimony by saying that the damage in picture C-l was taken in February because he could see the shoot starting to come out of the cane (TR Vol. III, p. 31). This corroborates the photographer's testimony that he took the pictures in the last part of February (TR Vol. II, p. 96).

So then, we have a company expert witness testifying that damage to vines from row 66, from pictures taken in the last week of February 1980, was nearly all freshly done within hours or days of the date of the pictures. And, it is agreed by all that the last day of work for Ms. Melgoza was January 28, 1980, a whole month prior to the pictures and to the damage!

Admittedly, there were other pictures of the alleged damage by Daryl Valdez, supervisor of Safety for the respondent. However, he admitted that he knew, at the time of the taking of the pictures, that there had been an unfair labor practice charge filed as a result of the discharge of Melgoza (TR Vol. II, p. 140). In fact, he had already consulted with respondent's attorney, Suellen Anderson, regarding the accusations going back and forth. Ibid. He testified that he went to photograph the vines for the purpose of getting physical evidence for the attorneys (TR Vol. II, p. 141). These pictures were identified as respondent's D-l, D-3 (TR Vol. II, p. 110). However, because these photos were of such poor quality and because they did not show any kind of damage clearly, only one was admitted into evidence (TR Vol. II, p. 199). And, as to any of the pictures Mr. Valdez took, he admitted that he had none which showed oozing sap indicating a fresh cut, even though the pictures were allegedly taken a couple of days after the damage (TR Vol. II, p. 141). The testimony regarding the photographs is but one example of the fact that the respondent manufactured a business justification for the discharge of Graciela Melgoza after the fact."

Findings with Regard to General Counsel's Argument About Manufactured Evidence.

A careful review of the transcript reveals that General Counsel has cast the testimony in a light that does not reflect the live testimony. It is necessary to read the entire testimony, not just the sections which can be interpreted as one will. It is important also to read the testimony on redirect in which Respondent's counsel clarified, through the witness Vaught, the misconceptions drawn from the cross examination.

During the cross examination of Mr. Vaught there was repeated mix-up and misunderstnading as to whether reference was being made to vines viewed by Mr. Vaught at the time he initially saw them or the time of the photographs. Just as it would appear this was cleared up, the misunderstanding appears to have crept in again.

General Counsel has tried to draw an inference that the vines in question were cut in the third or fourth week of February rather than the end of January. I do not find that to be the case. He relies heavily upon the use of the word "fresh cut". The witness clarified it somewhat in his redirect examination, but in any case I found that based upon all testimony that reference to the words "fresh cut" was intended to include all time after the pruning, which had taken place during the dormant stage in December.

General Counsel used the fact that Mr. Vaught had agreed that some pruning had taken place in January to assert that the pruning of the vines in question had taken place in January. This is not found to be the case. The witness Vaught specifically stated that the pruning of other varieties including the Emperor Grape was done in January. He specifically stated on redirect that the Thompson's were pruned in December only. We are only concerned with the Thompsons.

General Counsel relies on a statement of the witness Vaught that a cut will turn gray in a week to ten days. He ignores the fact that on redirect the witness said it sometimes takes longer. It clearly did take longer in this instance. He said it depends on the degree of the cut. Here it is clear that the healing was not yet complete in February when the photographs were taken. The witness stated he knew when the photographs were taken, i.e., in the last week of February, and yet he testified to the cuts as fresh. He was not being tripped up, as General Counsel seems to imply by his brief, but was at times confused as to what General Counsel was asking in terms of time from the initial viewing, or time when the photo was taken. He used qualifying words like "probably take a week to ten days", etc. He did not ever say it would only take that long. It would be unfair to try to bootstrap any misunderstnading by the witness of Counsel's questions concerning time of cuts into an inference that the evidence was manufactured. It was incorrect, where General Counsel states that Vaught testified that the fresh cuts were made a month earlier. His testimony was clearly intended to show that the cuts had been made at the end of January, and the pictures still showed some indication of the cuts as late as the end of February.

One would have to see and hear the witness to get a full understanding of the manner in which he answered the questions. One example is the one cited by General Counsel in which he quoted the questions and answers with reference to Respondent's C-5 Exhibit. In that example the witness answered General Counsel's questions as accurately as he could from his own perception of what was being asked for. When asked about how old the

breakage was, the witness answered "I would say four or five hours from the picture. Since it is clear that the witness knew that the breakage took place at least three weeks earlier and that the picture was taken in late February it appears he was indicating how old the breakage appeared based upon the coloration in the picture. It would be consistent with his adjacent statement to the effect that, with regard to one vine, it could have been broken at any time. The implication one could take by hearing the witness speak, i.e., the tone of his response, is that, because the picture is just a picture and the color cannot be as exact as in real life, it could have been that the breakage was any age. In fact, I find the pictures useful only to the extent of putting into focus the manner of the damage done. It is the testimony which I find most persuasive. All of respondent's witnesses testified that the damage was done.

I do not find that the evidence of vine cutting was manufactured. I find on the contrary that the witnesses for Respondent were frank, open and honest about the entire matter.

General Counsel contends that there are numerous inconsistencies in the testimony of Respondent's witnesses. I have taken all inconsistencies into account and allowed for reasonable difficulty in perception by differing individuals. Had there been a conspiracy to lie about the evidence offered the details would certainly have been agreed upon. Clearly, they were not. Each person testified as to his or her own idea of numbers of cut vines, etc. The different numbers only support my personal observation of the witnesses demeanor in testifying, and my conclusions that they were telling the truth as they recalled it.

General Counsel attempts to make something important of the fact that Mr. Kirkland did not fire Ms. Melgoza on the spot, that he went on checking vines before reporting to Mr. Vaught. He ignores the fact that Mr. Kirkland did not have the authority to fire anyone, and that he was checking to see if other damage had been done.

I will not comment on each and every conclusion drawn by General Counsel, as they tend to strain for proof where none exists. I will react to his contention that there was a contradiction between the testimony of Mr. Vaught and Mr. Lopez as to who fired the errant employees. General Counsel says that Mr. Vaught claimed to fire Ms. Melgoza. In fact Mr. Vaught was recommending to Mr. Lopez that ". . .1 don't think we need these types of employees on the ranch. I said, and from, that point on, it was decided to fire them." It was not Vaught who fired them but Lopez who made the final decision. It really doesn't matter, as neither of them knew who the employees were at the time the decision was made.

Employees Were Discharged For Wilful Destruction of the Employer's Property.

Neither the Act nor the federal labor laws serve to shield or insulate an employee from discharge or layoff. Lu-Ette Farms, Inc., 3 ALRB No. 38 (1977), citing to NLRB v. Winn-Dixie Stores, Inc., 410 F 2d 1119, 71 LRRM 2054 (5th Cir. 1969); Waterbury Community Antenna v. NLRB, 587 F 2d 90, 99 LRRM 3216 (2nd Cir. 1978). Mere union affiliation or support or past involvement in protected concerted activity will, not insulate or protect an employee from discharge when he violates an established and justified company rule. In the present case, as the evidence demonstrates, Graciela Melgoza and Maria Pimental were terminated because they intentionally destroyed the Employer's property.

The testimony of every person who inspected Rows 66 and 75 or who inspected the canes which were introduced as Respondent's Exhibit E clearly establishes that there was no doubt but that the canes were intentionally cut (in the case of Ms. Melgoza) or intentionally twisted off (in the case of Ms. Pimental). The persons making this judgment, Mr. Lopez, Mr. Vaught, and Mr. Kirkland, all testified that it was their belief that, due to the extensive nature of the damage, the act must have been intentional. Each of these individuals testified based on their extensive experience in working with vines. Bringing all of their experience to bear, the unanimous conclusion, reached by each person individually, was that the acts were willful.

The finding that the discharges were based on the damage which occurred is further supported by Ms. Melgoza's own admission that she cut several of the vines. In light of that admission, it would even be difficult to argue that her conduct was accidental in light of the other testimony by the Employer's personnel that the crews were specifically instructed, to tie the vines and never cut them.

The General Counsel argues that a reasonable man would endeavor to find out why the acts were performed and that the penalty of dismissal was too severe for a 5 year employee. It is entirely within an employer's discretion to set the penalty for violation of its rules. The fact that the penalty may be severe will not make a justified act unjustified. As This principle applies to the present case, it should be recognized that the Employer has every right to discharge employees for destroying the Employer's property. The mere fact of union involvement does not give an employee carte blanche to violate the Employer's rules. Furthermore, so long as anti-union animus is not the dominant motivation behind the penalty, the severity of the penalty does not affect the propriety of the penalty. As stated by the United States Supreme Court in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 1 LRRM 703, 714 (1937):

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees

with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons other than such intimidation and coercion." (Emphasis added.)

Such employment decisions are completely within the authority of the employer so long as there is no underlying anti-union animus:

> "The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reasons thus dissipated as pretence, not remains but anti-union purpose as the explanation. But we have so often said: "management is for management." Neither the Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or not cause at all. It has as the master of its own business affairs, complete freedom but with one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids." (Citations omitted.)

NLRB v. McGahey, 233 F 2d 406, 38 LRRM 2142, 2146-2147 (5th Cir. 1956).

In the present case, there is nothing to suggest that the Employer had any union attitude, one way or the other. There is, therefore, nothing to suggest that an anti-union attitude was the dominant factor in the decision to discharge the employees. To the contrary, the overwhelming evidence is that the discharge was based on what the Employer analyzed to be intentional destruction of its property. In this situation, the Employer was free to choose any penalty it felt appropriate. The fact that the penalty was severe does not, by inference, make the motive any less proper.

When the Complaint relates to discrimination under Section 1153(c) of the ALRA, as it does in this case, the General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the discharges. One of these

elements is anti-union motivation, and more than a mere suspicion of such motivation must be shown. Lu-Ette Farms, Inc., supra, 3 ALRB No. 38; Robert H. Hickam, Supra, 4 ALRB No. 48. Where there is an allegation of discriminatory action based on anti-union motivation and/or protected concerted activity, it must be shown that the anti-union motivation or anti-concerted activity motivation, while not necessarily the dominant motive, at least rises to a level where the union activity or protected concerted activity is the "moving cause" behind the employer's conduct, and that the employee would not have been subject to the conduct "but for" such activity. See, S. Kuramura, Inc., 3 ALRB No. 49 (1977), citing to NLRB v. Whitefield Pickle Co., supra, 374 F 2d 576, 64 LRRM 2656. See, also Waterbury Community Antenna v. NLRB, 587 F 2d 90, 99 LRRM 3216, 3221 (2nd Cir. 1978).

The key element in a Section 1153(c) case is discrimination. As reaffirmed in Whitfield Pickle Co., supra:

> "Discrimination consists in treating like cases differently. If an employer fires a union sympathizer or organizer, a finding of discrimination rests on the assumption that in the absence of the union activities he would have treated the employee differently." (Citation omitted.)

374 F 2d 576, 64 LRRM at 2659.

Moreover, as noted in Winchester Spinning Corp. v. NLRB:

> "If discrimination may be inferred from mere participation in union organization and acti-ity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership." (Citations omitted.)

402 F 2d 99, 69 LRRM 2458, 2463 (4th Cir. 1968).

The General Counsel cannot shift the burden of proving non-compliance with the Act to the employer. NLRB v. Winder Garden Citrus Products, 260 F 2d 913, 43 LRRM 2112 (5th Cir. 1958). Consequently, it is not up to the Employer to prove "non-discrimination." Indiana Metal Products v. NLRB, 202 F 2d 613, 21 LRRM 2490 (7th Cir. 1953).

In the present case, the General Counsel did not present any evidence to show that a different penalty would have been applied if the person suspected of damaging the Employer's property was not affiliated or supportive of the UFW. Thus, contrary to the requirement in Whitfield Pickle Co., supra, the General Counsel did not show that Ms. Melgoza or Ms. Pimental were treated any differently than employees who had similarly destroyed the

Employer's property. In fact, the General Counsel objected on each of the three occasions which the Empoyer's counsel sought to present evidence of non-discriminatory treatment.

I find that the General Counsel failed to introduce any evidence whatsoever that other employees were engaged in similar destruction of company property but were not discharged. Bud Antle, Inc. 3 ALRB No. 56 (1977). I find the General Counsel failed to prove that there was any violation of the ALRA by the Employer.

Should the Board Award Attorneys' Fees and Costs to Respondent?

Respondent did not request an award of attorneys fees in its pleadings, but sought such a recovery during the hearing. Normally, the NLRB has awarded attorneys fees and litigation costs in very few cases. And even in those, it has done so where a party, almost always the respondent, has engaged in frivolous litigation. In a concurring opinion in Western Tomato Growers, 3 ALRB no. 51, the policy and standard was set out:

> "There is NLRB authority for the proposition that an award of attorneys' fees and litigation costs is appropriate in circumstances where a party has engaged in frivolous litigation. In Tiidee Products, Inc. and I.E.E., 194 NLRB 1234, 79 LRRM 1175 (1972), the Board ordered attorneys' fees and litigation costs to be paid to the charging party and the Board on the ground that public policy required such action in order to discourage future frivolous litigation with its attendant drain on the resources of the agency and the parties.
>
> The Board's authority to make such awards was upheld in Food Store Employees, Local 347 v. NLRB (Heck's Inc.,) 476 2d 546, 82 LRRM 2955 (D.C. Cir. 1973). The court stated:
>
> 'It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. Id. at 551.'" (Id., at p. 13.)

Later, in Western Conference of Teamsters, 3 ALRB No. 57, in discussing the appropriateness of attorneys' fees concluded: "The NLRB holds the appropriateness of this remedy to be dependent upon a characterization of the respondent's litigation posture as either 'frivolous' or 'debatable'. Where the former is found, the award may be made; in the latter situation, it is not warranted." Id., at p. 7.

In United Farm Workers of America, AFL-CIO, 4 ALRB No. 42, the Board refused to award attorneys' fees to the respondent, finding that the issues were not frivolous, although it left open the question of awarding costs. However, in Golden Valley Farming, 4 ALRB No. 79, the Board rejected the Administrative Law Officer's recommendation that the charging party be ordered to reimburse respondent for its litigation costs on the grounds that the issues rasised by the complaint and answer were not so lacking in merit that prosecution of the case could be deemed frivolous.

The General Counsel claimsit met its burden by establishing its prima facie case at the close of its case in chief. I find that it did not establish its prima facie case. The attorney for respondent did not move to dismiss at this time. I disagree with General Counsel that the belated nature of the motion to dismiss is an admission that General Counsel had in fact established a prima facie case at the conclusion of the case in chief. Attorneys often fail to make timely motions. This does not deny all rights to their clients.

The defense put on by respondent showed that the discharge was for valid reasons. I do not agree with General Counsel that the inconsistencies and contradictions in the defense depict an after-the-fact manufacture of a business justification to cloak the real reason, retaliation for engaging in concerted and union activity. If find that General Counsel has failed to prove a violation of Labor Code Sections 1153(a) and (c). I find that the issues were frivolous.

Respondent seeks attorneys' fees on the failure of a Board agent to inspect the damaged vines as part of his investigation. I do not agree with General Counsel's assertion that respondent is seeking to set the precedent that we must now play Monday morning quarterback and scrutinize an investigator's tactics at the hearing despite the fact that he did not testify as to any of the facts he found. I agree that that kind of second-guessing could only open up a pandora's box of new issues and time-consuming litigation, and would not effectuate the policies of the Act. This case differs, in that Respondent offered and invited the investigation, but was refused.

The record indicates the appropriateness of the respondent's request for attorneys fees. Testimony of the respondent's attorney, Suellen Anderson, shows that the company did, as it asserts, make a sincere effort to provide information to General Counsel sufficient to dismiss the case.

By its amendment to Section 1145, the California Legislature added the following crucial language to the Agricultural Labor Relations Act:

"All employees appointed by the Board shall perform their duties in an objective and impartial manner without prejudice toward any party subject to the jurisdiction of the Board."

Ah identical provision has been added to Section 1149 of the Labor Code to provide that employees of the General Counsel's office shall perform their duties in an objective and impartial manner without prejudice to any parties. In the present case the ALRB's investigator, Frank Pulido, was neither prompt nor precise in his handling of the charge. The Employer was handicapped in preparation of its defense, because the charge was deficient in its specifics and Mr. Pulido delayed in revealing the perimeters of the case to the Employer.

While Mr. Pulido's delays did not in themselves suggest that the General Counsel, through its representative, failed to investigate the charge in an objective and impartial manner, Mr. Pulido's refusal to inspect the damaged vines at the Employer's request leave no inference but that he was purposely ignoring relevant evidence which established the innocence of the Employer at an early stage in the investigation. The evidence shows that Mr. Pulido was requested by the Employer's corporate counsel, Suellen H. Anderson, to inspect the damaged vines. In fact, these requests, made in writing and by telephone, indicated an urgency and an insistence that the offered proof would resolve the dispute.

The Employer did everything that it could to show to the General Counsel's investigator that the Employer's conduct was proper. Since the Employer itself cannot proceed with the investigation, it can only make all of the relevant evidence within its control available. Beyond that, the Employer is in a helpless position if the investigator chooses to ignore evidence which shows that no violation of the ALRA has occurred.

Throughout the hearing in this case Mr. Frank Pulido sat next to General Counsel. He heard all of the testimony by Respondent's corporate counsel to the effect that she had done everything she could to get him to meet with her and other persons from the Employer so that she could demonstrate that they had proof of the legitimate reason for dismissal of charging parties. Repeatedly throughout the hearing Respondent's Counsel attempted to call Mr. Pulido as a witness to prove that point. General Counsel objected so the Administrative Law Officer sustained the objection on the ground that it is against Board policy to allow respondents to call Board agents as their witnesses. There was nothing, however, to prevent General Counsel from putting Mr. Pulido on the stand after Suellen Anderson testified of his refusal to investigate. I take it as a consent to the accuracy of the testimony of Respondent's corporate counsel that it was not refuted in any manner.

The fear of second guessing the adequacy of investigations is unwarranted. It is only where a Board agent so deliberately refuses to perform the investigation sought that one should be entitled to assert this claim. It is the lack of reasonable investigation which raises this matter to what can only be characterized as frivolous. It was borne out by the quality of the case, though I do not mean to imply that a General Counsel's failure to establish a prima facie case will in all instances justify the award of attorney's fees and costs. It should be reserved to cases such as this where the case would never have been brought, had Respondent been afforded its due process and a complete investigation made as it requested.

I agree with Respondent's Counsel that,had this matter been investigated in an impartial manner, then the three-day hearing, administrative costs and legal costs to both the State and the Employer could have been avoided. Had a proper investigation been done, the present case would have never been brought.

Under these circumstances and in light of the unjustified and unnecessary burden placed on the Employer, I find and recommend that attorneys' fees and costs of the defense should be awarded to the Employer.

It should not be overlooked that the ALRB has the affirmative obligation to effectuate and enforce the purposes and policies of the ALRA. Labor Code 1142(b). Those policies include the impartiality mandated by Labor Code sections 1145 and 1149. Toward the enforement of the purposes and policies, the Board is vested with legislative, administrative, investigatory and judicial powers. Certainly, the ALRB's responsibility to administer its adjudicatory processes includes the power to impose sanctions when there is an abuse of the process.

I find that the investigation and conduct of the ALRB investigators and the insistence of the General Counsel to prosecute this frivolous case violated the requirements of objectivity and impartiality. The Employer should be awarded its attorneys' fees for preparing a defense to the Complaint as it relates to Maria Pimental which, as it turns out, was totally unnecessary since this aspect of the case was ignored by the General Counsel. With respect to the defense of the case relating to Graciela Melgoza, the Employer should be awarded its attorneys' fees and costs since the evidence underscores the frivolous nature of the allegations, and this case would never have been brought if the investigator had inspected the damaged vines as requested by the Employer.

SUMMARY OF FINDINGS

I find that General Counsel failed to establish a prima facie case as to the issues alleged in the complaint herein.

Ms. Melgoza was engaged in concerted protected activity; the employer was unaware; there was no connection between the concerted activity and the dismissal.

I find that the person alleged to be a supervisor, i.e., Anita Santos Macias, was not a supervisor within the meaning of the Act.

I find that the burden did not shift to Respondent to prove a business justification for dismissal of charging parties, but that even if it would have, Respondent established proof of such business justification.

I find no evidence of anti-union or anti-protected activity animus on the part of Respondent.

I find that General Counsel failed to show any discimination on the part of the Employer.

I find that the dominant motive for dismissal of the employees was a reasonable business justification, i.e., destruction of compnay property.

I find that the Investigator for the ALRB failed to make a reasonable investigation of the case as requested and invited by the Respondent, and in so doing allowed a case to go to hearing that could have been resolved without the extensive costs and attorney's fees involved.

I find that as a result of the above stated unjustified basis for bringing the case to hearing, the case was indeed frivolous, and that Respondent should be entitled to attorneys' fees and costs.

Any paragraph or portion of a paragraph heretofore set forth as a finding of fact, which should more appropriately be set forth as a conclusion of law, is hereby declared to be a conclusion of law and incorporated herein as such by reference.

REMEDY

Having found that Respondents have not engaged in certain unfair labor practices within the meaning of Sections 1153(c) and 1153(a) of the Act, and having found no violation of Section 1152 of the Act, I shall recommend that the charges in this complaint be dismissed.

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

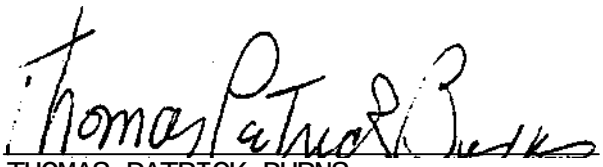
ORDER

The Agricultural Labor Relations Board shall take the affirmative action which is deemed necessary to effectuate the policies of the Act by dismissing all charges against Respondent in this matter.

That the Board shall extend an apology to Respondent for its failure to adequately respond to Respondent's request for an investigation of exculpative evidence offered at the outset of the investigation, and its failure to make such investigation as would have prevented the bringing of unfair labor practice charges against this employer in this case.

That the Board shall pay reasonable attorneys' fees and costs to Respondent by way of remedying the costs and difficulties that Respondent has been put to in defending this frivolous case.

DATED: August 26, 1980.



THOMAS PATRICK BURNS
Administrative Law Officer

LIST OF EXHIBITS

CASE NAME; Tenneco West, Inc . , Respondent

and

Graciela Melgoza & Maria Guadalupe Pimental,

Charging Parties

CASE NO. 80-CE-8-D

General Counsel	Identified	Admit or Rejected	Description
1A	6/17/80	Ad. 6/17/80	Charge
IB	6/17/80	Ad. 6/17/80	Complaint
1C	6/17/80	Ad. 6/17/80	Answer
ID	6/17/80	Ad. 6/17/80	Notice of Hearing
2	6/18/80	Ad. 6/18/80	Causes for Termination
3	6/19/80	Ad. 6/19/80	Letter to Ms. Anderson 2/11/80
4	6/19/80	Ad. 6/19/80	Letter to Mr. Pulido 1/31/80
5	6/19/80	Ad. 6/19/80	Letter to Mr. Pulido 2/8/80
6	6/19/80	Ad. 6/19/80	Letter to Mr. Pulido 2/20/80
7	6/19/80	Ad. 6/19/80	Letter to Mr. Pulido 3/6/80
8	6/19/80	Ad. 6/19/80	Letter to Mr. Pulido 4/16/80
9	6/19/80	Ad. 6/19/80	Letter to Mr. Pulido 2/26/80
10	6/19/80	Ad. 6/19/80	Letter to Mr. Pulido 2/15/80
Respondent			
Al	6/17/80	Ad. 6/18/80	Time Records
A2	6/17/80	Ad. 6/18/80	Time Records
A3	6/17/80	Ad. 6/18/80	Time Records
A4	6/17/80	Ad. 6/18/80	Time Records
B	6/17/80	Ad. 6/18/80	Note by Kirland
Cl	6/17/80	Ad. 6/18/80	Photographs of Grapevines
C2	6/17/80	Ad. 6/18/80	" " "
C3	6/17/80	Ad. 6/18/80	" " "
C4	6/17/80	Ad. 6/18/80	" " "
C5	6/17/80	Ad. 6/18/80	" " "
C6	6/17/80	Ad. 6/18/80	" " "
A5	6/18/80	Ad. 6/18/80	Time Record 1/28/80
Dl	6/18/80	Rej. 6/18/80	Photographs of Grapevines
D2	6/18/80	Rei. 6/18/80	" " "
D3	6/18/80	Ad. 6/18/80	" " "
E	6/18/80	Ad. 6/18/80	Three Grape Canes
F	6/19/80	Ad. 6/19/80	Records of Radio Station KXEM

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