Ripon, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

B & B FARMS, Respondent, and DAVID GARCIA MUNOZ, Charging Party.	)	Case No. 79-CE-37-S 7 ALRB No. 38

ERRATUM

The following language is hereby deleted from our Decision which issued on November 3, 1981:

"Pursuant to the provisions of Labor Code section 1146 (all Code citations herein will be to the Labor Code unless otherwise specified), the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel."

Dated: November 20, 1981

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Board Member

ALFRED H. SONG, Board Member

JEROME R. WALDIE, Board Member

Ripon, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

B & B FARMS, Respondent, and DAVID GARCIA MUNOZ, Charging Party.	)	Case No. 79-CE-37-S 7 ALRB No. 38

DECISION AND ORDER

On November 21, 1980, Administrative Law Officer (ALO) Jennie Rhine issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions and a supporting brief and the General Counsel timely filed a reply brief.

Pursuant to the provisions of Labor Code section 1146 (all Code citations herein will be to the Labor Code unless otherwise specified), the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent consistent herewith.

No party has excepted to any of the ALO's findings of fact, which are amply supported by the record. Briefly stated, the facts established in the record are as follows.

Respondent B & B Farms, a family corporation, is engaged in growing tomatoes, onions, bell peppers, grapes, sugar beets, and

almonds in Ripon, California. Bob Brocchini is Respondent's vice-president, his father is president, and his mother is secretary. Brocchini hired the charging party, David Garcia Munoz (Garcia), in April 1979 as a tractor driver. Garcia was hired at $3.50 per hour and was told that if his work proved satisfactory the rate would be increased to $3.75 per hour; after a week, Garcia's wages were so increased. Tractor drivers log their own working hours on time sheets that are handed in at the end of each shift. Garcia was one of five or six tractor drivers on Respondent's year-round work-force. After he was hired, Garcia and his family moved into Respondent's company housing.

In late June or early July, Brocchini made notations in his diary that Garcia was late in reporting for work on three occasions and he told Garcia that he should come to work on time. Brocchini testified that he made these notations because he had noticed a pattern of tardiness that he wanted to halt. No notation was made after early July 1979. On or about July 26, Respondent began its tomato harvest. Garcia was not initially involved, but on August 6 he was assigned to work in the tomato harvest. Garcia had never previously worked for Respondent in harvesting tomatoes.

Respondent harvests tomatoes in the following fashion, and Brocchini testified that its method of harvesting is representative of the general practice in the industry. In the tomato field, there is a loading area where machinery is stored and the employees park their cars. The harvesters and other equipment are also stored in the loading area during the harvest. Respondent operates two harvesters, a newer, electronic machine and an older mechanical

model. A crew of sorters works with each harvester, 8 to 10 sorters for the electronic harvester and 14 to 20 sorters for the mechanical harvester. One driver for the harvester and two tractors with drivers are also involved in the tomato harvest. Garcia and Juan Perez, two tractor drivers in this particular harvest, worked mainly with the electronic harvester, which was faster than the older model.

The first tractor driver attaches two empty trailers to the back of his tractor and drives along beside the harvester until both trailers are full of tomatoes. Then he drives his tractor and full trailers to the loading area while the second driver drives a similar rig with empty trailers alongside the harvester. Upon reaching the loading area, the first driver uncouples his full trailers from the tractor and then couples a pair of empty trailers and prepares to take the place of the second driver beside the harvester when the trailers are filled. During each shift, the sorters and harvester driver receive a ten-minute morning break, a half-hour lunch period, and a ten-minute afternoon break. During each break period, the tractor drivers are required to clean out the harvester so the sorters can resume work as soon as their break is finished. It was this practice, i.e., no definite time for break and no set lunch period, which led to Garcia's protest and consequent severance from Respondent's employ.

Brocchini and Victor Vielma, the supervisor for this particular tomato harvest, testified that they had directed each tractor driver to wait in the loading area (with his tractor and two empty trailers) until the other driver's trailers were nearly full

and then to follow the other driver and take his place when he returned to the loading area with his full trailers. Brocchini testified that having the driver wait was to save on diesel fuel and to avoid accidents. During the period between recoupling and taking position again beside the harvester, a period of 15 minutes to one hour and 45 minutes, the tractor drivers were, in effect, on a break. During such periods, they were free to eat their lunch and had no assigned duties, but were not free to leave the loading area.

At the hearing, Respondent, through shift records and records of the number of loads harvested from August 6 through 10, estimated that it took one hour and 40 minutes to fill each set of trailers during that particular tomato harvest. The ALO, through similar but unspecified calculations, arrived at one hour and 35 minutes per load. The ALO did not rely on her calculations, finding only that the tractor drivers generally receive more than the set 50 minutes of free time given the harvester driver and the sorters without deciding how much more. The tractor driver's free time was essentially an "on call" type of free time, however.

On either August 7 or 8, 1979, Garcia and Perez discussed their lack of a specific lunch period and designated breaks. No course of action was decided on, but on August 9 Garcia individually protested to Brocchini about the lack of a specific lunch period. Garcia announced that if he did not receive the same lunch period as the sorters he would submit his time card reflecting no time off for lunch. Brocchini rejected both alternatives proposed by Garcia and told him he could either continue to work as previously established or leave the job. Garcia walked away, after stating, "Well, if

you're going to fire me, fire me," and Brocchini told Garcia that he had two weeks to move out of Respondent's company housing. This conversation took place at approximately 8:00 a.m. and occurred in the loading area of the tomato field being harvested. [22/]

Respondent excepts to the ALO's finding that Garcia was discharged. However, in its answer to the complaint, Respondent admits the discharge, arguing that Garcia was discharged for cause. Respondent never sought to amend its answer to deny the discharge. California Evidence Code section 1220 directs that Respondent has admitted the fact of discharge. Therefore, whether Garcia voluntarily quit is not properly an issue in the case.[1/]

Respondent contends that Garcia attempted to set his own terms of employment, thus justifying discharge, citing Sam Andrews' Sons (Nov. 30, 1979) 5 ALRB No. 68 in support. In that case, the employee refused to complete a work assignment despite an offer of overtime pay, and we held that the employee was attempting to dictate his own working conditions. Here, Garcia indicated that if he could not take his lunch period with the sorters he would include on his time card all the time he was required to be present as time worked, not that he planned to alter any duties or assignments. See, Pink Moody (1978) 237 NLRB 39 [98 LRRM 1463],

Respondent excepts to the ALO's conclusion that Garcia's conduct was protected concerted activity within the meaning of

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[1/]We note, however, that the ALO's finding is supported by substantial evidence in the record. Respondent contested Garcia's claim for unemployment compensation and, at the hearing on that claim, Brocchini testified that he fired Garcia, not that Garcia quit. Respondent's records also show that Garcia was discharged.

section 1152 of the Agricultural Labor Relations Act (Act).[2/] The ALO, looking to National Labor Relations Act (NLRA) precedent and Miranda Mushroom Farms, Inc. (May 1, 1980) 6 ALRB No. 22, found Garcia's individual complaint to be constructive concerted activity. In Interboro Contractors, Inc. (1966) 157 NLRB 110 [61 LRRM 1537] enfd. NLRB v. Interboro Contractors, Inc. (2nd Cir. 1967) 388 F.2d 495 [67 LRRM 2083], the NLRB decided that "activity engaged in by an individual employee acting alone which was directed to enforce or implement the terms of a collective bargaining agreement will be deemed concerted activity within the meaning of section 7." See NLRB v. Dawson Cabinet Co., Inc. (8th Cir. 1977) 566 F.2d 1079, 1082 [97 LRRM 2075] denying enforcement to Dawson Cabinet Cabinet Co. (1977) 228 NLRB 290 [96 LRRM 1373].

The logic of Interboro Contractors was extended in Allelulia Cushion Co. (1975) 221 NLRB 999 [91 LRRM 1131], to apply to individual attempts to enforce statutory provisions, even absent a collective bargaining agreement. In Alleluia Cushion, the employee who was subsequently disciplined had filed and pursued complaints about health and safety to a state administrative agency. The NLRB extended the. Interboro approach another step in Air Surrey Corp. (1977) 229 NLRB 1064 [95 LRRM 1212] enf. denied (6th Cir. 1979) 601 F.2d 256 [102 LRRM 2599] where an employee, whose paycheck had been returned to him "unpaid," discussed the matter with his

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2/Section 1152 states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection ...."

co-workers and then investigated at his employer's bank in an effort to determine whether the employer's paychecks for the next pay period would be cleared for payment. The employee was subsequently discharged for this behavior. The NLRB found this activity to be for the mutual aid and protection of all employees, stating that "receiving payment for one's labor ... is on par with the concern for safe working conditions." Air Surrey Corp., supra, 95 LRRM at 1212. In Air Surrey, unlike Interboro, the workers were without a collective bargaining agreement. The NLRB found that the individual's actions were in the overall public interest by virtue of the employee's assertion of his right, as a member of the public at large, to have the employer comply with the Ohio statutes forbidding writing checks with insufficient funds. This reliance on legislatively declared public interest adopts the underlying principle of Alleluia Cushion, i.e., "constructive" concerted activity manifested by assertion of statutory rights.

In Miranda Mushroom Farms (May 1, 1980) 6 ALRB No. 22, we adopted the "constructive" concerted activity principle of Alleluia Cushion and its progeny. There, an employee complained to the Agricultural Commission that his employer was using illegal chemicals in its operation. We found that where an individual employee is discharged because of a complaint to a governmental agency about safety, the employer violates section 1153(a) of the Act. Miranda Mushroom Farms, supra, at 20-21.

While Alleluia Cushion has been criticized by some federal courts, see, e.g., NLRB v. Bighorn Beverages (9th Cir. 1980) 614 F.2d 1238-1242 [100 LRRM 3008] and Lopatka, Title VII and the NLRA

(1975-6) 50 N.Y.U.L. Rev. 1179, 1186-1195, it has not been repudiated by the NLRB. See, e.g., Hotel Employees International Union (1980) 252 NLRB No. 158 [105 LRRM 1444]. We find that it constitutes applicable precedent within the meaning of section 1148 of the Act, but precedent which should be applied with caution and precision.

Here, the ALO found Garcia's individual complaint to be concerted activity because she found that any response to his individual grievance would necessarily affect the other tractor driver employees of Respondent. She primarily relied on Interborp Contractors and Alleluia Cushion, Inc. as extended in Hansen Chevrolet (1978) 237 NLRB 584 [99 LRRM 1066] which implied a "collective rippling effect" test for constructive concerted activity.

In its recent decision in National Wax Company (1980) 251 NLRB No. 147 [105 LRRM 1371] the NLRB rejected the concept of "collective rippling effect," which had appeared in Hansen Chevrolet, supra, 237 NLRB 584. The national board explained that although Hansen Chevrolet was distinguishable from Interboro Contractors in that it involved no collective bargaining agreement, it was like Interboro in that in both cases the individual protest demanded a managerial reaction which would affect other employees in addition to the one protesting. In Hansen Chevrolet, the employee was seeking a salary raise for himself, but because of the managerial structure, the company could only grant the employee's request by modifying salaries for all its employees. In National Wax, however, the employee was seeking a merit increase, which the

employer could grant or deny to the individual employee alone. As in the National Wax situation, the protest by Garcia (that forms the gravamen of this charge) did not foreclose the employer from reacting solely to the individual employees. We conclude, therefore, that National Wax, not Hansen Chevrolet, is the more suitable precedent to follow in this case.

We believe that the approach taken by the NLRB in Hansen Chevrolet should be confined to situations wherein the relationship between the employer and its employees which is the subject of the individual employee's action is closely akin to a collective bargaining agreement. National Wax, supra, 105 LRRM at 1372; Interboro Contractors, supra, 388 F.2d 495. Here the relationship which existed between Respondent and its tractor drivers was not akin to a bargaining agreement, and it cannot be said that Garcia was attempting to enforce anything like such an agreement. As no theory has been presented where "constructive" concerted activity would be appropriately applied, we find that Garcia was not engaged in protected concerted activity and that Respondent did not violate section 1153(a) of the Act. Accordingly, we find it unnecessary to address Respondent's other exceptions.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders

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that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: November 3, 1981

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Board Member

JEROME R. WALDIE, Board Member

MEMBER McCARTHY, Concurring:

I agree with my colleagues in the majority only insofar as they find no violation.

In order to sustain a discipline or discharge finding under section 8(a)(l) of the NLRA, or section 1153(a) of the ALRA, it is required that the General Counsel establish that, at the time of the discipline or discharge, the employer had knowledge of, or a belief in, the concerted nature of the activity for which the employee is discharged or otherwise disciplined. Diagnostic Center Hospital Corp. of Texas (1977) 228 NLRB 1215 [95 LRRM 1220]; Alleluia Cushion Co., Inc. (1975) 221 NLRB 999 [91 LRRM 1131]; Miranda Mushroom (May 1, 1980) 6 ALRB No. 22; Lawrence Scarrone (June 17, 1981) 7 ALRB No. 13.

Thus, even if the record herein established, under any of the theories suggested by the majority,[1/] that Garcia engaged in

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[1/] I note that my colleagues have elected to follow NLRB decisions invoking the "constructive concerted activity" doctrine rather than the reversals of many of those decisions by various of the United States Circuit Courts of Appeals. I believe there is great substance to the distinctions the courts make relevant to the precise question at issue herein.

protected concerted activity, I could not conclude that Respondent violated the Act absent record evidence establishing the critical factor of employer knowledge of the concerted nature of such activity. There is nothing in Charging Party David Garcia's statements to Respondent on the occasion of his severance [2/] from employment which could reasonably have put Respondent on notice that Garcia's complaint was, or might be, a concerted act within the meaning of Labor Code section 1152.

Dated: November 3, 1981

JOHN P. McCARTHY, Member

[2/]I believe it is error for the majority to find that Garcia was discharged on the basis of Respondent's purported "admission" in its answer to the complaint, as "it is elementary that evidence is the sworn testimony of witnesses, and that statements of counsel are not to be considered as evidence." Witkin California Procedure (2d Ed.), Trial Section 230, and BAJI Instruction No. 1.02 (1977 revision). See also, Labor Code section 1160.3 which provides in relevant part that the Board shall determine that an unfair labor practice has been committed on the basis of "the preponderance of the testimony taken" in an evidentiary hearing. In addition, and contrary to what my colleagues contend, Garcia's action was clearly, "... an attempt to work on terms prescribed solely by himself," and he chose to leave voluntarily when that attempt failed. Thus, the instant case falls squarely within the precedent stated by this Board in Sam Andrews Sons (Nov. 30, 1979) 5 ALRB No. 68.

CASE SUMMARY

B & B Farms

7 ALRB No. 38
Case No. 79-CE-37-S

ALO DECISION

The complaint alleged that Respondent violated section 1153(a) of the Act by discharging David Garcia Munoz after he demanded that he be paid for his lunch hour or that he receive the same lunch hour as Respondent's other employees.

The ALO found that although Garcia acted solely in an individual capacity, Respondent discharged him for engaging in protected concerted activity in violation of section 1153(a). The ALO concluded that Garcia's protest constituted concerted activity, relying on Miranda Mushroom Farms (May 1, 1980) 6 ALRB No. 22 and Hansen Chevrolet (1978) 237 NLRB 584 [99 LRRM 1066]. The ALO found that the nature of Garcia's protest was likely to affect the working conditions of Respondent's other employees and could therefore be characterized as having a collective rippling effect on the work force.

BOARD DECISION

The Board noted that Miranda Mushroom Farms and Hansen Chevrolet were two applications of a theory of "constructive" concerted activity. It held the concept to be a valid one for agricultural labor relations and reaffirmed its holding in Miranda Mushroom Farms. The Board noted the continuing dissatisfaction of some commentators and courts with that theory and therefore stated its intent to proceed cautiously in its application. Here, the Board found that Hansen Chevrolet was inapposite in light of National Wax Company (1980) 251 NLRB No. 147 [105 LRRM 1371]. The Board declined to apply the theory to Garcia's protest, noting that Respondent could reasonably have interpreted Garcia's protest as an individual complaint rather than as a collective one. Accordingly, the Board dismissed the complaint.

Member McCarthy concurred in the result, but objected to language in the majority opinion that he believes could undermine the requirement, in concerted activity discharge cases, of proof that the employer had knowledge of the concerted nature of the employee's activity, and fired him for that reason. Viewing the proof of such knowledge as pivotal, Member McCarthy objects to any diminution of this requirement.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of B & B FARMS, Respondent and DAVID GARCIA MUNOZ, Charging Party.	Case No. 79-CE-37-S DECISION OF ADMINISTRATIVE LAW OFFICER

Raquel C. Leon, Delano, for the General Counsel

Daniel A. McDaniel and Dante John Nomellini of Nomellini 5 Grilli, Stockton, for the Respondent

David Garcia Hunoz, in propria persona

STATEMENT OF THE CASE

Jennie Rhine, Administrative Law Officer: This action arises from a charge filed by David Garcia Munoz, in which he claimed that on August 9, 1979, he was fired from B £ B Farms and evicted from company housing because he asked that he be paid for break and lunch periods during which he and other tractor drivers were required to work. On April 9, 1980, a complaint was issued which alleges that Garcia was discharged for engaging in protected concerted activity. The respondent denied the substantive allegation in a timely answer.

A hearing was conducted in Stockton, California, on September 18 and

19, 1980. Garcia, the charging party, was allowed to intervene in the proceedings. All parties were present throughout the hearing and had an opportunity to present evidence and examine witnesses. The general counsel and the respondent filed post-hearing briefs.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

THE EVIDENCE

B & B Farms is a family-owned corporation which grows tomatoes, onions, bell peppers, grapes, sugar beets and almonds in the vicinity of Ripon, California. Bob Brocchini, the sole company representative whose actions are in question here, is the vice-president of the corporation; he and his father, the corporation's president, generally supervise all farm operations, and are directly responsible for most hiring and terminations. The respondent admits that it is an agricultural employer and that Bob Brocchini is a supervisor within the meaning of the Agricultural Labor Relations Act,[1] and I find accordingly.

David Garcia Munoz was employed by the company as a tractor driver from sometime in April until August 9, 1979. The respondent admits, and I find, that Garcia is an agricultural employee within the meaning of the Act. On August 6 [2] Garcia began working in the tomato harvest, where conditions

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[1]Cal. Labor Code, sees. 1140-et seq. All statutory citations are to the Labor Code, unless otherwise stated.

[2]All dates refer to 1979, unless otherwise stated. Garcia testified that he worked in the tomato harvest only two full days prior to his termination, which would make his first day August 7. However, Brocchini's testimony that Garcia first worked in the harvest on August 6 is corroborated by the foreman's report for that week (see RX 4-), and I so find.

precipitated his termination.

In the harvest the tractor driver's main function is driving a tractor which pulls a set of two trailers alongside a mechanical tomato harvester. When both trailers are full of tomatoes, the driver returns to a loading area, where he exchanges the full set of trailers for an empty set. Two tractor drivers work with each harvester, so that little time is lost when the full trailers alongside the harvester are replaced with empty ones.

During two ten-minute rest periods and a half-hour lunch period taken by the operator and sorters who work on the harvester, the tractor drivers are required to clean and service it so that it is ready to go at the end of the break. No specific periods are allotted for the drivers to take comparable breaks, but the company contends that each driver has more than the equivalent free time while the other is accompanying the harvester. The drivers are required to deduct a half-hour lunch break from the work time they report on their tiraecards, as do the other harvest workers. This practice affected all six tractor drivers in the B £ B harvest (the company commonly operated two harvesters during the day, and one at night), and Bob Brocchini testified that it is common throughout the industry. Garcia had not experienced it in his previous tasks, however, and was not happy with it.

The evidence concerning how much free time the tractor drivers had is conflicting. Garcia and Juan Perez, the other tractor driver for Garcia's harvester, both testified that filling one set of trailers usually took from minutes to an hour, occasionally longer. Garcia estimated that after returning to the loading area a half-hour was needed to detach the full trailers and attach empty ones. Neither driver estimated the amount of time consumed by trips between the harvester and the loading area. Each man testified that when he finished connecting empty trailers to his tractor, he returned to the

field and followed the other tractor until its trailers were filled, and then moved in to take its place along the harvester. Both testified that they ate lunch while driving their tractors.

Bob Brocchini, who supervised the tomato harvest, testified that under the best of conditions, which did not exist at the stage of the harvest Garcia worked, filling a set of trailers takes an hour, and at the time in question, it took somewhere between one and two hours. The tractor driver needed twenty minutes at most to return to the loading area with a full load, detach the trailers, and connect empty ones. He then waited in the loading area, free to do as he wished, until he saw tomatoes appear over the top of the trailers accompanying the harvester, at which time he entered the field to get into position to replace the full trailers. Thus, the drivers had forty minutes or more of free time between each trip along the harvester. In order to avoid accidents, waste of fuel, and possible damage to tomatoes, one driver did not follow the other behind the harvester any longer than necessary.

Company records corroborate part of Brocchini's testimony. Calculations from these records reveal that from August 6 through 10, the average time to harvest one load was at least one hour and thirty-five minutes.

Brocchini's testimony is also corroborated by Victor Vielma, a foreman in the harvest. Vielma's estimates of the amounts of time needed to fill a load of tomatoes and to exchange full trailers for empty ones generally agreed with Brocchini's. Vielma, too, testified that between trips along the

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[3]See RX 3-6 for foremen's reports that show the numbers of shifts and the length of each (measured by the time worked by the sorters, reduced by twenty minutes per shift for rest breaks) during this period, and RX 7 3-F for Brocchini's records of the loads produced each day. My calculations of the time per load are less than those to which Brocchini testified. The differences are not significant, however, being a matter of ten minutes per load at most.

harvester the tractor drivers were free to do as they pleased after they attached empty trailers. They waited in the loading area, sometimes roaming around it, occasionally sitting in their cars, and he saw them eat there.

Thus, while the testimony of Garcia and Perez indicates that between trips alongside the harvester the tractor drivers had little or no free time, the testimony of Brocchini and Vielma indicates that they had upwards of an hour during the few days Garcia worked in the harvest. The company's testimony about the amount of time required to fill a load, corroborated as it is by the records, is given more weight than the drivers. Even if the drivers' testimony about the time required to change trailers is accepted, there would still be almost an hour between trips along the harvester. I do not consider it likely that all that time was spent following the other tractor in the field, given the unnecessary use of fuel that would entail. I therefore find that the drivers did have, as free time, more than the fifty minutes of breaks given the other workers, without deciding the precise amount. However, as is discussed below, the resolution of the case does not depend upon the merits of Garcia's complaint.

In any event, matters came to a head on August 9, when Garcia broached the subject with Brocchini. The previous day, according to Garcia, he and Perez had discussed the situation and agreed that they should be paid for the lunch and break periods during which they worked. Although he placed it several days prior to Garcia's termination, Perez confirmed that such a conversation occurred, and I so find. However, the men did not discuss any plan of action, and no evidence suggests that Garcia was delegated as a representative to Brocchini by Perez or any other tractor drivers.

The participants' versions of the conversations on the 9th between Garcia and management differ. According to Garcia, early in his shift he saw

Brocchini and told him in Spanish that he, Garcia, wanted to take fifteen minutes to eat lunch. Brocchini left for a few minutes, and returned with Victor Vielma to interpret. Through Vielma, Garcia told Brocchini that he wanted to be paid for lunch and a fifteen minute break, and if Brocchini would not permit him to have a break or a lunch period, he would put down on his timecard that he worked straight through. In a mixture of Spanish and English laced with obcenities, Brocchini told him to get out and to have his family out of their home (a trailer provided by the company) within three days. Brocchini was kicking his pickup and appeared so angry that Garcia was afraid he was about to strike him. Garcia left, and did not return to work or speak to Brocchini again.

Brocchini testified that he was approached by Garcia, who said that since he cleaned the harvester while the crew ate, he wanted to indicate on his timecard that he worked straight through. Brocchini replied that Garcia had plenty of time to eat before or after the rest of the crew, and Garcia responded that he would either take his lunch at the sane time or mark his time straight through. Brocchini told him, "Look, you either do it my way or there's the road," to which Garcia replied, "'Well, if you're going to fire me, fire me.'" Brocchini testified that he did not remember what his response was at that point, but Garcia turned and started walking in the direction of his car, and Brocchini, assuming he was leaving, called after him that he had two weeks to get out of his house. Brocchini denied using obscenities, and said that he is conversant enough in Spanish, the language of virtually all of the conversation, not to require an interpreter. At the hearing Brocchini demonstrated his fluency by repeating the conversation in Spanish. He testified that Vielma was within hearing distance of the conversation but did not participate, and he never used Vielma as an interpreter.

According to Vielma, that morning he was asked by Garcia why he could not be paid for the half hour he cleaned the harvester while the others were eating. Vielma replied that he could eat before or after the others but Garcia was not satisfied, so Vielma told him he would have to see the "higher-ups," meaning Brocchini. Vielma did not participate, but overheard part of the subsequent conversation between Brocchini and Garcia. In essence, Garcia insisted that if he did not eat when the other workers did, he should be paid for the lunch break, and Brocchini insisted that it was necessary for the harvester to be ready without delay, and Garcia had plenty of other time in which to eat. The conversation became heated and both men raised their voices, but neither used obscenities. Vielma recalled hearing Garcia say something to the effect of "'If you're going to fire me, fire me.'" Brocchini did not directly tell Garcia to leave and Vielma's sense of the conversation was that the choice was Garcia's, but Vielma did hear Brocchini say that if Garcia was not satisfied he should pick up his check. After Brocchini left the immediate vicinity Garcia left the field, and Vielma advised Brocchini that another tractor driver was needed.

Either that day or the following one, Brocchini made the notation which appears on Garcia's time ticket (RX 8): "Terminated 8/9 for insubordination and tardiness for work." The company's compensation record for Garcia (RX 2) also contains the notation, "Fired 8/9/79." At an unemployment insurance hearing in October 1979, Brocchini testified that he told Garcia he was fired.

To the extent that they are contradictory, I credit Brocchini's version of the conversation rather than Garcia's. Garcia's report about Vielma's role as interpreter is contradicted by Brocchini's demonstration in the hearing of his fluency in Spanish, in addition to his and Vielma's testimony.

Finding Garcia's testimony not credible on a major detail of the encounter, I consider his report of it unreliable in the main. However, there are no inconsistencies on two major points: Garcia insisted upon either having the same lunch break the crew on the harvester did or being paid for the time, and stated his unwillingness to continue the past practice; and he did not indicate that he was speaking on behalf of anyone other than himself.

With respect to whether Garcia voluntarily quit or was discharged, without relying on his testimony, I find that he was discharged. Testifying only that he did not remember, Brocchini did not deny telling Garcia he was fired. While Vielma's testimony implies that the decision to stay or to leave was Garcia's, I am convinced that Garcia was discharged by the entries on company records and by Brocchini's admission at the unemployment insurance hearing, made relatively soon after the events in question, that he told Garcia he was fired. In any event, Garcia did not have or communicate any intention to quit, but only an unwillingness to continue a practice he found unsatisfactory. Given the choice between accepting the practice or leaving, he could reasonably have believed he was being fired. His leaving did not convert the intended or apparent discharge into a voluntary quit. See Pappas & Co., 5 ALRB No. 52 (1979).

Furthermore, I think it indisputable that the primary reason for Garcia’s discharge was his protest about not being paid for the lunch period. Brocchini may well have been dissatisfied with Garcia's record of tardiness, as indicated by the entry on his timecard. He testified about the times he observed Garcia arriving late during June and July. However, he also testified that he retained Garcia throughout the July slow period because Garcia was a good tractor driver, and good drivers were hard to get for the harvest. It was Garcia's protest, not another late arrival, that precipitated his

termination. Tardiness was not mentioned during the encounter, and was added, I am convinced, only as an afterthought to Brocchini's reasons for the discharge. The record as a whole establishes that Garcia would not have been terminated but for his protest.[4]

ANALYSIS AND CONCLUSIONS

In essence, then, Garcia was discharged because he protested working while other workers had breaks yet being required to deduct a half-hour lunch period from the work hours reported on his timecard, and declared his unwillingness to continue the practice. He did not indicate in any way that his protest was on behalf of anyone but himself, yet the practice affected all six tractor drivers in the tomato harvest and Garcia had discussed it with another driver who also expressed his dissatisfaction with it. The issues presented are whether Garcia's conduct was activity protected by section 1152 of the Act, and if so, whether his discharge constitutes an unfair labor practice within the meaning of section 1153(a). I reach affirmative conclusions to both questions.

The pertinent portion of section 1152 states that "[e]mployees shall have the right ... to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" The identical provision appears in section 7 of the National Labor Relations Act (NLRA),

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[4]The existence of an additional, justifiable ground for discharge does not preclude a finding that an employee would not have been discharged but for his or her protected activity. See Abatti Farms, Inc. v. ALRB, 103 C.A.3d. 317, 334-335 (1980)(concurring opinion); Tex-Cal Land Management, Inc., 3 ALRB No. 14-(1977), enforced, 24 C.3d 335 (1979).

[5]The charge alleges that section 1153(c) was violated as well as section 1153(a), although the complaint states a cause of action for a violation of 1153(a) only. Since there is no evidence whatsoever of union membership or activity, there is no basis for finding an 1153(c) violation.

29 U.S.C.8157. Under section 1153(a), as under NLRA section 8(a)(l), 29 U.S.C. 8158(a)(l), an employer's interference with, restraint, or coercion of employees engaged in the exercise of protected rights is an unfair labor practice. Precedents developed under the NLRA shall be followed by the ALRB where applicable. ALRA 81148.

The initial issue is whether Garcia's protest was concerted activity within the meaning of section 1152, and therefore protected. Preliminarily, it should be noted that legal protection does not depend upon the merits of his complaint. See, e.g., NLRB v. Washington Aluminum Co., 370 U.S.9, 16, 50 LRRM 2235 (1962); Jack Bros. & McBurney, Inc., 6 ALRB No. 12 (1980) (ALO decision at 14), and cases cited there. Even a "miniscule controversy" may give rise to protected activity. St. Regis Paper Co., 192 NLRB 661, 77 LRRM 1878 (1971). Thus, the fact that Garcia and the other drivers had more than an equivalent amount of free time in which to rest and eat their lunches is not relevant.

A leading NLRB case on the issue of whether action by one individual can be "concerted," and therefore protected, is Alleluia Cushion Co., 221 NLRB 999, 91 LRRM 1131 (1975), where it was held that an employee who complained about alleged safety violations to his employer and a state OSHA was engaged in protected concerted activity, even though there was no evidence that the complaining employee represented other employees or even that other employees were concerned about the issue. The basis of the board's decision was that the matters complained of affected other employees as well as the complainer. The board stated:

> [t]he absence of any outward manifestation of support for his efforts is not sufficient to establish that Respondent's employees did not share [the charging party's] interest in safety or that they did not support his complaints regarding the safety violations. . . . [W]here an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto,

and deem such activity to be concerted. 91 LRRM at 1133.

The national board continues to follow and expand Alleluia Cushion despite disapproval by several federal circuit courts of appeal. See, e.g., Dawson Cabinet Co., 228 NLRB 290, 96 LRRM 1373, enforcement denied, 566 F.2d 1079, 97 LRRM 2075 (8th Cir. 1977); Air Surrey Corp., 229 NLRB 1064, 95 LRRM 1212 (1977), enforcement denied, 601 F.2d 256, 102 LRRM 2599 (6th Cir. 1979); Bighorn Beverage, 236 NLRB 736, 98 LRRM 1396 (1978), enforced as modified, 614 F.2d 1238, 103 LRRM 3008 (9th Cir. 1980) (38(a)(3) violation upheld while S8(a)(l) violation, based on Alleluia, reversed); Akron General Medical Center, 232 NLRB 920, 97 LRRM 1510 (1977); Pink Moody, Inc. , 237 NLRB 39, 98 LRRM 1463 (1978); Self Cycle g, Marine Distributor Co., Inc., 237 NLRB 75, 98 LRRM 1517 (1978); Hansen Chevrolet, 237 NLRB 584, 99 LRRM 1066 (1978); Krispy Kreme Doughnut Corp. , 248 NLRB No. 135, 102 LRRM 1492 (1979).

It is clear that the Alleluia Cushion doctrine is not limited to situations where the subject matter of the employee's actions is health and safety. See, e.g., Dawson Cabinet Co., supra (a female employee's individual refusal to perform a certain job unless she was paid the same as male employees doing the same job); Air Surrey Corp., supra (employee's individual inquiry at employer's bank to determine whether employer had sufficient funds to cover payroll); Self Cycle £ Marine Distributor Co., supra (employee's pursuit of an unemployment compensation claim); Hansen Chevrolet, supra (an individual request for a pay raise); Krispy Kreme Doughnut Corp. , supra (expressed intention of filing a workers' compensation claim). The board has stated that

[6]Alleluia Cushion has not been uniformly disapproved by the courts. See NLRB v. Modern Carpet Industries, Inc., 611 F.2d 811, 103 LRRM 2167, 2169 (10th Cir. 1979), enforcing 236 NLRB 1014, 98 LRRM 1426 (1978) (cited with approval); Keokuk Gas Service Co., v. NLRB, 580 F.2d 328, 98 LRRM 3332 (8th Cir. 1978), enforcing 233 NLRB 496, 97 LRRM 1278 (1977) (8(a)(l) violation upheld, without mention of Alleluia, where an individual acted on his own behalf in the absence of a collective bargaining agreement).

"receiving payment for one's labor ... is on par with the concern for safe working conditions." Air Surrey Corp., supra, 95 LRRM at 1212.

Nor is the doctrine limited to situations where employees resort to governmental agencies. Employee complaints were made known only to the employers in Dawson Cabinet Co., supra; Air Surrey Corp._, supra; Akron General Medical Center, supra; Pink Moody, Inc., supra; and Kansen Chevrolet, supra. There is no reason for a distinction between complaints to employers and complaints to governmental agencies. Akron General Medical Center, supra, 232 NLRB at 927.

The ALRB has adopted the Alleluia doctrine. See Miranda Mushroom Farm, Inc., 6 ALRB No. 22 (1980); Foster Poultry Farms, 6 ALRB No. 15 (1980) (dictum); Golden_Valley Farming, 6 ALRB No. 8 (1980) (ALO decision at 15-16). In Foster Poultry the board, citing both Alleluia Cushion and Air Surrey, stated that an individual's actions are protected and concerted in nature if they relate to conditions of employment that are matters of mutual concern to all affected employees. Although the ALRB cases all involved health and safety issues, Air Surrey, as indicated above, did not, and there is no reason to suppose that our board will not extend Alleluia as the NLRB has.

Factually, the present case is similar to Hansen Chevrolet, supra 237 NLRB 584, 99 LRRM 1066. There an employee, a mechanic, was fired because he asked for a pay raise. His request was made only on his own behalf and there was no evidence that others supported it, but, since there was only one pay system in effect, the only way his pay could be changed would be to change the pay of all the mechanics. The board held that he was engaged in concerted activity.

All tractor drivers in the tomato harvest at B & B Farms clean the harvesters while the other workers have breaks, and it apparently is a common practice in the industry. As a practical matter, this condition of Garcia's employment could not be changed without similarly changing the employment

conditions of other drivers. There was less evidence in Hansen than here that the matter was of mutual concern to the affected employees, for here another tractor driver had expressed his dissatisfaction to Garcia. In the absence of evidence to the contrary, it is likely that other drivers shared their concern. See Air Surrey, supra. Since Garcia's protest involved a condition of employment which affected other workers, I conclude that his activity was concerted within the meaning of section 1152, and therefore protected.

It is well settled that, as a general rule, discharging an employee for engaging in protected activity constitutes an unfair labor practice. Insubordination which consists of refusing to work as directed is not a legitimate ground for discharge if the employee's activity is protected. See, e.g., NLRB y. Washington Aluminum Co., supra, 370 U.S. at 15-17; Jack Bros. £ McBurney, Inc., supra, 6 ALRB No. 12; Sam Andrews' Sons, 5 ALRB No. 68 (1979) (Ruiz, concurring); Dawson Cabinet Co., supra, 228 NLRB 290, 96 LRRM 1373; Pink Moody, Inc., supra, 237 NLRB 39, 98 LRRM 1463. Thus, Garcia's indication that he would no longer complete his timecard as directed does not justify his discharge on the grounds of insubordination.

The respondent argues that Garcia's discharge does not violate section 1153(a) because the company did not know that his activity was either concerted or protected in nature. Its reliance on the ALRB cases it cites--Matsui Nursery Inc., 5 ALRB No. 60 (1979); Jackson & Perkins Rose Co., 5 ALRB No. 20 (1979); and Mario Saikhon, Inc., 4 ALRB No. 107 (1978) is misplaced. In those cases the board found that the evidence did not establish employer knowledge of the activity itself, and there was therefore no basis for concluding that the terminations were caused by the activity. The missing element is causation, a nexus between the protected activity and the termination. Southwest Latex Corp. v. NLRB, 426 F.2d 50, 74 LRRM 2214 (5th Cir. 1970),

denying enforcement to 175 NLRB 358, 70 LRRM 1592 (1969), another case cited by the respondent, is also distinguishable on the grounds that causation is lacking. Here, as has already been discussed, it is evident that Garcia would not have been discharged but for his activity.

Knowledge that an employee's actions are concerted or protected is not essential to a finding of a violation.[7] See Air Surrey, supra (majority rejects without discussion dissent's view that employer knowledge of the concerted nature is necessary); Wright-Schuchart-Harbor, 227 NLRB 1007, 1009-1010, 94 LRRM 1508 (1975) (good faith but mistaken belief that employee's conduct is unprotected not a defense); also see Miranda Mushroom, supra; Alleluia Cushion, supra; Dawson Cabinet, supra; Akron General Medical Center, supra; Self Cycle 6 Marine Distributor, supra, where the issue is not discussed but no evidence of such knowledge appears.

This view is consistent with the generally accepted proposition that an employer's motivation is irrelevant in assessing whether its conduct violates section 8(a)(l) of the NLRA or section 1153(a) of the NLRA. See, e.g., NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 57 LRRM 2385 (1964);[8] Jackson &

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[7] Alternatively, since the situation of which Garcia complained could not be changed without similarly changing it for all tractor drivers, employer knowledge that his protest was protected concerted activity might be inferred. See Hansen Chevrolet, supra, 237 NLRB at 590 (ALO decision).

Some circuits have taken the respondent's view and reversed the national board on this issue. See Tri-State Truck Service, Inc., v. NLRB, 616 F.2d 65, 103 LRRM 264-0 (3d Cir. 1980), denying enforcement to 241 NLRB No. 32, 100 LRRM 14-76 (1979); Air Surrey Corp. v. NLRB, supra. 601 F.2d 256, 102 LRRM 2599 (6th Cir. 1979), denying enforcement to 229 NLRB 1064, 95 LRRM 1212; but see NLRB v. Guernsey-Muskingum Electric Co-op, Inc., 285 F.2d 8, 47 LRRM 2260 (6th Cir. 1960), enforcing 124 NLRB 618, 44 LRRM 1439 (1959) (employees in fact acting together, but no indication employer knew).

[8] Language from Burnup & Sims has been cited in support of the respondent's position. See Tri-State Truck Service, Inc., v. NLRB, supra n.7, 616 F.2d at 69. The issue before the Court in Burnup S Sims was whether an employer's good faith but mistaken belief that an employee committed misconduct while engaged in protected activity is a defense to an alleged 3(a)(l) violation. (Continued)

Perkins Co., 3 ALRB No. 36 (1977), pet. for review dismissed, 77 C.A.3d 830 (1978). The test for a violation of section 1153(a), like that for a violation of section 8(a)(l), does not focus on the employer's knowledge of the law, on the employer's motive, or on the actual effect of the employer's action; rather, it is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. Nagata Brothers Farms, 5 ALRB No. 39 (1979), review denied (Ct. App. Nov. 19, 1979), hearing denied (S.Ct. Dec. 31, 1979), cert, denied, 100 Sup. Ct. 3010 (June 16, 1980).

Regardless of whether the company knew that Garcia's activity was concerted or protected, his discharge tends to deter him and other employees from questioning company practices. Other workers will not understand that he might not have been fired if only the company had known that they supported him and that his protest was legally protected. The company's conduct may reasonably be said to tend to interfere with the free exercise of employee rights.

(n. 8 cont'd) In holding that 8(a)(l) was violated regardless of the employer's motive, the Court stated:

> In sum, S8(a)(l) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. 379 U.S. at 23 (emphasis added).

The emphasized portion of the quotation is neither essential to nor consistent with the Court's holding and rationale, which stresses the deterrent effect on other employees of a contrary result. The Court went on to say: A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the S8(a)(l) right that is controlling. 379 U.S. at 23-24.

This is no less true if an employer has a good faith but mistaken belief that an employee's activity is not concerted or protected.

The respondent also contends that as a matter of law Garcia's activity is unprotected because the Act establishes no right for an employee individually to negotiate terms of employment, and if the employee is acting in concert with others, then negotiating about employment conditions runs afoul of the prohibition in section 1153(f) of the Act (which has no equivalent in the NLRA) of bargaining with an uncertified representative. However, section 1152 explicitly protects concerted activity for the purpose of "mutual aid and protection" other than collective bargaining. A one-time protest about a single issue cannot fairly be characterized as an attempt at "collective bargaining" as that term is used in the Act, which contemplates a comprehensive employment agreement. See section 1155.2(a), which states that "to bargain collectively ... is ... to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." (Emphasis added.)

Furthermore, section 1153(f) forbids an employer to "recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the [Act]." (Emphasis added.) Its purpose is to prevent "sweetheart" contracts with labor organizations not freely chosen by the employer's workers. See Harry Carian Sales, 6 ALRB No. 55, pp. 37-38 (1980). Although "labor organization" is broadly defined by section 1140.4(f), its definition is not so broad as to include an individual or an informal group who protests a particular working condition. To so construe it is seriously to undermine the Act's goal of encouraging and protecting the right of employees to "full freedom of association" and "self-organization." See section 1140.2.

Finally, prohibiting an employer from recognizing or bargaining with an uncertified labor organization is not inconsistent with prohibiting

the employer from discharging an employee who exercises his or her right to engage in protected activity, even if the employee does represent an uncertified labor organization. The Act prohibits both types of conduct.

I therefore conclude that the respondent's discharge of David Garcia Munoz violated section 1153(a) of the Act.

THE REMEDY

The usual remedy for a discharge in violation of section 1153(a)—reinstatement with backpay, along with the customary notice requirements—is appropriate here. Accordingly, pursuant to section 1160.3 of the Act, I recommend the following:

ORDER

Respondent B £ B FARMS, its officers, agents, successors and assigns shall:

1. Cease and desist from discharging any employee for engaging in protected concerted activities, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by section 1152 of the Act;

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

a. Immediately offer David Garcia Munoz reinstatement to his former position or a substantially equivalent position, without prejudice to seniority or other rights and privileges to which he is entitled, and make him whole for any loss of pay and other economic losses he has suffered as a result of Respondent's discharge, plus interest thereon at a rate of seven percent per annum;

b. Preserve and, upon request, make available to agents of this Board, for examination and copying, all payroll and other records relevant

and necessary to an analysis of the backpay and reinstatement rights due under the terms of this order;

c. Immediately sign the attached Notice to Employees and, upon its translation by a Board agent into the appropriate languages, reproduce sufficient copies in all languages for the purposes set forth hereinafter;

d. Post copies of the attached Notice, in all languages, for 60 consecutive days in conspicuous places on its premises, the time and places of posting to be determined by the Regional Director, and exercise due care to replace any Notice which is altered, defaced, covered, or removed;

e. Within 30 days of the date of issuance of this order, mail copies of the attached Notice, in all languages, to all employees employed at any time during August 1979;

f. Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all languages, to its employees assembled on company time and property, at times and places to be determined by the Regional Director; following each reading a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or employees' rights under the Act; the Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and question-and-answer period;

g. Notify the Regional Director in writing, within 30 days of the date of issuance of this order, of the steps taken to comply with it, and continue to make periodic reports as requested by the Regional Director until full compliance is achieved.

Dated: 21 November 1980

Jennie Rhine
Administrative Law Officer

NOTICE TO EMPLOYEES

After charges were made against us by David Garcia Munoz and a hearing was held where each side had a chance to present evidence, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers by firing him. The Board has ordered us to distribute and post this Notice, and to do the things listed below.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help unions;

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

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

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

Because you have these rights, we premise you that:

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

WE WILL MOT fire any worker because -hat person has done any of the things listed above;

WE WILL offer David Garcia Munoz his old job back if he wants it, and we will pay him any money he lost because we fired him, plus 7% interest.

If you have any questions about this notice or your rights as farm workers, you may contact any office of the Agricultural Labor Relations Board. One is located at 1585 E Street, Suites 101-103, Fresno, Ca. 93706, telephone (209) 445-5668.

Dated: B & B FARMS

By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, AND IS NOT TO BE REMOVED, DISFIGURED OR DEFACED IN ANY WAY.