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ALRB SLIP SHEET

Year	7
Report	39

Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUPERIOR FARMING COMPANY, INC., Respondent, and GUADALUPE GUTIERREZ ZACARIAS, Charging Party.	Case No. 79-CE-58-D 7 ALRB No. 39

DECISION AND ORDER

On November 7, 1980, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, the General Counsel timely filed exceptions to the ALO's Decision and a brief in support of those exceptions. Respondent filed a reply brief.[1/]

Pursuant to the provisions of section 1146 [2/] of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this

[1/] The General Counsel filed two exceptions to the ALO's Decision. The first was to the ALO's conclusion that the Charging Party was not a supervisor within the meaning of Labor Code section 1140.4(j). Although we view this question as a close one, and although both parties argued this case to the ALO as though supervisorial status had been proven, we affirm the ALO's conclusion. The General Counsel's second exception was to the ALO's recommendation that the complaint be dismissed. Respondent argues that this exception's breadth renders it meaningless. We find that the General Counsel's brief adequately identifies the portions of the ALO decision to which exception is taken and the portions of the record which support the exception.

[2/] All references herein are to the Labor Code unless otherwise stated.

matter to a three-member panel.

The Board has considered the record and the attached. Decision in light of the exceptions and briefs and has decided to affirm the ALO's rulings,[3/] and conclusions, as modified herein. However, as we find his analysis incomplete in light of the recent California Supreme Court decision in Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307 [172 Cal.Rptr. 720] we do not adopt the ALO's recommended dismissal of the complaint except as to the Charging Party.

The General Counsel alleged in the complaint that Respondent violated section 1153(a)[4/] of the Act by discharging the Charging Party and other members of his crew because of their protest of Respondent's wage rates. This conduct was alleged to be a concerted activity protected by section 1152 of the Act.

[3/] At the hearing before the ALO, the Charging Party testified that prior to taking over a crew he was directed to attend a management meeting where Respondent's representatives outlined Respondent's position vis-a-vis the United Farm Workers of America, AFL-CIO (UFW), and the role that Respondent expected its supervisors to adopt in dealing with any organizing At the hearing, the ALO granted Respondent's motion to strike this testimony as irrelevant, but considered the testimony in making his findings and conclusions. We therefore reverse the ALO's ruling on the motion to strike and admit the testimony for it is relevant to determine supervisorial status. Dave_Walsh Company (Oct. 27, 1978) 4 ALRB No. 84.

[4/] Section 1153(a) provides: "It shall be an unfair labor practice for an agricultural employer to do any of the following: (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in section 1152."

Section 1152 provides: "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 activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . . "

The ALO found that the crew members did engage in protected concerted activity by requesting a higher rate of pay. The ALO found that Respondent's senior management did not retaliate by discharging them for that reason, but that the crew members walked off the job because of the Charging Party's inaccurate report to them of Respondent's reaction to their request for a higher rate of pay.

Based on this mistaken interpretation of Respondent's labor coordinator's (Aurelia Menchaca) statements, Guadalupe Gutierrez Zacarias incorrectly notified his crew that they had been fired. But the ALO also found Zacarias was not a supervisor[5/] and that the statements of Zacarias to the crew were therefore not attributable to Respondent. Specifically, the ALO found Zacarias' "credited testimony [to be] conclusionary and Zacarias' conclusions . . . not [to be] binding upon Respondent since . . . he was not a supervisor within the meaning of the Act." Decision, p. 8, fn. 6.

Under the recent decision of the California Supreme Court in Vista Verde Farms v. ALRB, supra, (1981) 29 Cal.3d 307, and this Board's decision in Perry Plants, Inc. (Mar. 16, 1979) 5 ALRB No. 17, it is clear that non-supervisors can effectively bind agricultural employers and labor organizations. See Oil Chemical

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[5/] Supervisor is defined by the Act in section 1140.4(j) as follows: " . . . 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. "See Miranda Mushroom Farms (May 1, 1980) 6 ALRB No. 22, pp. 9-10; Perry Plants, Inc. (Mar. 16, 1979) 5 ALRB No. 17; Dave Walsh Company, supra, 4 ALRB No. 84.

and Atomic Worker International Union v. NLRB (D.C. Cir. 1976) 547 F.2d 575, 584, et seq. [94 LRRM 3074 amendg. 92 LRRM 3059]; NLRB v. Arkansas-Louisiana Gas Company (8th Cir. 1964) 333 F.2d 790, 795 [56 LRRM 2623]; Time-O-Matic, Inc. v. NLRB (7th Cir. 1959) 264 F.2d 96 [43 LRRM 2661]. In Vista Verde, the employer was held accountable for the coercive conduct of its labor contractor, even without a showing of prior authorization or subsequent ratification by the employer and even though the contractor was haranguing employees who, at the moment of the violation, were not destined for the employer's operation. The Court stated the test as follows:

> . . . [U]nder the ALRA, as under the National Labor Relations Act (NLRA) upon which the California Act was in large measure modeled, an employer may be held responsible for unfair labor practice purposes for any improperly coercive actions which employees may reasonably believe were either engaged in on the employer's behalf or reflect the employer's policy. Thus, even when it is not shown that an employer actually directed, authorized or ratified the improper conduct, an employer who gains the illicit benefit of such coercive conduct may be subject to appropriate unfair labor practice sanctions in order to protect the workers' rights and in order to deter similar coercive conduct in the future.
>
> We conclude that under the ALRA these general principles of employer responsibility apply equally to the coercive actions of a farm labor contractor hired by a grower as they do to similar coercive conduct engaged in by a supervisor or foremen employed by such grower. Vista Verde, supra, at 311-312.

Although the California Supreme Court dealt with the relationship of an agricultural employer and its labor contractor in the above analysis, the Court relied on authority under the National labor Relations Act[6/] involving the relationship between employers and

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[6/] Section 1148 of the Act requires us to "follow applicable precedents of the National Labor Relations Act."

non-supervisory employees. For example, the court pointed out that in I.A. of M. v. Labor Board (1940) 311 U.S. 72 [85 L.Ed. 50, 61 S.Ct. 83]

> the employer argued that the NLRB had improperly held it responsible for organizational efforts of several low-level employees ("lead men") which it had neither expressly authorized nor ratified. Justice Douglas, writing for a unanimous Supreme Court, rejected the employer's contention, declaring: `The employer . . . may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior. We are dealing here . . . with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination or influence.... Thus, where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.' . . . (31) U.S. at p. 80 [85 L.Ed, at p. 56].) Observing that whereas the lead men whose actions were in question 'were not high in the factory hierarchy and apparently did not have the power to hire or to fire [,] . . . they did exercise general authority over [other] employees and were in a strategic position to translate to their subordinates the policies and desires of the management' (ibid.), the court concluded that the Board could properly hold the employer responsible for their actions.
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> Vista Verde v. ALRB, supra at 318-319 (emphasis the Court's).

We are presented here with a highly anomalous fact pattern. Respondent argued to the ALO that one of its supervisors (Zacarias) mistakenly thought Respondent had ordered him to fire his own crew, contrary to the explicit instructions given Zacarias by Menchaca. After the discharge of his crew, Zacarias then filed charges under the Act. Although Respondent did not specifically address the issue of agency in the labor-management relations area, it made no effort to demonstrate that it disavowed Zacarias' instructions to the crew,

nor did it attempt to show that it has over a period of years clearly demonstrated to its employees a degree of concern for their rights which would render Zacarias' conduct isolated and contrary to established practice.

> To be sure, in exceptional circumstances an employer may be able to escape responsibility for misconduct of a labor contractor, just as it may occasionally escape responsibility for improper acts of a supervisor. (N.L.R.B. v. Big Three Inc. Gas & Equipment Co. (5th Cir. 1978) 579 F.2d 304$_f$ 309-312.) Thus, for example, if an employer publicly repudiates improper conduct and takes action to reprimand the labor contractor and to ensure that the conduct does not coerce or intimidate employees, the ALRB may find the employer not guilty of an unfair labor practice. (Compare Imco Container Co. of Harrisonburg v. N.L.R.B. (4th Cir. 1965) 346 F.2d 178, 181 with Colson Corp. v. N.L.R.B. (8th Cir. 1965) 347 F.2d 128, 137.)
>
> Similarly, if over a period of time an employer has demonstrated to the employees in question that it will not interfere with their rights and will not discriminate against them on the basis of their union affiliations or activities, the employer may escape responsibility for sporadic or isolated misconduct of a labor contractor which it has not authorized or ratified. Under such circumstances employees may reasonably infer that the potentially coercive acts are unauthorized and do not represent the policy of the grower. (Cf., e.g., National Labor Relations Bd. v. Cleveland Trust Co. (6th Cir. 1954) 214 F.2d 95, 101-102.)
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> Vista Verde v. ALRB, supra, at 328.

There is no evidence of either exceptional circumstance here and therefore we find the crew acted reasonably in believing themselves fired for protesting the piece rate. According to the testimony of Zacarias, corroborated by, among others, the General Counsel's rebuttal witness Ronald Dias Franco, they had no option of continuing to work at 60 cents, but rather could only remove the ladders and go home. No other agent of Respondent countermanded the order of Zacarias, although it must have become immediately apparent that the crew was no longer working. Given Respondent's past

practice of relaying orders through Zacarias, Respondent cannot now avoid liability for Zacarias' conduct by its own failure to adequately supervise him. OCAW v. NLRB, supra, 547 F.2d 584-5.

However, although Respondent must therefore be held to have violated section 1153(a) of the Act by virtue of the discharge of the crew, the uniqueness of the situation before us militates against imposing the standard remedial order. Menchaca's credited testimony demonstrates that Respondent had no intent to retaliate against the employees, however reasonable the employees may have been in believing themselves discharged. Therefore, although the crew members must be made whole for loss of wages and offered reinstatement, insufficient grounds are presented to require posting, mailing, or reading of our standard Notice. We further adopt the ALO's recommendation and dismiss the allegations of the complaint which assert the discharge of the Charging Party to be an unfair labor practice.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Superior Farming Co., Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any concerted activity protected by section 1152 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the

exercise of the rights guaranteed them by Labor Code section 1152.

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

(a) Immediately offer to employees:

Guadalupe Alvarez
Rafael T. Barrera
Cosine DeLeon
Ronald F. Dias
Angel Escalante
Florentine Escalante
Froylan Estrada
Iamael A. Estrada
Magdalena Garcia
Arturo Gonzalez
David Gonzalez
Gregoria Gonzalez
Ignacio Gonzalez
Javier Gonzalez
Maria Gonzalez
Mateo Gonzalez
Rigoberto Gonzalez
Santiago Gonzalez
Edward Gutierrez
Jose Hernandez
Rodrigo Landin
M. Elena Mora
Ramon Moreno
Isidro Perez
Agustin Sanchez

full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

(b) Make whole the above-named employees for any loss of pay and other economic losses they have suffered as a result of their discharge, reimbursement to be made according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

(c) Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(d) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report

periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: November 6, 1981

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Board Member

JEROME R. WALDIE, Board Member

CASE SUMMARY

Superior Farming Company, Inc. 7 ALRB No. 39
Case No. 79-CE-58-D

ALO DECISION

The ALO found that the Charging Party, a "crew pusher" for a labor contractor crew employed at Respondent operation, was not a supervisor, notwithstanding the apparent agreement of General Counsel and Respondent that he was a supervisor. The ALO then found that the Charging Party, in direct contravention of the instructions of Respondent's labor coordinator, told his crew they were discharged for protesting the lack of minimum hourly wage or increase in the piece rate. The ALO found that, because Charging Party was not a supervisor, his comments to the crew, although corroborated and credited, were not binding on Respondent. The ALO recommended that the complaint be dismissed.

BOARD DECISION

The Board affirmed the ALO's findings and rulings as to Charging Party's status but found that low-level supervisors and leadmen can effectively bind employers in the labor relations area, even absent authorization or ratification. Focusing on the employees discharged, the Board found that they were reasonable in believing that Respondent had discharged them for engaging in protected concerted activity, and therefore concluded that Respondent had violated section 1153(a) of the Act. Respondent offered no evidence that it had disavowed Charging Party's action or that due to Respondent's prior history, the discharged employees were unreasonable in believing that the Charging Party spoke for Respondent. However, the Board modified its usual remedy in this unique situation, based on the credited testimony of Respondent's labor coordinator, that no discrimination or discharge had been ordered. The Board ordered reinstatement and back wages for the employees, but not for the Charging Party, and did not order posting, mailing, or reading of a remedial Notice to Employees.

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of SUPERIOR FARMING COMPANY, INC., Respondent and GUADALUPE GUTIERREZ ZACARIAS , Charging Party	)	Case No 79-CE-58-D

APPEARANCES :

John Patrick Moore, Esq.
Ricardo Ornelas, Esq. 1685 E
Street Fresno,
California 93706

For the General Counsel

Doty Quinlan, Kershaw & Fanucchi By
William A. Quinlan, Esq. and
Bert Hoffman, Jr., Esq. 2409
Merced Street, Suite 3 Fresno,
California 93721

For the Respondent

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: The above captioned case was heard before me in Delano, California, on April 21, 23 and 24, 1980.

Complaint and Notice of Hearing issued January 10, 1980, alleging that Superior Farming Company, Inc., hereafter Respondent or Superior, violated Section 1153(a) of the Agricultural Labor Relations Act in that it discharged Guadalupe Gutierrez Zacarias, hereafter Charging Party or Zacarias, and his crew for engaging in concerted activity protected by Section 1152 of the Act. The complaint was based upon a charge filed by Zacarias on June 12,

1979. The complaint and charge were duly served upon Respondent.

Respondent filed a timely answer and thereafter filed and duly served an Amended Answer. Respondent's Answer admitted that Joe Rodriguez, Labor Contractor, was a supervisor within the meaning of Labor Code Section 1140,4(j) and was an agent of Respondent acting on its behalf. The amended answer denied this allegation.

During the course of the hearing General Counsel's Motion to Amend Complaint was granted. The amendment deleted from the complaint the names of certain persons initially alleged to be members of the Zacarias crew.

All parties were given full opportunity to participate in the hearing. Respondent and the General Counsel filed post hearing briefs. Charging Party did not enter an appearance.

Upon the entire record, including my observation of the witnesses, I make the following:

FINDING OF FACT

A. Jurisdiction

Respondent is a Nevada corporation and is a wholly owned subsidiary of Superior Oil Company. It is engaged in Kern County, California in the cultivation of citrus fruits, grapes, almonds and stone fruit. At all times material Respondent was and continues to be engaged in agriculture within the meaning of Labor Code Section 1140.4(a) and was and continues to be an agricultural employer within the meaning of Labor Code Section 1140.4(c) .

B. Supervisory Status of Zacarias

In December, 1978, Zacarias sought work with Respondent as a crew foreman. Aurelio Menchaca, Labor Supervisor for Respondent, advised Zacarias that no crews were available. Zacarias was offered and accepted a position doing regular field work. Sometime between March 15 and March 20, Menchaca told Zacarias that he was to be put in charge of a crew. Prior to starting as a foreman, Zacarias attended a forman's meeting at Respondent's Poso Ranch office during the course of which a management representative outlined Respondent's position vis a vis the United Farm Workers.

Zacarias' first assignment as a foreman was providing vacation relief for a period of two days for another crew foreman. Following this Zacarias was given a crew in Respondent's apricot thinning operation. He was instructed to hire 18 to 20 experienced workers. When the persons Zacarias purported to hire reported for work, Menchaca learned that the majority of them were undocumented and not legally in the United States. He refused to hire them as Superior employees. He also inquired regarding their experience as thinners. Zacarias told him that most of them had no experience

thinning stone fruit. Their inexperience was an additional reason Menchaca did not hire them as Superior employees. However, he was prepared to have them carried on the payroll of Joe Rodriguez, a labor contractor used by Superior, and Zacarias and his crew became one of the crews supplied by Rodriguez.

Each of Respondent's ranches is supervised by an employee of Superior. Zacarias was directly responsible to the ranch supervisor.

As crew foreman Zacarias maintained a daily crew list which he turned in to Rodriguez. He translated instructions given him by Superior's supervisor into Spanish for the workers and translated their complaints regarding work into English for the supervisor. It does not appear that Zacarias independently instructed the crew in the manner in which the work was to be performed.

From time to time he was directed to lay off certain workers who failed to meet the Respondent's productivity requirements. There is no evidence Zacarias ever laid off a worker without instructions from the ranch supervisor or otherwise exercised any discretion regarding layoffs.

As workers were terminated, Zacarias[1] crew was brought up to strength by replacements provided by Superior and on occasion by new people provided by Zacarias. He did not participate in the decision regarding which source of replacements would be used; nor does it appear that he had any control over the crew size.

Respondent's policy regarding payment of an hourly minimum to workers whose production on a piece work basis was insufficient to earn that minimum was not explained to Zacarias.

Unlike the members of his crew, Zacarias was paid an hourly rate rather than a piece rate. His hourly rate was $4.54 as opposed to the workers guarantee of $3.25. Additionally, he was paid for two hours per day more than the crew worked. The crew's hourly guarantee increased during the period they were employed at Superior.

C. Labor Contractor Joe Rodriguez

Respondent denied in its amended answer that Rodriguez was an agent of Respondent. Rodriguez was utilized as a labor contractor by Respondent at all times material; therefore for purposes of the Act he is deemed to be Respondent's supervisor, and Zacarias and his crew to be employees of Superior.

D. Chronology of Events

April 2 to May 28, 1979

The Zacarias crew thinned apricots from April 2 until

April 10; from April 11 until the 17th they thinned peaches; from the 18th until May 12th they thinned plums and then moved to thin nectarines from May 14 until May 16. There is no evidence showing what work, if any/ was performed by the crew during the period between May 17th and May 25th; on the 26th and 27th they picked peaches. With the exception of their first day, all thinning and picking work was paid on a piece rate basis with an hourly guarantee providing an earnings floor.

May 28 to June 1, 1979

On May 28th the Zacarias crew began the first picking of plums under the supervision of Martin Veiss. It was the first occasion the crew worked for Veiss.

On the 28th when Veiss arrived at the orchard, he met with Zacarias. Since he customarily met only with the crew boss rather than the entire crew, Veiss, by using a sizing ring, showed Zacarias the minimum size plum to be picked. He told Zacarias to pass the correct size plumb among the crew so they could get the feel of it. Veiss showed Zacarias the correct color plum to be harvested and had him pass this information on to the crew. Veiss also told him that the piece rate was to be 70 cents per bucket and explained how the buckets were to be dropped into the bin. Thereafter Zacarias called the crew around him and explained the color and size requirements as well as the information regarding the price and bucket dumping. Veiss apparently made no mention of the fact that pickers would be guaranteed a minimum of $3.25 per hour.

Veiss returned to the orchard later that day and noted that ripe fruit was being left on the trees. Three or four times during the course of the day, Veiss had Zacarias recall the crew and had them redo trees already picked in order to harvest all the available fruit.

When Veiss asked why the crew was having so much trouble, Zacarias told him that 70 to 80% of them had never picked stone fruit before. The Company's crew sheet for May 28th shows no worker picked sufficient buckets to exceed the $3.25 hourly guarantee. According to the crew sheet everyone was paid that day at $3.25 per hour.

On May 29th all but five workers earned more than the hourly guarantee. On the 30th all but three crew members earned more than the hourly guarantee.

The first pick was completed sometime during the morning of May 31st. Before the crew started the second pick, Veiss explained to Zacarias that the price per bucket for the second pick would be 60 cents. He told Zacarias the price was going down because there was more fruit to be picked. Although the size remained the same, the color standard was lower; thus the pickers would not have to be so selective. Veiss does not set the piece rate. He had no part in setting either the 70 cent

rate for the first pick or in reducing the rate to 60 cents for the second pick. It is the harvest coordinator who sets the rate.

At the close of work on the 31st Veiss was at the edge of the orchard awaiting the crew sheet from Zacarias when an employee approached and stated she was not happy with the price and asked whether it could be raised back to 70 cents per bucket, Veiss told her that he didn't have the authority to raise the price, that he would ask the boss that night and see what he had to say.[1/]

On June 1st the crew started at the regular hour. Veiss visited the crew at a point in time when they had picked about a bin and a quarter of fruit, somewhere between an hour and an our and a half after work commenced. He ascertained that the fruit being picked was too small. He called Zacarias over to the bin and showed him the fruit. Veiss had him call the crew over to the bin. Zacarias then picked fruit from the bin which was too mall and passed through the ring. He then picked a plum of minimum size which did not pass through the ring and passed this among the crew members for them to feel. Veiss also put fruit through his ring which fell to the ground. He admitted he could have displayed anger because he was upset the fruit being picked was too small. The members of the crew were not provided with rings.

The workers did not resume work upon completion of the demonstration. Someone asked Veiss whether he got the price raised. Veiss said no. Someone asked Veiss. Why he couldn't raise the price. He said he didn't set the prices that it was out of his hands. He said these were orders from the chief. The crew was upset and stood talking among themselves for five or ten minutes with no work being done. Veiss called Zacarias to the side and told him the price was set, and the crew would either have to go to work or go home.[2/] Zacarias did not respond. Veiss started to

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[1/] Veiss testified he talked to Binardi, the harvest coordinator, that night. Binardi told him the price was fair.

[2/] Ronald Diaz Franco, General Counsel's witness, testified that "He [Veiss] said that if we wanted to work to go ahead and work, but if not, for us to go home." Zacarias denied that Veiss made such a statement. His testimony was as follows: He told Veiss that people wanted to work by the hour because they didn't have rings. He said the workers wanted $1.00 per bucket or $3.55 per hour. Veiss then threw some plums on the ground and said he'd had a lot of difficulty with the crew. "I don't want so many problems with you [the crew], take the ladders out to the avenue. All of you go home, I do not need you [the crew] go home. I have a lot of people who want to work." The crew took the ladders out and Zacarias told the people to wait while he went to talk to Menchaca.

No other witness testified to hearing the absence of a ring as a reason for wanting to work by the hour. There is no

leave the orchard; Zacarias approached Veiss and said he would like to talk to Menchaca. Veiss went to his truck, called Menchaca on the radio to come to the orchard to see the crew. Menchaca said he couldn't come; he was in the office. Veiss relayed this information to Zacarias and departed for the office to speak to Menchaca.[3/]

Upon arriving at the office, Veiss told Menchaca that the crew wanted a price rise and that he thought they weren't going to work unless they got it. Menchaca said he would take care of the matter.[4/]

Veiss returned to the ranch and spent some time moving the checker to an adjacent field to sucker some small grafted trees. When he finished instructing her as to what he wanted done, he

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evidence any crew member ever asked to be supplied a ring. Veiss testified it would be impractical to give each worker a ring when working on piece rate. Certainly if a piece worker ringed each plum, his production would be impaired. Zacarias' testimony that he made this statement to Veiss is not credited. The workers' reason for wanting an hourly rate was that they felt they couldn't "make out" on the 60 cent piece rate.

Zacarias' testimony that he told Veiss the workers wanted a dollar a bucket is not credible. There is no evidence that any worker made such a suggestion. Nor is there any reason to conclude that Zacarias was doing other than relating to Veiss what the workers were seeking, that is, there is no reason to conclude that he escalated their requests.

[3/] Zacarias denied that he asked Veiss if he could go talk to Menchaca. He denied that Veiss tried to contact Menchaca by radio on his behalf. Menchaca testified to receiving a call on the radio from Veiss, the substance of which was that Zacarias wanted to speak to him. Menchaca responded that he would be at the office in a few minutes. While there is variance between Menchaca's and Veiss' recollection of what was said, the substance is the same. It would serve Respondent no purpose to fabricate the radio contact. I credit Veiss' testimony regarding the circumstances under which he made the call. The fact that Zacarias asked Veiss if he could talk to Menchaca provides some additional support for crediting the Veiss Diaz testimony that Veiss told the crew to go to work or go home and that he did not tell them they were fired. Had Veiss told the crew they were fired, there would have been no reason for Zacarias to ask Veiss to talk to Menchaca. It is only in the context of Zacarias' continuing recognition of Veiss as his superior that the request makes sense.

[4/] Menchaca did not recall whether he spoke with Veiss before or after his meeting with Zacarias. From the content of their conversation, it seems likely that Veiss and Menchaca spoke first.

started to leave to visit his other crews. At that point Zacarias was returning from the office. Veiss told him that he had seen a couple of cars of workers leave, and if the crew was not going to work, to make sure that the ladders were taken from the rows.

Menchaca testified he was away from the office when he got Veiss' radio call; that he arrived at the office a few minutes later and shortly thereafter Zacarias arrived. The Menchaca testimony regarding what transpired is as follows: Zacarias told him the people wanted a raise because they weren't making wages. Menchaca said he would get hold of the labor contractor and straighten the matter out. Rodriguez arrived at this point, and Menchaca instructed him to go tell the crew they're guaranteed the hourly minimum even if they don't make it on the piece rates. He told Rodriguez that if the piece rates are wrong, we will adjust them. Zacarias was present during this conversation. When Zacarias departed no understanding had been reached that the rate would be increased.

Zacarias' version of his conversation with Menchaca is as follows: he waited at the office 15 or 20 minutes for Menchaca to arrive. Menchaca asked him what the problem was. Zacarias responded that Veiss had fired the entire crew. He asked for another chance for him and his crew with another supervisor. He sought a place where they would be paid by the hour. Menchaca responded that if Veiss had fired the crew he couldn't do anything. Rodriguez was present near the end of the conversation, but Zacarias did not speak to him and apparently Rodriguez said nothing.[5/]

Menchaca denied that Zacarias told him that Veiss fired the crew or that the crew was leaving. Veiss had no authority to fire the crew.

When Zacarias returned to Ranch 85 where the crew had seen working, he told them that the company didn't want to pay 70 cents and did not want to pay by the hour. He said he couldn't do anything; I think we should leave. Another worker testified that Zacarias stated that he couldn't do anything about raising the 60 cents to 70 cents, that the whole crew was fired, including

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[5/] Rodriguez was not called to testify by either party. There is no evidence he was unavailable. Since General Counsel as the burden of proving its version of the conversation, a reasonable inference to be drawn from the General Counsel's failure to call Rodriguez is that his testimony would be adverse. However, because Rodriguez, having interest allied to those of Respondent, could reasonably be anticipated by General Counsel to be hostile, no significance is attached to its failure to call him.

the boss.[6] He said the crew was to take the ladders out and to go home.[7]

The next day the Zacarias crew was replaced with another crew supplied by Rodriguez. Included therein were four from the Zacarias crew who showed up for work.[8] Each is alleged to have been discharged on June 1st.

Menchaca testified, that during a conversation a few days later in front of the office, Zacarias asked him for another crew. Menchaca told him he could put him to work that day but not as a crew leader. Zacarias declined the offer and said he would go talk to Rodriguez. Zacarias denied having this conversation.[9]

DISCUSSION AND CONCLUSIONS

General Counsel and Respondent agree that the instant case presents no substantial substantive issues. Respondent does not contend that the Zacarias crew in seeking to have its per bucket piece rate increased from 60 to 70 cents was not engaged in protected concerted activity. Rather the question is whether Respondent responded to that activity by discharging the crew and its crew leader. If so, the law is clear that its conduct violated Labor Code §1153(a) and that an appropriate remedy for such violation is reinstatement with full back pay. If not, Respondent did not violate the Act. Thus, the finding of a violation hinges upon resolution of conflicts in the testimony of various witnesses and upon the credibility of various witnesses.

6/ General Counsel's witness, Diaz, whose testimony was straightforward, articulate and unassisted by leading questions testified that when Zacarias returned from the office he told the crew that he could do nothing about raising the 60 cents to 70 cents, that they were fired. He told them to take out the ladders and go home. This testimony is credited. On direct examination of Zacarias General Counsel elicited no testimony regarding events following his conversation with Menchaca. The credited testimony is conclusionary and Zacarias' conclusions are not binding upon Respondent since, as noted below, he was not a supervisor within the meaning of the Act.

7/ Zacarias testified that the crew removed the ladders before he went to speak to Menchaca. Veiss testified the ladders were still in the orchard when he returned after speaking to Menchaca. Diaz testified that Zacarias told the crew, before leaving for the office, not to take the ladders out; that they were taken out when Zacarias returned.

8/ Rigoberto Gonzales, Maria Gonzales, Angel Escalante and Maria E. Mora.

9/ Zacarias' denial is not credited. See discussion below regarding his credibility.

A preliminary question is whether Zacarias is a supervisor within the meaning of the Act. The complaint does not so allege. Respondent contends that Zacarias was a supervisor and, thus, the protections of the Act are not available to him. There s no evidence that Zacarias had independent authority to instruct crew members how to harvest or thin stone fruit. While working under the supervision of Veiss, Zacarias merely translated orders given by Veiss, a function not indicative of supervisorial status [Miranda Mushroom Farm, Inc., 6 ALRB No. 22 at page 9 (1980)] Zacarias did not independently instruct employees to redo improperly harvested trees, rather it was Veiss who directed that trees be redone and who gathered the crew together for the purpose of illustrating their errors.

There is no evidence that Zacarias issued warnings to is crew members [c.f. Paoli Chair Co. 213 NLRB 909, 920 (1974)]

Zacarias made no independent determinations regarding the lay-off of employees for unsatisfactory work. He was instructed to lay off employees not meeting productivity standards prescribed by Superior. His role was merely to ascertain whether or not those standards were met, and if not, to effect the person's layoff. Authority to lay off is indicia of supervisory status only if "...the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." [Labor Code §1140. 4(j)].

While it appears that the assignment of rows to particular employees in the crew was left to Zacarias, such authority is not indicative of supervisory status absent evidence that this function called for the exercise of independent judgment. [Anton Caratan & Sons, 4 ALRB No. 103 (1978)].

When Zacarias was made a crew leader, he was told to hire a crew of 18 to 20 workers. The authority to hire, standing alone would ordinarily suffice to establish supervisorial status, since the statutory indicia in §1140.4(j) are to be read disjunctively [Perry's Plants, Inc., 5 ALRB No. 17 at p. 36 (1979) ALO's conclusions adopted by Board]. However, the record does not support the conclusion that the initial hire of the crew was an exercise of independent authority. Rather, Respondent's labor supervisor, Menchaca, determined who was to be hired, and as the record shows, declined to put any of the applicants provided by Zacarias on the Superior payroll. In effect, Zacarias' role was merely to round up applicants, and Menchaca determined whether Superior would employ them. When Menchaca declined to place the applicants on Superior's payroll, he arranged for them to be placed on the Labor contractor's payroll; Zacarias played no role in this decision.

During the period Zacharias had a crew, it was necessary to replace workers. Some were transferred into the crew by Respondent, others were obtained by Zacharias; there is no evidence whether the additional workers provided by Zacarias were subject to approval by Menchaca or whether Zacarias had independent authority

to employ them. Since it is Respondent who urges that Zacarias is a statutory supervisor, the burden of establishing such status rests with it. The failure to present evidence of independent authority to hire, warrants the inference that Zacarias was vested with no more authority with respect to replacements than he possessed when his crew was initially hired.

Since the record does not support the conclusion that Zacarias had authority to exercise independent judgment on behalf of Superior to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, responsibly direct them, adjust their grievances or effectively to recommend such action, it follows that he was not a supervisor within the meaning of the Act.[10/]

The crux of General Counsel's case is that Veiss fired the crew or behaved in a manner which could reasonably lead the crew members to believe that they had been fired. Its case rests primarily on the testimony of the charging party. For the reasons set out below, I find his testimony is not credible except insofar as it is corroborated by other witnesses.

Veiss denied that during the course of his conversation with Zacarias in front of the crew that he fired them. After saying that he had no authority to raise the rate and upon seeing that they were not returning to work, he stated in substance that if they wanted to go to work to do so, otherwise they should go home. This testimony was corroborated by that of General Counsel's witness Diaz.

It is undisputed that Veiss had no authority to fire the crew. In view of his relatively brief tenure as a ranch supervisor, it is unlikely that he would overstep himself. But it is the corroboration of Veiss' testimony on this point by Diaz, a named dischargee, which is the strongest reason for crediting Veiss. As an alleged dischargee, Diaz' corroboration of Veiss was against his own interests, and for that reason it is unlikely that the testimony was fabricated. Moreover, Diaz was a convincing witness. He was articulate, responsive and otherwise created the impression that he was telling the truth.

Zacarias' testimony regarding the events of June 1st contained no mention that Veiss made the statement attributed to him by Diaz. Zacarias must have heard the statement since it is undenied that Veiss was speaking to him. Zacarias' omission of this testimony, whether deliberate or attributable to poor recollection, is but one example of the unreliability of his testimony.

10/ The fact that Zacarias was paid differently from the members of his crew arid at a higher rate, while an indication of supervisorial status, is not sufficient standing alone to find him to be a statutory supervisor.

Further illustrative of such unreliability is found in Zacarias' testimony regarding the preparation of his crew sheets and his testimony regarding the period for which his crew had been paid a piece rate of 70 cents per bucket. With respect to his crew sheets, Zacarias testified that he was instructed to record four, five or six hours for those workers who failed to produce enough to earn the hourly rate, rather than to pay the worker for eight hours. The purpose of such an approach being to have the worker's hours coincide with his piece rate earnings for the day. This testimony was designed to establish the absence of any guaranteed minimum for the day. However, the crew sheets prepared by Zacarias contradict his testimony. Those crew sheets show, for the most part, that all workers worked the same number of hours each day and that crew members who did not earn more under piece rate than the hourly rate received the hourly rate for all hours worked that day. Similarly, the same crew sheets for the Zacarias crew controvert Zacarias testimony that his crew worked for two weeks or more at a piece rate of 70 cents per bucket. May 26th was the first day the crew picked rather than thinned. Their picking on the 26th was in peaches at a rate of 50 cents per bucket. [11/]

Having credited Veiss and Diaz regarding what workers were told during the interaction prior to the time Zacarias departed for the office, the conclusion follows that Veiss did not fire the crew; moreover, the words attributed to him by Diaz could not reasonably be construed by the workers as words of discharge. They were told work was available at 60 cents per bucket; as one worker testified, the crew was not willing to work for that rate. Their unwillingness to do so rather than their discharge was the reason the crew left the job.

Further evidence that Zacarias was aware that Veiss had not fired the crew is the credited testimony of Veiss that Zacarias asked him to contact Menchaca so that he could speak to him about getting the 70 cents. It is only in the context of believing himself still to be an employee of Superior that going through channels to speak to Veiss superior makes sense.

When Zacarias returned from meeting with Menchaca, Diaz testified that Zacarias told the awaiting crew members that he couldn't do anything about getting the rate raised to 70 cents and that the whole crew was fired. Another witness of General Counsel testified that upon his return Zacarias said he had talked to Menchaca and that he had not been able to work anything out and for us to go home.[12/] Since I have not credited Zacarias testimony regarding his conversation with Menchaca and since Zacarias was not a statutory supervisor, the variance in the

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ll/ Other instances in which the testimony of Zacarias has not been credited as set out above.

12/ Testimony of rebuttal witness Rodrigo Landin.

testimony of Diaz and Landin is immaterial. Zacarias' recitation of what Menchaca said was incorrect and not binding upon Respondent. Finally, the fact that those members of the Zacarias crew who reported for work on June 2nd were given work in another crew at the 60 cents per bucket rate is indicative of crew member awareness they hadn't been fired. Their employment is consistent with a conclusion that had the crew been willing to continue working at the 60 cent rate on June 1st, they would have been permitted to do so despite their concerted activity in seeking a raise to 70 cents.

Having found that Respondent did not terminate the Zacarias crew on June 1, 1979, it follows that the complaint must be dismissed. Respondent's motion to this effect is granted.

Dated: November 7, 1980

AGRICULTURAL LABOR RELATIONS BOARD

By _____

Robert LeProhn
Administrative Law Officer