

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

YAMAMOTO FARMS,)
)
 Respondent,) Case No. 80-CE-6-OX
)
 and)
)
 MARCIANO POMPA,) 7 ALRB NO. 5
)
 Charging Party.)
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)

DECISION AND ORDER

On October 8, 1980, Administrative Law Officer (ALO) Alex Reisman issued the attached Decision in this matter. Thereafter, the General Counsel timely filed exceptions and a supporting brief, and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order as modified herein.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Yamamoto Farms, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee for participating in a concerted protest against the discharge of any other employee.

(b) In any like or related manner interfering with,

restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by Labor Code section 1152.

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

(a) Offer Gerardo Hernandez full and immediate reinstatement to his job as a celery harvester or comparable employment, without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Gerardo Hernandez for any loss of pay and other economic losses he has suffered as a result of his discharge by Respondent, according to the formula stated in J & L Farms (August 12, 1980) 6 ALRB No. 43, plus interest thereon at the 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 and reinstatement rights due under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance

of this Order, to all employees employed by Respondent at any time between February 20, 1980, and the date of issuance of this Order.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places on its property, the period and place(s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the 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 the question and answer period.

(h) 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

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

Dated: March 10, 1981.

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Oxnard Regional Office., the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging one of our employees because, on February 22, 1980, he protested the discharge of a fellow employee. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farmworkers these rights:

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that, although we lawfully terminated Marciano Pompa on February 21, 1980, it was unlawful for us to discharge Gerardo Hernandez because, on February 22, 1980, he participated in a concerted protest against Pompa's discharge and stated that he might organize other workers to protest the discharge. WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities.

WE WILL reinstate Gerardo Hernandez to his job as a celery harvester or to comparable employment, without loss of seniority or other privileges, and we will reimburse him for any pay or other money he has lost because of his discharge from Yamamoto Farms.

Dated: YAMAMOTO FARMS

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question about your rights as farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 528 South "A" Street, Oxnard, California 93030. The telephone number is (805) 486-4475.

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Yamamoto Farms (Marciano Pompa)

7 ALRB NO. 5

Case No. 80-CE-6-OX

ALO DECISION

The ALO found that Respondent discharged employee Marciano Pompa after he had yelled epithets at other crew members, accused one of them of stealing his trowel and made an insulting remark to his foreman. The ALO concluded that Pompa was not thereby engaged in protected concerted activity, and that his discharge, although various reasons were given therefor, was not based on his earlier role as spokesman for the crew during negotiations with the employer.

However, the ALO concluded that Respondent violated the Act by discharging Pompa's friend, Gerardo Hernandez, because he, along with another employee, had protested Pompa's discharge and stated that he might get other workers to join the protest. Respondent's action, with regard to Hernandez, tended to coerce, restrain, and interfere with the rights of employees to engage in activities for their mutual aid or protection and thus violated section 1153(a).

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALO and ordered reinstatement and backpay for Hernandez, and the posting, reading and mailing of a remedial Notice to Employees.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the Agricultural Labor Relations Board.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the matter of)
)
YAMAMOTO FARMS,)
)
Employer-Respondent,)
)
and)
)
MARCIANO POMPA,)
)
Petitioner-Charging Party.)
)
_____)

Case No. 80-CE-6-OX
ADMINISTRATIVE LAW
OFFICER'S DECISION

Robert P. Roy, Esq., Ventura County Agricultural Assn., Oxnard, California, for Employer-Respondent.

Marciano Pompa, of Oxnard, California, for the Petitioner-Charging Party.

Robert W. Farnsworth, Esq., of Oxnard, California, for the Petitioner-General Counsel.

STATEMENT OF THE CASE

ALEX REISMAN, Administrative Law Officer: This case was heard by me on July 15, 16 and 17, 1980 in Oxnard, California. On February 22, 1980, Marciano Pompa filed an unfair labor practice charge against Yamamoto Farms (hereinafter respondent or employer) alleging that respondent had unlawfully discharged Marciano Pompa and Gerardo Hernandez, on February 21 and 22, 1980 respectively, for engaging in protected concerted activities. A complaint was issued on April 17, 1980 alleging violations of Section 1153(a) of the Agricultural Labor Relations Act (hereinafter ALRA). Respondent answered on April 30, 1980, denying all allegations of unfair labor practices.

All parties were given a full opportunity to participate in the hearing. After the close of the hearing, the

parties filed post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the briefs and arguments of the parties, I find as follows:

FINDINGS OF FACT

I. JURISDICTION

Yamamoto Farms is engaged in agriculture in Ventura County, California, and is admitted to be an agricultural employer within the meaning of Section 1140.4 (c) of the ALRA. At all times material herein, Marciano Pompa and Gerardo Hernandez were agricultural employees within the meaning of Section 1140.4(d) of the ALRA.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that respondent, through its agents William Yamamoto, Gabriel Magana and Jose Salas, discharged Marciano Pompa on February 21, 1980 and Gerardo Hernandez on February 22, 1980, because they were engaged in protected concerted activities.

Respondent denies the allegations and contends that Marciano Pompa was discharged for acts unrelated to protected activities, and that Gerardo Hernandez was not discharged from his employment or in the alternative that he was discharged for acts unrelated to protected activities.

III. BACKGROUND OF RESPONDENT'S OPERATIONS

Respondent, Yamamoto Farms, is an agricultural employer owned by William Yamamoto. Respondent is engaged in growing and harvesting celery. It employs two separate crews. One

crew works year round planting, weeding and hoeing and is paid on an hourly basis. The other crew harvests the celery beginning in November of each year, and is paid on a piece rate basis. Jose Salas and Juan Pedroza are the foremen of the hourly crew and Gabriel Magana is the foreman of the piece-rate crew.

The employees of respondent have never been represented by a union.

At the beginning of each harvest season, it was Mr. Yamamoto's customary practice to talk with the workers in the harvesting crew about his competitors' rates for piece-rate work, and on the basis of these discussions, set a rate somewhere in between the highest and lowest rates being paid in the Valley. IV.

IV. EMPLOYMENT OF MARCIANO POMPA

Marciano Pompa, the charging party herein, is a 23 year old farmworker who was employed seasonally by respondent in the harvesting crew from at least 1974 through February 21, 1980. During this entire time, he worked with Gabriel Magana, the foreman. The two men maintained good relations until shortly before Pompa was discharged, and Pompa was regarded by Magana and Yamamoto as a good worker.

The 1979 harvest season began on November 26, 1979. At that time the workers in Magana's crew were being paid \$.95 per box and Magana, the foreman, was being paid by the crew. Approximately two to three weeks after the harvest season began, the workers in Magana's crew decided to have a work stoppage. The principal demands of the workers were that

respondent increase their salary and pay the foreman. The workers expressed these demands to Magana and, as a result, Magana went to bring Yamamoto to meet with the crew.

The records reveals conflicts in testimony regarding some of the circumstances of this meeting. In this area I credit the testimony of Marciano Pompa. His testimony evidenced a comprehensive recollection of the events of and surrounding the meeting, and is corroborated by other credible testimony.

The meeting between the harvesting crew and Yamamoto took place in Yamamoto's yard in the afternoon after work. The workers had chosen Pompa to be a spokesman for the crew because he had worked for respondent the longest. He and Jesus Luna presented the workers demands for increased pay and for respondent to pay the foreman, to Yamamoto. Yamamoto responded that he would pay the foreman but would take away the forklift used for loading boxes. He then added another difficult condition about the loading of boxes. Consequently the workers agreed to continue paying the foreman and settled with Yamamoto on a piece rate of \$1.00 per box.

Although Marciano Pompa was not disciplined or threatened by respondent for his leadership role in the meeting, he was switched from job to job. In the weeks preceding his discharge, he was involved in two apparently minor disagreements with Magana, his foreman.

V. THE DISCHARGE OF MARCIANO POMPA

On February 20 and 21, 1980, both crews employed by respondent were working together in the fields. On these two days /Magana 's crew, which usually was paid on a piece rate

basis, was being paid by the hour. This was the first time that the two crews had worked side by side that season. In general, the two crews worked separately and had little contact with one another.

It was customary for the workers in Magana's crew to yell back and forth to one another in the fields while they worked, teasing and calling each other names. On February 20 and 21, 1980, Marciano Pompa was yelling to the 'members of his crew, calling them "barberos", those who are working faster than normal by the hour, and "bola de bueyes", bunch of oxen.

Apparently two other workers were upset by Pompa's language, and complained to Yamamoto on the morning of the 21st of February. Although no one had complained to Magana about Pompa's conduct, Magana told Yamamoto that same morning that Pompa was using abusive language to those ahead of him in the field. However, nothing was said to Pompa in the way of warning or reprimand. Magana only told Pompa on the morning of February 21 to keep up with the rest of the crew. Pompa asked Magana to help him like he helped the others, and Magana, apparently angry with Pompa, said he would not help him until he caught up with the rest of the crew. Pompa then got ahead of the crew and yelled to Magana for help, but Magana did not respond.

At approximately 12:30 p.m. on February 21, 1980, an incident occurred involving Pompa's trowel. In regards to this incident I credit the testimony of Jesus Perez because of his demeanor as a witness, and because his testimony is corroborated by the testimony of other credible witnesses.

Upon returning from lunch on February 21, Pompa thought that someone had switched his trowel during the lunch break and had left him a trowel of poorer quality. Pompa accused Jesus Perez of having done this and Perez replied that this was impossible since Pompa returned from lunch before him. Pompa then admitted he might be wrong and went to the other workers to look for his trowel. His search proved fruitless and he returned to Perez and demanded the trowel. Perez did not respond and apparently they went back to work. Pompa was saying "fuck your mother, the one who switched my shovel" and "bola de bueyes".

Perez spoke to Magana about the incident within an hour after it occurred. Apparently Magana took no immediate action against Pompa in response to Perez's complaint. Magana then walked by Pompa and Pompa said to Magana, "the only thing missing today is that a dog come pee on me." There is conflicting testimony regarding whether Pompa made this remark before or after he was fired. I credit the testimony of Pompa that he made the remark before he was fired because it is corroborated by the testimony of another credible witness, Dan Ruiz, and because Magana's testimony contains internal contradictions and conflicts with credible testimony of other witnesses.

This remark angered and embarrassed Magana because it was made in the presence of other members of the crew, some of whom were laughing. Magana went over to Pompa and told him to "go fuck himself". Pompa replied in kind. Magana then fired Pompa.

When Pompa went to get his check from Yamamoto, Magana had already talked to Yamamoto about the incident. Pompa

protested his firing to Yamamoto, but Yamamoto stood by Magana's decision. He gave Pompa his check and Pompa left to inform his brothers in the field that he would pick them up later.

The record is rife with conflicting reasons for Pompa's discharge. Yamamoto testified that the sole reason he fired Pompa was because Pompa used abusive language. Magana testified that he fired Pompa in order to avoid fights and accidents, because he was bothering people, not doing his job (Magana also testified that Pompa was a good worker), talking too much, and because he disobeyed orders. Both Marciano and Heriberto Pompa testified that Yamamoto said Marciano Pompa was fired because he (Pompa) was trying to get the workers to stop working. Marciano Pompa himself testified that this was not his intention, and that he was only yelling back and forth with his crew as they often did.

The strongest and most logical inference that is raised by the record viewed in its entirety is that Pompa was not discharged wholly for any of the reasons stated above. None of Pompa's conduct prior to the verbal exchange between Magana and Pompa immediately preceding Pompa's firing was considered by either Magana or Yamamoto to be serious enough to warrant or even consider his discharge. In fact, the only reprimand Pompa received was for falling behind the crew, and both Magana and Yamamoto admitted that Pompa was not fired because of the quality of his work.

What emerges from the record is that Pompa was upset about the incident with his shovel. He was upset because Magana would not help him earlier in the day. When Magana came by

Pompa said "the only thing missing today is that a dog come pee on me." This remark embarrassed and angered Magana, particularly coming from Pompa, with whom he had a recent history of prior disagreements. Magana cursed Pompa and Pompa cursed him back. Magana's anger at this interchange prompted him to fire Pompa.

When Yamamoto heard of the discharge of Pompa, he backed up Magana, his foreman and loyal employee of 15 years.

VI. EMPLOYMENT OF GERARDO HERNANDEZ

Gerardo Hernandez is a 23 year old farmworker who worked seasonally for respondent in the harvesting crew, under Magana, since he was 17 years old. Prior to February 21, 1980, he had no problems with respondent's management regarding his employment.

VII. THE DISCHARGE OF GERARDO HERNANDEZ

On the afternoon of February 21, 1980, after Pompa was discharged, Yamamoto went out to the field. There he was approached by Gerardo Hernandez and Heriberto Pompa, the brother of Marciano Pompa. Marciano Pompa was also present.

Hernandez and Heriberto Pompa told Yamamoto that they did not think it was fair to fire Marciano Pompa and that Yamamoto should either rehire Marciano Pompa or fire Magana as well. Yamamoto replied that he did not want to fire Magana and that Marciano Pompa was like a tumor in his stomach that had to be removed. Hernandez then said that Yamamoto would have greater troubles and that there would be problems in the field if Yamamoto did not rehire Marciano Pompa. The men then spoke at some length about other work-related issues. During this conversation nothing was said to Hernandez by

Yamamoto about the status of his job.

Some time later that afternoon Yamamoto told Magana about the above-mentioned conversation.

The next morning, Hernandez came to work at approximately 6:30 a.m. and began to put on his rain gear. Regarding the events that follow, I credit the testimony of Gerardo Hernandez because of his demeanor as a witness and because it is corroborated by other credible testimony, particularly Dan Ruiz. I discredit Magana's testimony that he stopped Hernandez from working because Hernandez was not doing his job well because it is contradicted by the testimony of Yamamoto and is totally uncorroborated.

As Hernandez was dressing, Magana told him not to put on his rain gear because he was out of a job and should get his check. Magana then went to get Yamamoto.

When Magana returned with Yamamoto, Hernandez asked Magana why he was out of a job. Magana replied that Hernandez had no shame to return to work since Magana had given Hernandez his job because Hernandez's uncle used to work there and because they came from the same land. Magana then told him he should talk to Yamamoto.

Hernandez asked Yamamoto whether there was anything wrong with the way he was doing his job. Yamamoto replied that he did not know anything about it, but that he did not want anyone going around getting the people all riled up over the firing of Pompa. Hernandez stated that he had a right to help his co-workers.

There is substantial conflict between the testimony of Hernandez and that of Yamamoto regarding the resolution of the conversation they had on the morning of February 22.

Yamamoto testified that he had a difficult time understanding Hernandez and offered to get an interpreter. He claims that Hernandez said that he would have a friend call Yamamoto and explain his side of the story, and then Yamamoto would decide about Hernandez's job. Meanwhile, Yamamoto would talk to Magana. Yamamoto testified that he never received a phone call and that he still considers Hernandez to be on probation.

Hernandez testified that Yamamoto told him that he would talk to Magana and his brothers and then call Hernandez about his job. According to Hernandez, Yamamoto had trouble understanding the words "verguenza", shame, and "apoyar", to support. Hernandez told Yamamoto that he would have a friend call only to explain these words to him, not to explain his position regarding his job. Hernandez never received a phone call from Yamamoto.

I credit the testimony of Hernandez regarding this conversation. It appears, from other portions of Yamamoto's testimony and that of Hernandez, that the workers, including Hernandez, would speak slowly and clearly to accommodate Yamamoto's lack of fluency in Spanish. Yamamoto himself testified to the contents of a lengthy conversation in Spanish with Hernandez and Heriberto Pompa on the previous afternoon during which they discussed the firing of Marciano Pompa and unions, among other things. The record reveals that Yamamoto, though not fluent in Spanish, is able to communicate adequately with his employees.

In addition, Hernandez expressed no difficulty in understanding Yamamoto or any lack of clarity as to the import of

his conversation with Yamamoto. Yamamoto, on the other hand, testified that he did not recall the particulars of the events of February 21 and 22, 1980 that well, and that he was not sure what Hernandez said to him about an interpreter. He agreed that he could be wrong about the purpose of the interpreter.

I conclude that the situation at the end of the conversation was that Hernandez's employment was terminated, and that unless Yamamoto called Hernandez after he talked with the Magana's, Magana's decision that Hernandez was out of a job, would stand. This conclusion is bolstered by Yamamoto's lack of response to the ALRB charge he received later' that day. The document made it clear that Hernandez understood that he had been fired. Yamamoto made no attempt to explain to Hernandez that he was not fired until Yamamoto heard Hernandez's side of the story.

Yamamoto discussed the question of Hernandez's employment with Magana several times since February 22, 1980. Magana told Yamamoto that he did not want Hernandez in the crew because Hernandez was threatening to cause trouble over the firing of Marciano Pompa. Yamamoto never called Hernandez about his job.

I conclude that Gerardo Hernandez was discharged on February 22, 1980 because he protested Pompa's discharge and threatened to organize the workers in protest as well.

APPLICABLE PROVISIONS OF THE ALRA
AND NATIONAL LABOR RELATIONS ACT
AND GENERAL LEGAL PRINCIPLES

Section 1152 of the ALRA 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 activities for the purpose of collective bargaining or other mutual aid or protection."

The language of Section 1152 of the ALRA is identical to that of Section 7 of the National Labor Relations Act (hereinafter NLRA).

Section 1153 of the ALRA states in pertinent part:

"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. . . ."

The language of Section 1152 (a) of the ALRA is essentially the same as that of Section 8(a)(1) of the NLRA. Section 1160.3 of the ALRA states as follows:

"If, upon the preponderance of the testimony, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without back pay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part." (emphasis added)

Section 1148 of the ALRA states that the Agricultural

Labor Relations Board (hereinafter ALRB), shall follow applicable precedents of the NLRA.

The National Labor Relations Board (hereinafter NLRB) has long held that

"any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative. . ." Section 9(a) of the Act, 29 U.S.C.A. Section 159(a). Concerted activity may take place where one person is seeking to induce action from a group. N.L.R.B. v. Schwartz, 146 F.2d 773 (5th Cir. 1945), 15 LRRM 870. Further, "concerted activities for the purpose of . . . mutual aid or protection are not limited to union activities." Salt River Valley Assn. v. N.L.R.B., (CA 9, 1953) 99 NLRB 849, 32 LRRM 2598.

While much of the applicable case law involves unlawful discharges based on union activity, the legal principles applicable to discharges based on union activity and other protected concerted activities are identical. N.L.R.B. v. J.I. Case Co., Bettendorf Works, 198 F.2d 919 (8th Cir. 1952).

In order to prove that a discharge of an employee constituted an unfair labor practice, the general counsel has the burden of showing by a preponderance of the evidence that the employer knew of the employee's protected concerted activity and there was a causal connection between the protected activity and the discharge. Jackson & Perkins Rose Co., 5 ALRB No. 20 (1979). Once this burden has been met, the employer must come forward with evidence of legitimate and substantial business justification for the discharge. N.L.R.B. v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979); Lu-Ette

Farms, Inc., 3 ALRB No. 38 (1977). The general counsel must then establish that the employee would not have been discharged but for the protected activity or that the protected activity was the motivating cause for the discharge. Adam Dairy, 4 ALRB No. 24 (1978), review den. by Ct.App., 2nd Dist. Div. 3, March 17, 1980.

CONCLUSIONS OF LAW

I. THE GENERAL COUNSEL HAS NOT MET ITS BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT MARCIAMO POMPA WAS DISCHARGED FOR ENGAGING IN PROTECTED ACTIVITY.

In December of 1979, Marciano Pompa was a spokesman for his crew in a meeting with Yamamoto where workers' grievances about wages and working conditions were discussed. Clearly during this meeting Pompa was engaged in protected concerted activity.

"Even individual protests are protected as concerted activity if the matter at issue is of moment to the group of employees complaining and if the matter is brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group."
Oklahoma Allied Telephone v. N.L.R.B., 210 NLRB No. 123 p.916, 86 LRRM 1393.

However, the general counsel has failed to establish that Pompa engaged in any protected concerted activity between this meeting and his discharge on February 21, 1980. There is evidence in the record that Pompa had two disagreements with respondent regarding working conditions. However, there is nothing in the record to prove by a preponderance of the evidence that Pompa's conduct was calculated to induce group action to correct the grievances or that he was speaking for

the benefit of an interested group. Oklahoma Allied Telephone v. N.L.R.B., supra. In addition, Pompa denied that his comments on February 20 and 21, 1980 about working for hourly wages were meant as anything more than casual bantering and teasing with his fellow crew members. He himself stated that he was not trying to induce any action on the part of the crew.

The record reflects that Pompa engaged in concerted activity in December of 1979. He was not disciplined or reprimanded for this activity by respondent. Pompa did testify that he was switched from job to job in late 1979 and early 1980, but the general counsel failed to establish that this constituted disciplinary action as a result of his role in the December 1979 meeting with Yamamoto. Nor is it established in the record that Pompa's discharge had any causal connection to his role as spokesman at this meeting.

There are inferences that can be drawn from the record that respondent regarded Pompa as a problem because he was outspoken about his views of working conditions. The numerous and conflicting reasons given for Pompa's discharge also could give rise to an inference that Pompa was fired because respondent considered him a threat to the status quo of worker-management relations. Kuramura Inc., 3 ALRB No. 49 (1977), review den. by Ct.App., 1st Dist., October 26, 1977, Hg. Den. December 15, 1977.

However, based on the record as a whole, I find that the general counsel has not sustained its burden of proving by a preponderance of the evidence that there was a causal connection between Pompa's engaging in concerted activity and his discharge.

II. GERARDO HERNANDEZ WAS DISCHARGED BY RESPONDENT BECAUSE HE PROTESTED THE DISCHARGE OF MARCIANO POMPA AND THEREFORE HIS DISCHARGE CONSTITUTED A VIOLATION OF SECTION 1153(a) OF THE ALRA.

The threshold issue in the case of Gerardo Hernandez is whether he was, in fact, discharged. The record is clear that Hernandez was told by Magana that he was out of a job. Yamamoto backed up the decision of his foreman and indicated to Hernandez that he was not to return to work unless he received a phone call. Hernandez never received such a phone call. Although I conclude that Hernandez was discharged by both Magana and Yamamoto on February 22, 1980, at the very least, respondent's actions constituted an indefinite suspension of Hernandez. Such a disciplinary action is severe enough to amount to a constructive discharge. Lynch-Davidson Motors, Inc. v. N.L.R.B., 183 NLRB 840, 76 LRRM 1484 (1970).

The next inquiry regarding Hernandez is whether he was discharged because he had engaged in concerted activity protected under Section 1152 of the ALRA. I have discredited the testimony of Magana that Hernandez was discharged because his work was of poor quality (see discussion of Hernandez's discharge under "Findings of Fact", supra.). The only other reason which appears in the record for the discharge of Hernandez is that he had protested Pompa's discharge and Yamamoto and Magana thought he might organize other workers to take action on Pompa's behalf.

It is well settled that an employee's protests over, or criticism of the discharge of a fellow employee, constitute protected concerted activity for mutual and or protection within the meaning of Section 1152 of the ALRA.

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Chiaro Co., 6 ALRB No. 38 (1980); Martori Brothers Distributors, 4 ALRB No. 80 (1978), review den. by Ct.App., 4th Dist., Div. 1, June 22, 1979, hg. den. July 26, 1979. This is so even if the original discharge did not constitute an unfair labor practice so long as the protesting employee had a good faith belief that the discharge had been effectuated for an improper reason. N.L.R.B. v. Holcombe, 325 F.2d 508 (5th Cir. 1963).

In N.L.R.B. v. J.I. Case Co., Bettendorf Works, 198 F.2d 919 (8th Cir. 1952), three employees attempted to "instigate a walkout from the plant of all union employees because of the previous firing that morning of a union steward. The firing of the steward, however, was not shown to have had a union basis . . . The attempted walkout therefore amounted simply to a protest of a fellow-union employee." The Court held that this "protest" was protected concerted activity for the purpose of mutual aid or protection within the meaning of Section 7 of the NLRA.

Clearly, Hernandez's protest against what he in good faith believed to be the unfair discharge of Marciano Pompa was concerted activity for the purpose of mutual aid or protection under Section 1152 of the ALRA. Even in Hernandez had organized other workers to join in his protest, this too would have been protected activity. N.L.R.B. v. J.I. Case Co., Bettendorf Works, supra.

However, Hernandez's protests and intimations of possible labor unrest never went farther than an expression of his opinions to Yamamoto, who in turn related the conversation to

Magana. Yamamoto told Hernandez that he did not want anyone riling up the workers. Magana told Yamamoto that he did not want Hernandez on his crew because he did not want any trouble over the firing of Pompa. It is precisely this sort of interference with the rights of employees to engage in activities for their "mutual aid or protection", that Section 1153(a) of the ALRA seeks to prohibit.

I conclude that the discharge of Gerardo Hernandez constituted an unfair labor practice under Section 1153(a) of the ALRA.

REMEDY IN UNFAIR LABOR PRACTICE CASE

Having found that the employer violated Section 1153(a) of the ALRA, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the ALRA as delineated by the following order.

ORDER

Respondent Yamamoto Farms, their owners, partners, officers, agents, successors, and assigns shall:

1. Cease and desist from:

A. Interfering with, restraining and coercing employees in the exercise of their right to engage in concerted activities for the purpose of mutual aid and protection.

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

A. Offer Gerardo Hernandez full and immediate reinstatement to his job as a celery harvester or comparable employment, without prejudice to his seniority or other rights and privileges.

B. Make whole Gerardo Hernandez for any loss of pay or economic losses suffered by reason of his discharge, plus interest thereon.

C. Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyse the back pay and reinstatement rights due under the terms of this order.

D. Notify the Regional Director within 30 days after the issuance of this Order of the steps it has taken to comply herewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: October 8, 1980



ALEX REISMAN
Administrative Law Officer