Imperial Valley,
California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS DISTRIBUTORS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 78-CE-3-E(R) 8 ALRB No. 15 (5 ALRB No. 47)

SUPPLEMENTAL DECISION AND ORDER

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

In accordance with the remand of the Supreme Court in Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.Sd 721, we have reviewed and reconsidered our decision in Martori Brothers Distributors (July 19, 1979) 5 ALRB No. 47 in light of Wright Line, a Division of Wright Line, Inc. (Aug. 27, 1980) 251 NLRB 1083 [105 LRRM 1169] and hereby make the following findings and conclusions.

In our July 19, 1979, decision in this matter, we affirmed the ALO ' s conclusions that Respondent violated Labor Code section 1153 (c), (d) , and (a) by discharging Keriberto Silva, a known union activist, for engaging in protected union and concerted activity and for testifying against Respondent at an ALRB hearing.

Silva had been discharged by owner Steven Martori in January 1977 after a heated discussion over a work assignment that

Silva believed he deserved. After charges of discrimination were filed with the Agricultural Labor Relations Board (ALRB or Board) Respondent rehired Silva and, in fact, gave him the work assignment he had demanded. The discharge was subsequently held to be lawful in Martori Brothers Distributors (Oct. 24, 1978) 4 ALRB No. 80, based on the ALO's finding that Silva goaded Martori into firing him by his belligerent attitude and conduct.

In January 1978, Silva was hired by Respondent's supervisor Juan Martinez. Silva had been working in the lettuce harvest for five days when he came to the attention of Steven Martori. Martori testified that he recognized Silva for the first time at that point (Silva having grown a beard in the previous months) and immediately discharged him a second time because of his belligerence and because of threats he had previously made t "get" Martori.

In remanding this case to us for further consideration, the Supreme Court emphasized that the analytic approach taken by the National Labor Relations Board in Wright Line, Inc., supra, 251 NLRB 1083, should guide our deliberations in cases of this type, where the evidence suggests the existence of both a lawful and an unlawful basis for an employer's discharge or other action against an employee or employees. As we commented in Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 13, the Wright Line approach may be expressed in the following formula: if the General Counsel establishes that protected activity was a motivating factor in the employer's decision, the burden then shifts to the employer to show that it would have reached the same decision absent the

protected activity. The burden referred to in this formula is the burden of going forward with evidence (or "burden of production"), not the burden of proof, which always remains with the General Counsel. Texas Department of Community Affairs v. Burdine (1981) 450 U.S. 248 [101 S.Ct. 1089].

In applying the Wright Line analysis to this case, we note that the ALO found in the timing of Silva's discharge, as well as in the testimony of Silva, supervisor Martinez, and employee Zambrano, evidence that Respondent discharged Silva because of his protected activity. Silva testified without contradiction that on the morning of January 11, 1978, just as he was beginning to answer questions put by other employees as to how they could get paid for repacking lettuce from rain-damaged boxes, supervisor Camerino Sandoval arrived on the scene and tele the employees they would be paid for the work. Silva encountered Steven Martori moments later, and there ensued a conversation concerning which Silva and Martori gave conflicting accounts. Both agreed, however, that their conversation ended with Martori telling Silva he could finish the day's work but would have no work with Respondent thereafter. The ALO found that Martori observed Silva acting as a leader among employees on this occasion, helping them to solve a problem, and that this triggered Martori's decision to terminate Silva.

Although the General Counsel established a prima facie case that Respondent violated the Act by discharging Silva because of his protected activity and/or his union support and/or his filing of a charge and giving testimony at an Agricultural Labor

Relations Act (ALRA or Act) hearing, Respondent nonetheless established the existence of other reasons for which Silva might have been justifiably discharged. Silva's pugnacious assertion in January 1977 of a "right" to a job as a folder on his new crew after Steven Martori granted his hardship-based request to be kept on the payroll when the rest of his crew was laid off revealed a clearly insubordinate attitude and would constitute just cause for a refusal to rehire him.

We have before us, then, evidence tending to support the General Counsel's allegation that Respondent discharged Silva for reasons proscribed by the Act, and countervailing evidence that Respondent discharged Silva for reasons not proscribed by the Act. In this situation we find dispositive the remarks of the U. S. Supreme Court in a similar litigation context in Texas Department of Community Affairs v. Burdine, supra, 450 U.S. 248 at p. 254 and p. 257:

> The burden that shifts to defendant, therefore, is to rebut the presumption of discrimination by producing evidence that plaintiff was rejected ... for a legitimate non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. (Citation omitted.) It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.
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> The Court of Appeals would require the defendant to introduce evidence which, in the absence of any pretext, would persuade the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production.

We agree with the California Supreme Court that Respondent's

evidence of its non-discriminatory reasons for discharging Silva amply satisfied its burden of production. In our judgment, General Counsel did not overcome this evidence so as to persuade us that Respondent's second discharge of Silva constituted a violation of the Act. Accordingly, in conformity with Wright Line supra, 251 NLRB 1083, we shall dismiss the complaint in this matter.

ORDER

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

Dated: March 1, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

MEMBER WALDIE, dissenting.

Although I agree with the majority's statement of the law regarding "dual motive" cases, I do not believe that Heriberto Silva would have been fired by Steven Martori even absent Silva's protected activity. I would therefore reaffirm this Board's original conclusion that Respondent violated Labor Code section 1153 (c),(d), and (a).

Silva testified that when he was discharged in January 1978, Martori told him it was because of the damage Silva had caused at the ALRB hearing on Silva's first discharge. Martori denied he made such a statement and testified that: he told Silva he was fired because of the threats he had made. The ALO credited Silva's version, relying on the corroborating testimony of Enrique Zambrano and supervisor Juan Martinez. Zambrano actually testified that he heard Martinez state that Silva was being fired because he was a troublemaker who had cost Respondent millions of dollars by filing a complaint. Martinez testified chat he was instructed

by Martori to lay off the troublemakers and new workers and was specifically told to lay off Silva. Martinez also testified that Silva was laid off due to lack of work. While Martinez' testimony is consistent with Zambrano's, it is vague and confusing as to Martinez' reason for firing Silva. Based primarily on the credibility of Zambrano, a disinterested employee, I find that Steven Martori made the statement attributed to him by Silva.

Respondent alleged that it was justified in discharging Silva because Silva had threatened to "get" Martori and his family during an argument between Silva and Martori over a work assignment in January 1977 and again after an ALRB hearing in March 1977.[1/]

Considering all of the circumstances of Silva's first and second firings, I cannot find that Respondent would have fired Silva for his threats in any event. Silva was an experience' lettuce harvester with six years of satisfactory prior employment by Respondent. Supervisor Juan Martinez apparently solicited Silva to come work for Respondent in 1978 because he needed good workers.

Silva's confrontation with the Martoris in 1977 involved his assignment to work as a lettuce cutter rather than as a folder.

[1/] Silva's first threatening remark was made after Silva's angry discussion with Steven Martori about his work assignment. Ed Martori, the one who actually heard the remark, recalled Silva saying, "... the Union was going to get the Martoris and he was going to get the Martoris and - just to that nature." Ed Martori did not discipline Silva at the time, because Silva apparently calmed down and went back to work.

The second threat was made outside the ALRB hearing in February and March 1977 regarding the allegations that Martori had discharged Silva and laid off a crew because of union activity. The statement, made to Steven Martori this time, was "I'm going to get you.

Silva had worked as a folder in the crew of Adolfo Ponce in December 1976 until Ponce's crew was temporarily laid off. At that time, because Silva was in financial straits, Martori agreed to transfer Silva to another crew as a cutter, until his regular crew returned to work. On January 5, 1977, it became clear that Ponce's crew had been completely replaced by a crew supervised by Ruben Rodriguez.[2/]

Silva believed that he was entitled to work as a folder in the Rodriguez crew and began complaining about his assignment to cut and pack on January 6. While still in the field, Martori told Silva he could change jobs the next day, but had to finish that day as a cutter. Silva was angered by this decision and began shouting about how things would be better with the UFW. It was at this juncture that Silva threatened that the union or he personally would "get" the Martoris.

After work on January 6, Silva went to the company office to ask Martori what his job would be the next day. In an angry tone, Silva complained again about working as a cutter that day. Martori, although agreeing that Silva could work as a folder the next day, told Silva that it was his company and he would run it the way he wanted. Silva did not give up, however, and continued to complain about working as a cutter that day, until Martori finally fired him. Martori Brothers Distributors, supra, 4 ALRB

[2/] We concluded in Martori Brothers Distributors (Oct. 24, 1978) 4 ALRB No. 80 that Ponce's crew was discharged in violation of Labor Code section 1153 (c) and (a), because of their union sympathies. Silva, a leading UFW supporter, escaped discharge by virtue of his temporary transfer.

No. 80, ALOD at 44-48.

On January 7, Silva filed a charge against Martori which was immediately investigated by ALRB field examiners. Martori sent Silva a telegram on January 8, offering to rehire him. Silva returned, worked a few days, and then quit.

Although there is no excuse for the excessive and offensive quality of Silva's complaints, it is clear that Silva was angry at Martori's arbitrary decision to make Silva finish the day as a cutter. Ed Martori, who first heard Silva's threatening remark, took no action at the time. When Silva was finally fired, it was only after he goaded Steven Martori and had nothing to do with the threat. Two days later, in spite of the angry behavior, Silva was rehired.

The substance of the threat, itself, is subject to varying interpretation. Both in the field and after the ALRB hearing, Silva stated only that he would "get" Martori. While this could be construed as a threat of personal injury or property damage, it could also be construed as a threat that by bringing in the Union or the ALRB, Silva would get Martori to treat him fairly. I find that in the context in which Silva's remarks were made, the latter interpretation is more reasonable. This finding is supported by Ed Martori's passive initial response and Silva's rehire after two days.[3/]

[3/] Although Martori may have actually hired Silva back simply to mitigate his potential backpay liability, which I question in light of Martori's failure to hire back the 30-40 members of the Ponce crew, his decision clearly demonstrates that the perceived risk to. his family and business was less than his fear of financial loss.

This case is similar in many respects to Trustees of Boston University v. NLRB (5th Cir. 1977) 548 F.2d 391 [94 LRRM 2500], where an employee was found to have been fired for participating in concerted activity, despite her bad personal relationship with her supervisor, her offensive dealings with supervisors, and significantly, her threatening a co-worker with a scissors. The court noted this misconduct, but concluded, it was not "major." In balancing the employer's right to run its business against the employees' right to act in concert without fear of retaliation, the court observed that while protected rights are not a license to threaten and offend supervisors, an employee must be given some leeway for impulsive behavior.

In this case I find that the threats were not of sufficient seriousness that Silva would have been fired even absent his union and other protected activity. I am persuaded by the timing of the discharge and the contemporaneous statements of intent made by Steven. Martori and Juan Martinez that Respondent fired Heriberto Silva because of his history of UFW support and activism and because of the trouble caused to Respondent by the first discharge case before the Board. Therefore, in light of the entire record, I conclude that Respondent has violated Labor Code section 1153 (c), (d), and (a) and would reaffirm and reinstate the original remedial order in Martori Brothers Distributors (July 18, 1979) 5 ALRB No. 47.

Dated: March 1, 1982

JEROME R. WALDIE, Board Member

CASE SUMMARY

Martori Brothers Distributors

8 ALRB No. 15
Case No. 78-CE-3-E
(5 ALRB No. 47)

PRIOR BOARD DECISION

The Beard previously affirmed an ALO's conclusion that Respondent had discharged employee Heriberto Silva in violation of section 1153(a), (c), and (d) of the Act. The Board found Respondent's defense of misconduct to be pretextual and that, but for Silva's protected and union activities, he would not have been discharged.

COURT DECISION

The Supreme Court remanded the case to the Board for reconsideration in light of Wright Line, a division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], in which the NLRB set forth a burden-shifting formulation for the analysis of factual situations in discharge cases where there exists a lawful motivation and an unlawful motivation.

BOARD DECISION

The Beard determined, using the Wright Line formulation that it had adopted in Nishi Greenhouse (Aug. 5., 1981) 7 ALRB No. 18, that Respondent had met its obligation to produce evidence of its non-discriminatory reasons for the discharge of Silva, and General Counsel had failed to overcome the motivation. Accordingly, the Board dismissed

DISSENT

Member Waldie, applying the same analysis as the Board majority, concluded that, even accepting that Respondent had met its burden of production, General Counsel had still met his burden of proof on the issue. That is, Member Waldie was persuaded that Silva would not have been discharged absent his protected concerted activity and union activity. Member Waldie would, therefore, affirm the prior Board Decision and find that Respondent violated the Act by discharging Silva.

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