Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

M. CARATAN, INC.,	)	
Respondent,	)	Case Nos. 80-CE-80-D 80-CE-91-D
and	)	80-CE-114-D
MIGUEL CASTRO, ALI A. MOSAD, A. M. MUFLIHI, NAGI ALMAN SOOB, and WILSON GARCIA,	)	8 ALRB No. 41
Charging Parties.	)	

DECISION AND ORDER

On February 2, 1981, Administrative Law Officer (ALO) Kenneth Cloke issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions to the ALO's Decision and a brief in support of those exceptions. The General Counsel timely filed a reply brief.

Pursuant to the provisions of section 1146[1/] of the Agricultural Labor Relations Act (ALRA or Act), the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and, for the reasons set forth below, has decided to reject the ALO's findings, rulings, and conclusions.

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

The ALO stated during the course of the hearing herein;

> The record should reflect that in an off-the-record discussion between counsel, [the General Counsel] stated that he is not an attorney. He is a graduate legal assistant, and the Administrative Law Officer stated that every effort was going to be extended to make certain that there is an equality of representation as far as legal issues are concerned in this proceeding.
> Reporter's Transcript, volume I, pages 80-81 (hereafter cited as RT:I:80-81).

Later in this hearing, responding to Respondent's counsel's objection that the ALO was "trying the General Counsel's case for him," the ALO stated:

> I'm not attempting to try the General Counsel's case for him. I am raising objections where it seems to me that the interest of the charging party is depending upon a legal decision or a legal objection that may be beyond the experience of the graduate legal assistant who is conducting the case for the General Counsel.
> RT:I:87.

The record of this case is replete with examples of the effect of this improper interposition of the ALO and his theories into the prosecution of this matter.[2/] Because of the ALO's misguided attempt to "even the odds," all of his subsequent conclusions, rulings, and findings of fact must be viewed with distrust. The ALO became so inextricably

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[2/] See, for example, RT:I:78-84 (ALO imposes theory of constructive discharge on the General Counsel); RT:I:86-88 (motion to strike solicited); RT:III:18-24 (ALO suggests a recess to allow the General Counsel an opportunity to review with the witness his upcoming testimony); RT:III:91-94 (ALO offers the General Counsel a list of possible exceptions to the hearsay rule in aid of his evidentiary proof); RT:V:54-63 (ALO denies the counsel for the Respondent the same benefit of his understanding of the hearsay rule).

intertwined with the presentation of this case as to render his subsequent judgment on the merits suspect.

Respondent, apparently content with the evidence adduced at the hearing (notwithstanding the ALO's improper and unprofessional manner of conducting the hearing) states in its brief that:

> The Board is compelled to disregard the ALO's findings of fact and make its own review of the record, because the ALO was demonstrably biased and prejudiced against [Respondent]. For the Board to give any weight to the ALO's factual findings under these circumstances would • constitute denial of administrative due process.

We agree. The appropriate result for a finding that an ALO demonstrated a "mental attitude or disposition ... towards a party to the litigation ...."[3/] would be to reject the tainted record and remand for a new hearing of the issues. Crown Cork de Puerto Rico (1979) 243 MLRB 569, 570 [101 LRRM 1499]. We are prepared to acquiesce in Respondent's request in our statutorily mandated independent review of the record,[4/] and issue new findings, rulings, and conclusions, testing them against those made by the ALO but affording his conclusions, rulings, and findings of fact (including resolutions of witness credibility) no deference. S. Kuramura, Inc. (June 21, 1977) 3 ALRB No. 49; Universal Camera Corp. v. NLRB (1951) 340 U.S. 474 [27 LRRM 2372]

[3/] Andrews v. ALRB (1981) 28 Cal.3d 781, 790 [171 Cal.Rptr. 590, 596-7]; Evans v. Superior Court (1980) 107 Cal.App. 372, 380 [290 P.662].

[4/] Section 1160.3; Andrews v. ALRB, supra, 28 Cal.3d at 794; Royal Packing Co. v. ALRB (1980) 101 Cal.App.3d 826, 836 [161 Cal.Rptr. 870].

We undertake this task in the interest of rapid resolution of these matters and to avoid further unnecessary and costly delay. Smith Corp. v. NLRB (7th Cir. 1965) 343 F.2d 103; [58 LRRM 2643].

Findings of Fact

We find that Respondent is an agricultural employer and that each of the Charging Parties is an agricultural employee within the meaning of the Act so as to render jurisdiction proper in this case. These facts are admitted by Respondent.

Miguel Castro

At the time of the filing of the charges in this matter, Miguel Castro had been an employee of Respondent for nearly three years. Castro, a resident of the "Puerto Rican labor camp" (as distinguished from the "Arab labor camp"), testified that on May 25, 1980,[5/] he lodged a complaint with the cook, Gloria Orozco, about the quality of the food being served at the labor camp. As a resident of the labor camp, Castro was charged $35.00 per month for board. This money was collected by Fermin Martinez, the head of the labor camp and the supervisor of the work crew drawn from the camp. Martinez purchased the food for the camp and any excess money collected was kept by Martinez as payment for his services. Castro's complaint was based on his belief that the food being served for the dinner meal was left over from the lunch meal. He testified that he asked the cook to fry two eggs for him, and that she refused to do so, Castro them emptied his plate of food into a trash container. Orozco denied that

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[5/] All dates herein refer to 1980 unless otherwise indicated.

Castro had complained about the quality of the food, testifying that Castro demanded different service and routinely requested special treatment. Kipolito Camacho, a co-worker and resident of the labor camp, testified and corroborated Castro's version of the event.

Orozco reported to supervisor Martinez that Castro had demanded different food and requested special treatment. The next morning, on the bus to a work site, Martinez told Castro to move from the labor camp into the town of Delano. Respondent operates with three crews, one drawn from each of the two labor camps and one designated the "town crew." Ahmed Alomari supervised the crew drawn from the Puerto Rican labor camp. Martinez' half-brother, Jose Cadiz, supervised the town crew during the harvest season and Martinez supervised the town crew during thinning and tipping periods. Castro's status as of this point had become unclear, for although he had not been discharged, he had not been transferred to the town crew.

Castro was unable to leave the labor camp immediately due to a malfunctioning truck, a fact of which both Martinez and his second in command, "Chuco," were aware. During the next two days Castro moved into Delano. Respondent has an unwritten policy that the bus to the work site was for the use of the residents of the labor camps only. Notwithstanding that policy, Castro arrived at the labor camp on May 28 and boarded the bus to the work site. Later that afternoon, Chuco informed Castro that he was not to ride the bus but was to use his own transportation to get to the work sites, some of which were up to 30 miles away. Castro did

not work on May 29, but on Friday, May 30, he again boarded the bus. Chuco ordered him to disembark, which he refused to do. Martinez was supervising work in Arvin so Chuco asked Respondent's labor contractor, Lee Boydstun, to remove Castro. Boydstun stepped into the bus and ordered Castro to leave the bus. Castro again refused and Boydstun informed owner Luis Caratan. Caratan allowed Castro to remain on the bus and to work that day and spoke to Martinez later. Martinez explained that he had ordered Castro to move from the labor camp because of his continued complaints about the food and demands for special treatment. Caratan authorized Martinez to discharge Castro. On Saturday, May 31, Castro again boarded the bus and Martinez ordered him off and gave him his final check. Castro filed his charge in this matter on June 3, 1980.

Jose Torrez testified for the General Counsel that he rode the bus while not living in the labor camp. He stated that employee Lawrence Abueno also rode the bus to the work site although he did not reside in the labor camp. Torrez stated that he never received permission to ride the bus but that Martinez was aware that he was doing so. In his testimony, Caratan stated that one employee, apparently Torrez, was allowed to ride the bus during a short period following that employee's marriage. In corroboration of Castro's testimony that any employee who complained about the food in the labor camp was subject to immediate discharge, a former employee, Armando Vasquez, testified that he had been summarily discharged the previous year following his complaints concerning the food served at the camp. This

testimony was rebutted by Priciliano Sanchez Armendaring, who had been a steward for the United Farm Workers of America, AFL-CIO (UFW) at the time of Vasquez[1] discharge. Armendaring testified that Vasquez had been discharged after receiving three warnings for poor work and for the theft of a soda bottle, not for his complaints concerning the quality of the food served.

Wilson Garcia

Garcia, an employee of Respondent since 1979, had been elected "president" of the labor crew by the crew members. On May 30 he led a protest of the crew concerning Boydstun's attempted eviction of Castro from the bus. Subsequently, Martinez announced to the crew on the bus that the ALRB would be sending a Board agent to read a notice about their rights under the Act, apparently pursuant to the Board's order in M. Caratan (Mar. 5, 1979) 5 ALRB Mo. 16. Martinez referred to the Act as "nonsense." Garcia was selected by the crew members to be spokesperson about their rights under the Act. Also, in early June, Garcia protested to Martinez, on behalf of the crew, about a shortened break period.

On June 23, Garcia and the other employees in the Puerto Rican crew were given layoff notices. The notices included a date, approximately one month later, as the projected rehire date. Respondent's practice was to require all laid-off employees to reapply at its main office and to guarantee rehire to those employees who had completed the prior employment period. Apparently, the employees who remained in residence at the labor camps during the layoff period were frequently rehired without

having to reapply and the supervisor would later notify Respondent's office which employees had been rehired. Garcia moved from the labor camp shortly after receiving his layoff notice.

Approximately July 26, Caratan informed Martinez that he would need about 22 employees, starting on July 28, to check the sugar content of the grapes to see whether harvesting could begin. Garcia testified that he visited Martinez at the latter's home on July 25 to find out when harvesting would begin and that Martinez told him that 22 employees would be hired for work starting on July 28 and that he would be one of the 22. Garcia also testified that he informed Martinez that the July 28 starting date was acceptable to him and that he would return to the labor camp on Sunday the 27th. Martinez testified that he did not promise Garcia work, not having been informed of the projected starting date, and that Garcia told him that he was presently employed in Arvin but would keep in touch to receive word about the date for the beginning of work.

On July 26, Martinez notified the employees then residing at the Puerto Rican labor camp of the projected work for July 28 and said that he would post a list of the 22 workers to be hired for that work. On Sunday, July 27, Martinez chalked 22 names on the blackboard at the labor camp. Garcia's name was not included. Martinez testified that Garcia was not included because he was not present at the labor camp. Later that evening Garcia checked into the labor camp and was surprised to see his name missing from the list. At 4:30 a.m. the next day Garcia

approached Martinez in the kitchen and demanded to know why he hadn't been rehired. When Martinez refused to add his name to the crew list, Garcia requested that he and other employees not be charged for meals since he did not plan to eat at the labor camp until work began. Garcia testified that Martinez refused to accommodate him. In Martinez[1] version of this conversation, Garcia did not make any request regarding meal costs. Martinez also testified that Respondent has an unwritten policy allowing rebates for meals not eaten at the camp. Martinez further testified that Garcia became incensed when Martinez refused to hire him and began shoving Martinez, followed him outside, demanded a fight, and then draped himself on the door of Martinez[1] pickup. Martinez stated that his half-brother, Jose Cadiz, was in the pickup at the time. Cadiz did not testify but the cook, Gloria Orozco, did and she corroborated much of Martinez[1] testimony. Martinez reported his version of the alleged assault to Caratan who then directed Martinez to fire Garcia. Garcia was terminated the next day, on July 29. Garcia demanded and received from Caratan a written note regarding his termination; the note stated that Garcia was discharged because he "threatened [his] foreman physically." Garcia testified on rebuttal and denied the substance of Martinez' testimony and reiterated his surprise at being terminated. Garcia filed his charge in the instant matter on July 29, 1980.

The Arab Workers

On Friday, June 20, approximately 13 of the employees from the Arab labor camp were engaged in planting "dry-stick

vine" and working on other long-term vine-training projects which Respondent's employees perform during reduced-operation periods. Part of the dry-stick vine project involves digging, and employee Ali Noman was directed by "Sultan," the second in command of the Arab labor crew, to dig with his hands. Woman objected and eventually shared a shovel with a co-worker. At 11:40 a.m., Ahmed Alomari, the supervisor of the Arab labor crew, directed Sultan to return the crew to the labor camp for lunch and to report after lunch to a different work site. Alomari directed that Sultan return with the crew by 12:10 p.m. Respondent's usual practice for crews working in the field with afternoon assignments is to have their lunch delivered to them in the field. Noman, among others, complained that in view of the 10-15 minute drive to the labor camp and a trip of equal length to the new work site, they were being deprived of their lunch period. Noman requested that the crew members receive travel pay and their usual lunch period. Alomari stated that if the employees did not choose to return by 12:10 p.m. there would be no afternoon work or any work for the rest of the weekend. The crew discussed the matter on the bus in which Sultan drove them back to the labor camp, and decided to submit a petition at the ALRB office. All but two of the employees signed the petition and three of the crew members took the petition to the ALRB office as support for filing their charges herein on June 20.

Alomari reported the crew members' complaints to Caratan who, while asserting that the workers' protest had no effect on his allocation of work assignments, nonetheless testified that he

told Alomari to delay the afternoon work and the Saturday assignments, as that work could be easily delayed during this non-harvesting season. Alomari returned to the labor camp and, after speaking to Sultan, passed by the petition signers and went into the kitchen. He approached the table occupied by Noman and the two workers who had not signed the petition and asked the two workers whether they wanted to work that afternoon. They said they wanted to work and Alomari assigned them the task of hanging irrigation pipe, a task of no urgency. Noman requested work also, but was refused.

Several days after the Arab workers' charge was filed, a Board agent telephoned Caratan and suggested that the problem involving these workers could be handled informally if Caratan would talk the matter over with the protesting workers. Caratan went to the Arab labor camp, gathered the residents together and asked them why their charge had been filed. An interchange followed, in which the workers voiced their grievances concerning Alomari. Caratan requested that, in the future, they bring their complaints to him before filing formal charges. The complaint herein alleged, inter alia, that this session constituted retaliation for the previous filing of charges with the ALRB. The three cases herein were consolidated and heard in Delano, California, from August 19, 1980, to September 5, 1980.

Analysis and Conclusions of Law

Miguel Castro

Under Lawrence Scarrone (June 17, 1981) 7 ALRB No. 13, to prove that a discharge of a worker is a violation of

section 1153(a)[6/] the General Counsel must establish by a preponderance of the evidence, "... that the employer knew, or at least believed, that the employee(s) had engaged.in protected concerted activity and discharged or otherwise discriminated aginst the employee(s) for that reason." Id., p. 4. Further, the Board in Scarrone noted that the standard of proof under section 1153(a) and (c)[7/] is identical when the violation alleged is discriminatory discharge. The only difference is that in establishing a violation of section 1153 (c) the General Counsel must show that the protected conduct under section 1152 was a form of union activity rather than other types of protected concerted activity, which do not involve union consideration. In Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18, we adopted the recent formulation of the test stated in Wright-Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] for the standard of proof required in proving allegations under section 1153 (c). Once the General Counsel establishes that the employees' protected union activity

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[6/] 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 organisations, 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..."

[7/] Section 1153(c) provides: "It shall be an unfair labor practice for an agricultural employer to do any of the following: ... (c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

was a motivating factor in the employer's decision to discharge the employee, the burden of producing evidence that it would have reached the same decision (to discharge the employee), even absent the protected activity, shifts to the employer. Nishi Greenhouse, supra, at p. 3. Under Lawrence Scarrone, supra, the same burden-shifting formulation of the test applies to discriminatory discharges based on other protected activities in violation of section 1153 (a).

Applying the analysis indicated above, we conclude that the General Counsel has failed to present a prima facie case that Castro was a victim of discrimination. The hurdle which the General Counsel failed to clear was proving that Castro was engaged in protected concerted activity when he complained about the quality of the food served at the labor camp. No evidence was offered to demonstrate that Castro's complaint was other than an individual protest or a personal complaint.[8/] We therefore conclude that the General Counsel has failed to demonstrate a prima facie case of discrimination by Respondent against Castro.

Wilson Garcia

The General Counsel established that Garcia was previously engaged in protected concerted activity and had been

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[8/] Assuming, arguendo, that Castro's protest could be viewed as an attempt to negotiate on behalf of the labor camp residents regarding the price charged for company provided meals, see Westinghouse Electrical Corp. (1966) 156 NLRB 1080 [61 LRRM 1165] enf. den. (4th Cir. 1967) 387 F.2d 542 [66 LRRM 2634], Castro exceeded the leeway afforded employees presenting grievances to their employers. See Giannini & Del Chiaro Co. (July 17, 1980) 6 ALRB No. 38, p. 4; Golden Valley Farming (Feb. 4, 1980) 6 ALRB No. 8; S & F Growers (Aug. 21, 1978) 4 ALRB No. 58.

designated "president" and spokesperson for his crew. Subsequently, Garcia was discharged and, according to his version, this was precipitated by his request not to be charged for meals he did not eat. Martinez revealed some anti-ALRA sentiment when he referred to the rights guaranteed by the Act as nonsense. Although this evidence is circumstantial rather than direct, it presents a sufficient showing to meet the General Counsel's burden of producing evidence under the Nishi Greenhouse formulation. See also, S. Kuramura, Inc., supra, 3 ALRB No. 49 at p. 12. Respondent presents a legitimate business reason for the termination. Caratan testified that his justification for termination was Garcia's assault on Martinez. Whether this is pretextual or not depends on credibility resolutions. While Martinez' version is corroborated by the cook, Orozco, her credibility, based solely on the record before us, is in doubt. In testifying as to the events surrounding Castro's protest, she failed to substantiate those portions of Castro's testimony that were corroborated by Camacho, who was not shown to be other than a disinterested witness.[9/]

The ALO discredited Orozco based on demeanor and on her denial that she was serving left-overs. He discredited Martinez because of his anti-ALRA statements and because Martinez failed

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[9/] Orozco denied that Castro dumped his tray of food in the trash in disgust. Both Castro and Camacho agreed that this had taken place. Further, Orozco denied that Castro was dissatisfied with the food quality, only that he sought special treatment. Camacho corroborated Castro's complaints about the food's quality.

to fire Garcia during the alleged altercation.[10/] The ALO further noted that Respondent failed to call Cadiz as a witness, although he was reported to have been sitting in- Martinez' pickup truck while Garcia was allegedly shoving Martinez. Respondent asserts in its brief that testimony by Cadiz would only have been cumulative and that the ALO should not have used Evidence Code section 412 to discredit Respondent's evidence.[11/] Specifically, the ALO states:

> Garcia's motivation is unclear and in doubt, if we believe Martinez, whereas Martinez's anti-union sentiments and desire for personal agrandizement are clear and unequivocal, if we believe Garcia. His refusal to pay for kitchen services which would decrease Martinez' income, his criticism of Martinez on several occasions, including over the termination of Miguel Castro, his selection as employee representative, his reading rights under the ALRA to fellow employees, all of these are adequate grounds to infer a discriminatory purpose in the discharge of Garcia. Martinez's failure to fire Garcia on the spot is suspect, if he really was assaulted, and he need not have feared for his safety in doing so with his half-brother and the cook present. The failure to call [as a witness] the half-brother is completely unexplained, and in all, it is clear that Garcia must be believed over Martinez.

[10/] In M. Caratan, Inc. (Oct. 25, 1978) 4 ALRB No. 83, the power to hire or fire at Respondent's operation was shown to lie primarily with Luis Caratan, so this factor is not to be given much probative value as the present record does not demonstrate changed practices at Respondent's operation.

[11/] Section 412 allows the trier of fact to view with distrust the evidence presented if there exists better evidence not presented. It is doubtful that Evidence Code sections 412 and 413 actually are germane here. Respondent put on two of the three alleged eye witnesses and can not be required to call all the witnesses referred to or suggested by the evidence, Provencio v. Merrick (1970) 5 Cal.App.3d 37 [84 Cal.Rptr. 882]; Davis v. Franson (1956) 141 Cal.App.2d 263, 270 [296 P.2d 600]; Witkin, California Evidence (2d Ed. 1966) 1046.

> I therefore conclude that Wilson Garcia was discharged pretextually for engaging in concerted activity, and not for threatening his supervisor, as Respondent has alleged.

This issue presents a very close question. On one side is our long-standing deference to the ALO's credibility resolutions, especially those based upon demeanor.[12/] This must be balanced with the present ALO's unwarranted involvement in the presentation of the evidence in this case, and our concomitant decision to reject his conclusions and findings, including his resolutions of credibility based on witness demeanor.

As we have not observed the witnesses testifying in this case, we are in no position to assess independently the testimonial demeanor of the critical witnesses, Garcia, Fermin Martinez, and Gloria Orozco. Since no party has requested that this matter be remanded due to the conduct of the ALO, we conclude in the interests of administrative efficiency that all parties must be presumed satisfied with the evidence presented.

In attempting to determine if the ALO's resolution of this matter is supported by the evidence, we find ourselves presented with two equally credible accounts as to the termination

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[12/] Our standard in evaluating credibility resolutions is the following: "To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531]." See, C. J. Maggio (Dec. 10, 1980) 6 ALRB No. 62; Tenneco West, Inc. (Sept. 12, 1980) 6 ALRB No. 53; Sun Harvest, Inc. (Jan. 21, 1980) 6 ALRB No. 4; Sierra Citrus Assoc. (Feb. 15, 1979) 5 ALRB No. 12; O. P. Murphy Co., Inc. dba O. P. Murphy and Sons (Sept. 19, 1978) 4 ALRB No. 62.

of Garcia. Supporting Respondent's version are two witnesses; Orozco, a less than candid witness on the present record, and Martinez. Martinez admits to expressing anti-ALRA sentiment on this record and has been previously shown to be hostile to employees who attempt to assert their rights under the Act (see M. Caratan, Inc. [Oct. 26, 1978] 4 ALRB No. 83 and M. Caratan, Inc. [Mar. 5, 1979] 5 ALRB No. 16). However, Martinez was not found by the ALO to have testified in an evasive or inconclusive way. Supporting Garcia's version is Garcia himself, who the ALO found to present the logically more consistent account. Since we have concluded that the major rationales for finding Martinez' version unbelievable to be unwarranted on this record (i.e., the use of Evidence Code section 412 and the failure to immediately discharge Garcia), we find the evidence supporting both versions to be in equipoise. Therefore, we conclude that the General Counsel has failed to meet his burden of proof on this issue. The preponderance of the evidence does not support a finding that the discharge of Garcia was in violation of the Act.

The Arab Workers

The General Counsel has clearly presented a prima facie case of discrimination here. The group of employees engaged in a concerted protest over what they viewed as a change from past practice. Because of that protest Respondent elected to postpone work scheduled for that afternoon and the following day, thereby depriving the protesting employees of scheduled work. Further, Respondent sought out the only two non-participating employees and offered them work, at the same time directly refusing one of

the spokespersons for the protesting employees an equal opportunity to work. Lawrence Scarrone, supra, 7 ALRB No. 13.

Respondent argues that the fact that it was operating on a reduced basis due to the period of the year in which the protest took place affords a sufficient business justification for delaying the work. Applying Wright-Line, Inc., supra, 251 NLRB 1083, and Nishi Greenhouse, supra, 7 ALRB No. 18, it is clear that Respondent has not adequately rebutted the prima facie case. Respondent has not shown that absent the protected activity of its employees it would have elected to delay the work until Monday. We must draw the logical inference that but for the protected concerted activity of the employees, Respondent would not have delayed the scheduled work. We further find that no violation of section 1153(d) is presented on the above facts.

ORDER

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

1. Cease and desist from:

(a) Postponing or delaying work schedules or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any other 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) Make whole each of the below-named employees for any loss of pay and other economic losses they have suffered as a result of the delayed work hours, 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:

Affedi Y. Ahmed
Nagi Almansoob (Alman Soob)
Mosleh Ali Assayadi
Ahmed Daifulla
Yahya B. Hasson
Hamood M. Mohsen
Ali A. Mosad
A. M. Muflihi
Kassan A. Nasher
Mohsin A. Nasser
Mosed Ali-Noman

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise 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.

(c) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) 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 during the period from June 1980 until the date on which said Notice is mailed.

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

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) 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 in order to compensate them for time lost at this reading and during the question-and-answer period.

(g) 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: June 10, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

MEMBER SONG, concurring

I agree with the majority's independent review of the record in this case and the results reached based on that review. I therefore concur in the remedial Order contained in the majority opinion.

I also agree with the majority's description of the ALO's improper interposition of himself and his theories into the prosecution of this case. The ALO's interference with the General Counsel's presentation of his case at the hearing clearly warrants a de novo review of the evidence.

However, I do not agree that the ALO's interference at the hearing evidenced bias or prejudice against Respondent. Rather, I would find, as does dissenting Member Waldie, that the record in this case does not establish that the ALO was biased. The NLRB faced similar conduct by an administrative law judge (ALJ) in A-l Janitorial Service Co. (1976) 222 NLRB 664 [91 LRRM 1210], where the ALJ unduly injected himself in the presentation of the

evidence. The NLRB found that, while the ALJ "approached closely the limits of permissible conduct," there was no showing of prejudice to the respondent. Similarly, in the 'present case, I find no bias on the part of the ALO and no showing of prejudice to Respondent. The de novo review applied in the majority opinion sufficiently remedies the ALO's overly-zealous participation at the hearing.

Dated: June 10, 1982

ALFRED H. SONG, Member

MEMBER WALDIE, Concurring in part and dissenting in part:

While I agree with the majority's conclusion finding a violation in the case of the Arab crew, I dissent from the majority's dismissal as to Miguel Castro and Wilson Garcia. I further find no basis for a finding of bias in the instant case. I find that little or no evidence of bias or prejudice has been presented in the record which demonstrates a "mental attitude or disposition of the judge towards a party to the litigation," Evans v. Superior Court (1930) 107 Cal.App. 372, 380; Andrews v. ALRB (1981) 28 Cal.3d 781, 790 [171 Cal.Rptr. 590, 596-597]. The record is sufficient here for the Board to undertake its required de novo review of all the evidence presented therein. Respondent has simply requested a de novo review, asking that the Board in its reviewing power, substitute its findings of fact and conclusions of law for that of the ALO. I would conduct a de novo review here, as I would in any other case. A question has beer, raised as to the conduct of the ALO who purportedly improperly

interposed himself in the prosecution of this case. Though the ALO took an active role in the hearing, I do not find that the ALO's conduct, in fact, constituted improper interposition or interference in the case. See Greencastle Manufacturing Co. (1978) 234 NLRB 772 [97 LRRM 1249]; Ohio Power Company (1974) 215 NLRB 165 [88 LRRM 1007]; Helena Laboratories Corp. (1976) 225 NLRB 257 [93 LRRM 1418], enf. in part sub nom., Helena Laboratories Corp. v. NLRB (5th Cir. 1977) 557 F.2d 1183 [96 LRRM 2101] .

Our standard in evaluating credibility resolutions is the following: "To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect." Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531]. See C. J. Maggio (Dec. 10, 1980) 6 ALRB No. 62; Tenneco West, Inc. (Sept. 12, 1980) 6 ALRB No. 53; Sun Harvest, Inc. (Jan. 21, 1980) 6 ALRB Mo. 4; Sierra Citrus Association (Feb. 15, 1979) 5 ALRB No. 12; O. P. Murphy Co., Inc., dba O. P. Murphy and Sons (Sept. 19, 1978) 4 ALRB No. 62. Applying this standard, I find no basis whatsoever upon which to disturb the credibility resolutions of the ALO. A thorough review of the record in the instant case demonstrates that they are fully supported by the record as a whole.

I disagree with the majority that the General Counsel has failed to meet its burden of proof on the issue of Wilson Garcia's discharge. The majority's reasoning is net supported

by the record. The General Counsel has established a prima facie case that Wilson Garcia was discriminatorily refused rehire because he led a protest of the crew concerning labor contractor Lee Boydstun's attempted eviction of Miguel Castro from the bus. Anti-union animus has been established not only by supervisor Fermin Martinez[1] anti-ALRB sentiment expressed on this record, but also in M. Caratan, Inc. (Oct. 26, 1978) 4 ALRB No. 83, where the Board found that Respondent violated section 1153 (a) and (c) of the Act when Fermin Martinez forced two union members to perform painful work under unpleasant conditions, in retaliation for their union activity. The Board in M. Caratan, Inc. (Mar. 5, 1979) 5 ALRB No. 16 upheld the ALO's finding that supervisor Ahmed Alomari threatened employees with loss of employment for engaging in union or other protected activity. The Board also upheld that ALO's finding that supervisor Fermin Martinez engaged in surveillance of employees at a union meeting. Therefore Respondent, and supervisor Martinez in particular, have already been found by this Board to have engaged in the commission of unfair labor practices.

After Garcia's May 30, 1980, leadership of the crew protest of Boydstun's attempted eviction of Castro from the bus, Garcia continued work through the season's end on June 23, 1980. On June 23, the Puerto Rican crew (including Garcia), were given layoff notices. Respondent's practice was to require all laid-off employees to reapply at its main office and to guarantee rehire to those employees who had completed the prior employment period. Employees who remained in residence at the labor camps during the

layoff period were frequently rehired without having to reapply and the supervisor would later notify Respondent's office which employees had been rehired. Garcia moved from the labor camp shortly after receiving his layoff notice.

Accepting the ALO's credibility resolutions, I would credit Garcia's testimony that Garcia visited Martinez at Martinez' home on July 25, 1980, to find out when harvesting would begin and was informed by Martinez that 22 employees would be hired for work starting on July 28, 1980, and that Garcia would be one of the 22. On July 26, 1980, Martinez notified the employees then residing at the Puerto Rican labor camp of the projected work for July 28, 1980, and said he would post a list of the 22 workers to be hired for work. On July 28, 1980, Martinez posted that list, excluding Garcia from the list. That evening Garcia checked into the labor camp and was surprised to see his name missing from the list. At 4:30 a.m. the next day Garcia approached Martinez in the kitchen and demanded to know why he hadn't been rehired. When Martinez refused to add his name to the crew list, Garcia requested that he not be charged for meals since he did not plan to eat at the labor camp until work began. Garcia testified that Martinez refused to accommodate him. Martinez, who was discredited by the ALO, testified that Garcia became incensed when Martinez refused to hire him and began shoving Martinez, followed him outside, demanded a fight, and then draped himself on the door of Martinez' pickup. Martinez stated that his half-brother, Jose Cadiz, was in the pickup at the time. Cadiz did not testify, but the cook, Gloria Orozco, who was

discredited as a witness, testified and corroborated much of Martinez[1] testimony. Martinez reported his version of the alleged assault to Caratan who then directed Martinez to fire Garcia. Garcia was terminated the next day, on July 29, 1980. Garcia denied that there had been a fight and when he was fired asked Caratan why he was being terminated. Caratan gave Garcia a note stating that Garcia was discharged because he "threatened [his] foreman physically." Garcia expressed surprise to Caratan at that point, and informed Caratan that there had been no fight. Caratan never rebutted Garcia's testimony and made no effort to investigate whether in fact a "fight" had transpired. The majority totally ignores this vital evidence. This lack of investigation of the basis of Garcia's termination renders Respondent's motive further suspect. When faced with Garcia's surprise and statement that there had been no fight, Respondent totally disregarded that information. I would accept the ALO's credibility resolutions that there was no fight and further find Respondent's alleged reason for firing Garcia pretextual and in retaliation for his leadership of the crew protest on May 30, 1980. The timing also renders the discharge suspect. It was Respondent's first opportunity to discriminate against Garcia after the end of the season, by failing to rehire a known troublemaker. I would find that Respondent discriminatorily discharged Wilson Garcia in violation of section 1153 (a) of the Act because of his participation in protected concerted activity.

The majority also concludes that the General Counsel has failed to demonstrate a prima facie case of discrimination against

Castro by Respondent for engaging in concerted activity protected by the Act. The majority bases this conclusion on the assertion that Castro was not "clearly" involved in protected concerted activity when he complained about the quality of the food served at the labor camp. The majority asserts that no evidence was offered to demonstrate that Castro's complaint was other than an individual protest or a personal complaint. I disagree. NLRB precedent provides a far broader framework for analyzing protected concerted activity than does the majority. Here, the majority simply provides a conclusory statement without offering any indication of what precedent it relies upon in reaching 'that conclusion that Castro's complaint was an individual protest.

The NLRB has long recognized that in order to be protected, the activity need not be well-developed. There need not be more than the "suggestion of group action," and the existence of a group need not be communicated to management, Hugh H. Wilson Corporation v. NLRB (3rd Cir. 1969) 414 F.2d 1345 [71 LRRM 2827]. Likewise, there is no need for a formal selection of a spokesperson for the group, and the spokesperson may be a voluntary one or a chosen representative. Hugh H. Wilson Corporation, supra; NLRB v. Guernsey-Muskinguro Elec. Co-op., Inc. (6th Cir. 1960) 285 F.2d 8 [47 LRRM 2260]. The NLRB and this Board have recognized that an individual's actions may be concerted in nature and therefore protected, where individual activity has been found to be for the mutual aid and protection of all employees. Alleluia Cushion Co, (1975) 221 NLRB 999 [91 LRRM 1131]; Foster Poultry Farms (Mar. 19, 1980) 6 ALRB No. 15; Miranda Mushroom Farms (May 1, 1980)

6 ALRB No. 22.

Castro's complaint[1/] clearly involved an issue in which fellow Caratan labor camp residents had a shared concern and interest, since as residents in the labor camp they were charged $35.00 per month for food, with supervisor Fermin Martinez pocketing any excess money. Castro's protest is clearly in line with Alleluia Cushion, supra, and his activity was for the mutual aid and protection of all employees, as food was provided as a term and condition of employment by virtue of labor camp residence. I would therefore find Castro's complaint protected under our Act. The majority also failed to adequately discuss and resolve the circumstances of Castro's discharge. The day after the "complaint" incident, supervisor Martinez told Castro to move from the labor camp into the town of Delano. The majority correctly described Castro's status at this point as unclear, for although he had not been discharged, he had also not been transferred to the town crew. Due to a malfunctioning truck, Casrro did not immediately move into Delano, but did so over the following two days. On May 28, 1980, Castro boarded the bus to the work site. Castro was allowed to board the bus as usual, without incident. Later that afternoon Castro was told by foreman Chuco that he could no longer ride the

[1/] Miguel Castro testified that on May 25, 19SC, he lodged a con-plaint with the cook, Gloria Orozco, about the quality of the food being served at the labor camp. Kipolito Camacho, a co-worker and resident of the labor camp, testified, and corroborated Castro's version of the event. Orozco denied that Castro had complained about the quality of the food, testifying that Castro demanded different service and routinely required special treatment. Crczco was discredited by the AL6 as a witness. As stated earlier, I would not disturb the credibility resolutions of the ALO.

bus and would have to use his own transportation. Chuco ordered Castro to get off the bus, and Castro refused. Another attempt was made by labor contractor Lee Boydstun to remove Castro, and he again refused. Castro was then allowed to remain on the bus and work that day. After discussions between Caratan and Martin-22, Castro was fired the following day, May 31, 1980.

Respondent's "business justification" is that it had an unwritten policy that the bus to the work site was for the use of the residents of the labor camp only. This business justification cannot withstand scrutiny. Castro was ordered off the bus shortly after engaging in protected concerted activity and the timing of this order and subsequent discharge casts doubt on Respondent's business justification. Caratan employee, Jose Torrez, testified that he rode the bus while not living in the labor camp and stated that employee Lawrence Abueno also rode the bus to the work site although he did not reside in the labor camp. This testimony was not rebutted by Respondent and no justification was given to explain why Castro was ordered to be removed from the bus, while others similarly situated remained free to ride the bus. Respondent's defense is pretextual and falls short of disproving that Castro was in fact discharged for his participation in protected concerted activities. I would find a violation of section 1153(a) of the Act.

Dated: June 10, 1982

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which 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 discriminatorily delaying the work hours of members of the Arab crew because of their participation in protected concerted activity. 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 farm workers 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.

WE WILL reimburse the following employees for any loss of pay or other money they have lost because we postponed their work hours, plus interest computed at seven percent per annum:

Affedi Y. Ahmed	Ali A. Mosad
Nagi Almansoob (Alman Soob)	A. M. Muflihi
Mosleh Ali Assayadi	Hassan N. Nasher
Ahmed Daifulla	Mohsin A. Nasser
Yahya B. Hasson	Mosed Ali-Moman
Hamood M. Mohsen	

Dated: M. CARATAN, INC.

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California, 93215; the telephone number is 805/725-5770.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

M. Caratan, Inc.

8 ALRB No. 41
Case Nos. 80-CE-80-D
80-CE-91-D
80-CE-114-D

ALO DECISION

In May 1980, when Miguel Castro protested the quality of the food served at Respondent's labor camp, supervisor Fermin Martinez ordered him to move from the labor camp. Thereafter, when Castro attempted, in contradiction of direct orders from supervisors, to ride to the work site on the bus reserved for labor-camp residents, he was discharged. Wilson Garcia, a crew spokesperson and designated representative of the crew, was terminated two months later by Respondent for allegedly assaulting Martinez. Garcia denied the assault and testified that he had been terminated following his protest of Respondent's policy of charging him for meals which he had not eaten. Employee Ali Noman, with other workers in his crew, protested a change in working conditions that would have denied the crew their full lunch period. He and all but two members of the crew signed a petition in support of a charge which was thereafter filed with the ALRB's regional office. Ahmed Alomari, the supervisor, denied scheduled afternoon work to Noman and the other employees who had signed the petition, but assigned work to the two non-signing employees. On receipt of the petition, a Board agent suggested to Respondent that the problem could be resolved informally.

The ALO found that the quality of food served at a labor camp is a term or condition of employment and therefore concluded that Castro's protest in that regard was a protected concerted activity. The ALO also found Respondent's unwritten bus policy to be unenforceable and recommended that Castro be reinstated with backpay. The ALO resolved the credibility of the witnesses in favor of Garcia's version of the discharge and recommended that Garcia also be reinstated with backpay. The ALO concluded that Respondent's denial of afternoon work to the protesting employees was a violation of the Act and recommended an appropriate remedy. The ALO held that an informal resolution of the dispute attempted by Respondent was not in violation of the Act and did not constitute unlawful interrogation.

BOARD DECISION

The Board rejected the ALO's Decision in its entirety, finding that the ALO had demonstrated bias by conducting the hearing in an improper and unprofessional manner. The Board found that the ALO had interposed his theories and personality into the prosecution of the case and the presentation of evidence. The Board, in its statutorily mandated independent review of the record evidence, concluded that Respondent did not violate the Act by discharging Castro, finding that Castro's protest was an individual protest rather than a protected concerted activity. The Board found that the General Counsel had failed to meet its burden of proving by a

preponderance of the evidence that Respondent's discharge of Garcia was a violation of the Act. However, the Board concluded that Respondent violated the Act by depriving workers of an afternoon's work because they had engaged in protected concerted activity and ordered Respondent to make them whole for any economic losses they suffered as a result thereof. The Board found no unlawful interrogation.

CONCURRING AND DISSENTING OPINIONS

Member Song, while agreeing with the majority's conclusions, disagreed with the finding of ALO bias. Rather, Member Song would have found that the ALO had closely approached the boundaries of permissible conduct but had not demonstrated a biased outlook„ Member Waldie, while agreeing with Member Song that no bias was present on the record, disagreed with the majority's findings and conclusions. Member Waldie would have deferred to the findings of the ALO.

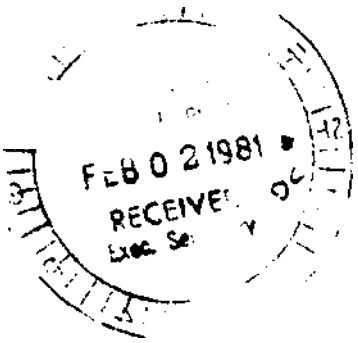
* * *

This Case summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	)	
	)	
M. CARATAN,	)	
	)	
Respondent,	)	
	)	
and	)	Cases No. 80-CE-80-D
	)	80-CE-91-D
MIGUEL CASTRO, ALI A. MOSAD,	)	80-CE-114-D
	)	
A.M. MUFLIHI, NAGI ALMANSOOB,	)	
	)	
AND WILSON GARCIA,	)	
	)	
Charging Parties	)	

DECISION

Appearances

For the General Counsel:

Nicholas Francisco Reyes Graduate
Legal Assistant 1685 "E" Street,
Suites 101-103 Fresno, CA 93706

For the Respondent:

Keith A. Hunsacker, Jr.
Attorney-at-Law
Seyfarth, Shaw, Fairweather & Geraldson
2029 Century Park East, Suite 3300
Los Angeles, CA 90067

Kenneth Cloke, Administrative Law Officer:

STATEMENT OF THE CASE

This case was heard before me on August 19, 20, 21, 26, 27, 29 and September 4 and 5, 1980, in Delano, California.

On July 9, 1980, a complaint was filed and served alleging the commission of unfair labor practices by Respondent, An answer was duly filed and served on July 15, 1980. On August 13, 1980, a First Amended Complaint was filed and served containing new allegations which were deemed denied pursuant to 8 Cal. Admin. Code 1 20230. All parties filed briefs which were mailed on November 10, 1980, and a reply brief was mailed by Respondent on November 20, 1930. On request, I have taken judicial notice of the decisions of the Agricultural Labor Relations Board, hereinafter referred to as ALRB, in 4ALRB 43 and 5 ALRB 16, and the Administrative Law Officer's decision in Case No. 79-CE-57-D.

All parties were afforded full opportunity to conduct a hearing, call and examine witnesses, present documentary evidence, and argue their positions. On the record as a whole, including judicial notice, I reach the following findings of fact and conclusions of law.

SUMMARY OF THE EVIDENCE

1. Jurisdiction;

Respondent is an agricultural employer, the charging parties are employees, and named supervisors are supervisory

employees, all within the meaning of the Agricultural Labor Relations Act, hereinafter referred to as the Act-

2. Unfair Labor Practices;

a. Discharge of Miguel Hermandez Castro

Miguel Castro worked for Respondent for three years and lived in its labor camp. Nearly all of that time he worked in the crew of Fermine Martinez, his immediate supervisor. Castro testified the employees had complaints about the food served in Respondent's kitchen, and frequently spoke about it among themselves. It was common knowledge that if anyone spoke negatively about the food in front of Fermine Martinez, they would be fired.

One employee, Armando Herrera Vasquez, had previously been fired for this reason. The crew had been in the field and Fermine had given them sodas, then blamed Vasquez for one being missing, then fired him after Vasquez had complained about the food.

Castro complained that Martinez frequently served leftovers from lunch for dinner. Employees complained among themselves, but were afraid to say anything. Castro began to complain to the cook four or five months before his discharge; and spoke to her several times about the food. Each time she stated it was not her fault, that it was Fermine[1]s fault. Sometimes she became angry, but the complaints did no good, so Castro ceased making them.

Shortly before his discharge, Castro served himself a dinner of left-overs from lunch, became disgusted, and asked the cook to prepare two eggs for him instead, since he did not like the food. She became angry and began arguing with him, saying he was the one who bothered her most, and she would tell Pennine the following day. Castro tossed the food in the garbage and walked out.

The following morning he boarded the bus to go to work when Fermine arrived, and angrily told him to get off the bus. Fermine told Castro he would no longer be able to stay in the labor camp because he had problems with the food. This took place in front of other workers. Castro asked why he was being taken off the bus, and Martinez turned and walked away.

Castro got off the bus, but had nowhere to go and his pick-up was not working. He was told by "Chuco", Martinez' Assistant Foreman, that he was supposed to leave the camp, and replied that he had no transportation or place to go. The conversation was repeated later with Martinez, who told him he had to leave the camp, and Castro left.

The following day, Castro was unable to secure a ride to work. The next day he walked four to six miles to the camp and boarded the bus. "Chuco" was at the door, and did not say anything. He worked that day, but in the afternoon "Chuco" told him Fermine did not want him riding the bus, and he would have to find a ride to work. The next day he

secured a bicycle, rode to the camp, and boarded the bus. "Chuco" came up to him and told him to get off, saying Fermine had said he could not ride the bus to work. Castro refused, saying he had no other way to get to work, and told "Chaco" to tell Fermine to direct him to get off the bus. "Chuco" stated he only obeyed orders, and went to get Lee Boydstum, a supervisor, who told Castro in English, to get off the bus, stating there was no more work for him. Castro said he didn't understand, and stayed on the bus. Boydstum said: "Fine, just go ahead and take the bus to the field and go about your work." Luis Caratan, Respondent's President, approached, told him he would have to speak with Fermine the following day, but that for the time being he could work. The next day he was given a notice of termination (General Counsel's Exhibit 2, hereinafter cited as CGX 2), which contained the handwritten explanation: "He didn't pay attention to the foreman on the job." Luis Caratan also informed him he had been fired for not paying attention to the foreman. He had never been disciplined or warned previously regarding this problem.

Lee Boydstrum, Respondent's supervisor, testified in substantial conformity, adding that there was an unwritten camp rule that employees who did not live in the camp could not ride the bus to work. He had never seen the rule posted and did not know whether employees had been told of its existence.

Fermine Martinez, Castro's immediate supervisor, testified he directs Respondent's labor camp for Mexican and Puerto Rican employees, and manages its kitchen. He stated that Armando Herrera Vasquez had been fired by another supervisor for poor work performance, rather than for criticizing the food.

One morning Martinez had asked the cook if there were any problems and she had stated there was only one, the same one as usual. He inquired further and was told, the problem was Miguel Castro, who had said he disliked the food, and asked her to cook eggs especially for him. She had told him she was not going to cook special goodies for anyone, and told Martinez he was the only one who said he didn't like the food, and asked for special Mexican food.

Martinez went to the bus, found Castro, and told him he was causing lots of problems in the kitchen. Martinez asked for Castro's shears, said he would not work that day, and told him he could eat downtown or wherever he wanted to, but not in the camp. Castro said nothing and got off the bus. Martinez never asked Castro for his version of the events in the kitchen, did not re-assign him to the "town crew", which does not use the bus to get to work, and said nothing about riding on the bus.

Later that afternoon he saw Castro in the camp and asked why he had not moved. Castro stated he had no money, no place to go, and his pickup was out of order. Martinez

replied these were not his problems, and told Castro to move that night because he did not want any more problems.

Later, Martinez saw "Chuco", who told him Castro had rode the bus to work. Martinez told "Chuco" to tell Castro he had better find a ride to work, that the bus was for people who lived in the camp. When he returned, Martinez learned from "Chuco" that Castro had refused to leave the bus when directed to do so by both "Chuco" and Lee. Martinez informed Luis Caratan of the problem and the following day gave him his final check.

Martinez stated he took away Castro's camp privileges because he had complained about the food served in the kitchen (Reporters' Transcript, Vol. V, p. 79, hereinafter cited as RT V, 79), and confirmed Lee's testimony regarding the unwritten rule that employees who did not live in the camp could not ride the bus.

Martinez testified he purchased all the food for the kitchen from money deducted from workers' paychecks by Respondent at the rate of $5.50 per person per day, seven days a week. If an employee informed the cook in writing that he would not eat the following day, he would not be charged for the meal, yet no one, to his memory, had ever received money back for giving advanced notice. While Martinez testified he had never served the same food for lunch and dinner, he admitted that all savings incurred in the cost of food came to him as salary. Sometimes he made as much as $180-200 extra each week as a result of food

savings. The company pays the cook directly for her services, though she works under Martinez' direction.

Gloria Maria Orczco is the cook in Respondent's labor camp, and testified Castro occasionally requested special food. One day he had asked her to fix him some fried eggs, but had not complained about the food before, and generally ate everything. She denied serving the same food for lunch and dinner.

She complained to Martinez about Castro's request, but had never complained to him before, was not angry about the incident, and did not believe it would result in expulsion from the labor camp.

Priciliano Sanchez Armendariz testified he had been union steward in Martinez[1] crew, and that Arnando Herrera Vasquez had been fired for poor work performance. He recalled the soda incident as occurring prior to the discharge, and close in time to the termination.

Armando Vasquez Herrera testified on rebuttal that he complained one day at lunch that the food was the same every day, Martinez replied that if he wanted it he should eat it, or else he would be dismissed, adding, "If you don't want it, then just get the hell out." (RT VIII, 92). Herrera asked for a soda pop and Martinez told him to leave. This was the sole reason he was fired.

Jose Luis Torres testified he and Lorenzo Sueno had ridden the bus to work and did net live in the camp. He had

never been told of a rule prohibiting employees who did not live in the camp from riding the bus.

Hipolito Camacho testified he had been present in the kitchen during the conversation between Castro and the cook and heard him complain that the food was left over from lunch and then reject it. Castro had asked the cook to give him a couple of eggs for supper. The cook said she had no authority to prepare special orders, and refused his request. Caraacho testified the food had been left-over from midday, and denied he had ever been told he would not be charged for food if he notified the cook in advance.

Luis Caratan confirmed that the company had an unwritten rule that employees who did not live in the camp could not ride the bus. He left camp matters to Martinez and approved the discharge of Garcia for insubordination in his refusal to leave the bus. He did not investigate or ask Garcia for his version of the incident prior to approving the discharge.

b. Discriminatory Lay off of Arab Workers:

Several Arab workers testified, in substantial conformity, to the following set of facts: On June 12, 1980, an ALRB Board Agent came to one of Respondent's fields and informed employees, in Arabic, of their rights under the Act. Approximately a week later, the crew finished work at 11:40 and boarded the bus to return to the camp for lunch. Their supervisor, Ahmed Alomari, boarded the bus and told his assistant foreman, "Sultan", to take the workers to camp to

eat, but have them back in the next field by 12:10. The workers were allowed 30 minutes for lunch, exclusive of transportation, and it would have taken ten minutes to return to camp and ten minutes to travel to the next field, leaving only ten minutes for lunch. They protested to Alomari that the time was not adequate. Alomari told them he did not care whether they had enough time for lunch, if they did not return to work at the hour he had set, there would be no work that afternoon or the following day.

The workers returned to camp on the bus, several gathered in a group and all but two signed a petition indicating their intent to file a charge with the ALRB. "Sultan" was present during part of this time, as was the cook, who was from the same village as Alomari or his relative, and Alomari also walked by while the workers were talking. Alomari went into the kitchen, approached the two workers who had not signed the petition and gone to the kitchen before the others, and asked them if they wanted to work. Mosed Ali Noman was sitting close by, and asked to work. Alomari said he could not. Noman said he had more seniority than the other workers, and Alomari said he didn't care, and left. No other members of the crew worked that afternoon or the following day.

Mr. Alomari denied these allegations, and asserted the workers had finished at 11:30 and wanted to be paid for the half-hour until noon that they did not work. Alomari claimed he told the workers to "go and eat your lunch...in camp. And

if you would like, to come back after lunch to work again" (RT IV, 75), taking as much time as they wanted, from a half-hour to an hour for lunch. Such a statement, from supervisor to employees, is inherently improbable, both from the standpoint of extending the usual half-hour lunch period to an hour for no apparent reason, without any other precedent in the past two years, and the permissive statement that they could return to work in the afternoon if they wished. According to Alomari, the workers refused to go to lunch unless they were paid until noon. This also is improbable, as the frequency of strikes over the lunch hour is minimized by the self-interest of workers in satisfying their appetites. Alomari asserted he had asked whether anyone in the kitchen wanted to work, and only those who had not signed the petition responded, but this also is unlikely, since his crew was waiting directly outside and logically should have been asked first. While Alomari claimed he did not see the petition, he did see the workers gathered under the tree, knew Mosad was among them, and could easily deduce that the two workers in the kitchen were non-supporters. To favor them with work by <u>accident</u> while others protest, is again, inherently improbable. Under cross-examination, Alomari stated he had only needed two workers and these were the first to apply. According to Shaker Mohammed Muflihi, one of the two non-signing workers, Alomari had cone right up to where he was sitting, near another worker who was married to Alomari's

sister-in-law, and asked them separately and individually, to work. He did not recall if Ali Noman had asked to work.

While Luis Caratan testified that the work done on that date did not require many workers, he was not present during the incidents in question, could not have known whether Alomari had other plans for his crew that day, or whether he had discriminated in the assignment of work. In any event, the amount of work available is a subject more pertinent to backpay proceedings than to a determination of statutory violation.

c. Interrogation of Arab Workers:

Abdulazim Muflihi and Ali Mosad, who filed charges based on the incident with Ahmed Alomari, alleged that several days later, Luis Caratan came to the Arab workers' camp. He told one of the workers to call the others from their rooms, and when most had arrived, asked who had filed the unfair labor practice charge with the ALRB. The two charging parties identified themselves, and Caratan asked, "Why didn't you let me know before?" (RT IV, 29-31). They responded that Alomari had done things to them before and he hadn't helped them. They recited several complaints against Alomari, and Caratan said he would investigate and return, but did not return.

Luis Caratan testified he received a telephone call from ALRB Board Agent Jack Metalka informing him that a charge was pending, and that it would not have to go to hearing if he could speak to the workers and work something out. He went

to the Arab camp, and said he wanted to discuss the problems they had last Friday with as many workers as possible. The workers who were present gathered several others in the camp, and Caratan asked what the problem had been. He did not believe he had asked who had filed the charge. They explained the problem with Alomari, he thanked them for their time, and left.

d. Discharge of Wilson Garcia;

Wilson Garcia began working at Respondent's ranch in April, 1979, under the supervision of Fermine Martinez. In June, he had been laid off with the rest of his crew, and was told work would begin again after the 20th. After speaking by telephone to Martinez, Garcia went to his home and was told he would start work on Monday with 22 of the most experienced people. Garcia said he would go to the camp on Sunday to get ready.

Sunday evening he arrived at the labor camp, checked the blackboard outside the kitchen and found his name missing from among the 22 listed for work the following day. Early Monday morning he went to the kitchen, and when Martinez arrived, questioned him about the availability of work. Martinez told Garcia he would not work that day. Garcia asked that he not be charged for board because he would not eat in the kitchen until he began working. Martinez said he would be charged whether he ate or not. Garcia protested that he should not be charged for kitchen services he had not used, and Martinez discharged him. (RT III, 9-11, 68-69).

On Tuesday morning, Garcia went to the boarding area and entered the bus. Luis Caratan arrived, asked him to follow, and told him he was discharged because he had problems with Martinez. He had never been fired before or warned, and did not threaten Martinez in any way.

On June 11, 1980, Martinez had told the crew that ALRB would be coming to read workers their rights, "with the same nonsense that they had last year, but you know that." (RT III, 29). On the bus returning to camp, Garcia was selected by the crew to represent them and inform the ALRB of the problems they were having with Martinez. They gave him a paper from the ALRB that explained workers' rights, and he read the document in a loud voice to assembled workers in the presence of "Chuco", Martinez' assistant. On the day the ALRB arrived, he represented the members of the crew and spoke about their problems, including several with Martinez. No company representatives were present, but the cook's boyfriend who lives with her in a company-owned house, was present. When Miguel Castro was fired at the end of May, 1980, Garcia protested the firing within hearing of "Chuco".

Martinez testified Garcia had said he would be working in Arvin. Martinez said he told Garcia to check back with him, and when Garcia failed to do so, he was dropped from the list of eligible workers. On Monday morning Martinez told Garcia he would not be taken. Garcia said he had to "because I'm a man and you're a man" (RT V, 54), followed

him from the kitchen, pushing him to his pick-up outside. Garcia then took off his shirt, threw it on the ground, and challenged Martinez to fight. Garcia held the door of the pick-up open. 'Martinez' half-brother, Jose Cadiz, was in the pick-up, and Garcia held on to the window. Martinez told him not to break the pick-up, since his problems were not the car's fault. Garcia said Martinez had better get work for him or it would go bad for him and the company. (RT V, 64, 66-67).

Martinez told Luis Caratan what had happened, and Caratan decided to fire Garcia. According to Martinez, Garcia had not mentioned paying for food, and had not checked in at the office prior to the selection of twenty-two workers. He had received no list of names from the camp office, however, prior to making his selection.

Luis Caratan testified company procedure was for workers to check in with the office after a lay-off, or if they left the camp, and be given a dispatch slip. There had been exceptions, but the rule was that workers were not supposed to contact foremen on their own. Caratan did not investigate or ask Garcia for his version of the events before approving his discharge.

Gloria Orozco, a cook working under Martinez[1] direction, testified she saw Garcia elbow Martinez and hang on to the door of Martinez[1] pick-up.

Garcia, in rebuttal, denied pushing, assaulting,

threatening or touching Martinez or his car, and denied elbowing him or challenging him to fight. He testified he did not see Martinez[1] half-brother, Jose Cadiz in the pick-up. Jose Cadiz was not called as a witness.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Discharge of Miguel Castro:

The following issues are posed by Miguel Castro's discharge:

a) Were his complaints regarding the food served in the labor camp concerted activities?

b) Were these complaints a "substantial part," or "motivating factor" in his discharge?

c) Was the company's rule regarding bus transportation legally enforceable?

d) Would dismissal have occurred without Castro's protected activity? Did his refusal to leave the bus provids just cause for termination?

a. Concerted Activity:

It is initially clear that complaints over the quality of food services in a company kitchen to which employees must contribute, concerns a "term or condition" of employment. While eating takes place during off-work hours, the quality of food served in a company kitchen is a well-established subject of collective bargaining.

Moreover, while requests for special meals may not be

considered "concerted," or to concern more employees than one, complaints that luncheon left-overs are being served for dinner affect all employees, particularly where deductions are taken from weekly pay checks to purchase a variety of foods for each meal. As Castro testified, all the employees were unhappy with this practice, but were fearful of speaking out against it, due to their belief that they would be fired.

An individual employee may encage in isolated activities which, by their nature, concern others, as where an employee complains about safety, see, e.g., Stevens Elastomeric and Plastic Products, Inc., 240 NLRB No. 76, 100 LRRM 1273 (1979); or where an employee telephones an accounting officer to see why checks are late, PJR Enterprises, Inc., 240 NLRB No. 11, 100 LRRM 1273 (1979); or where an employee anonymously complains about working conditions, South Hills Health System, 240 NLRB No. 164, 100 LRRM 1411 (1979); or where an employee complains about lint and dust in his work area, and co-workers do not disavow the complaint, Akron General Medical Center, 232 NLRB No. 140, 97 LRRM 1510 (1977); or for filing a criminal complaint against an employer for issuing a pay check returned for insufficient funds, Ambulance Services of New Bedford, 229 NLRB No. 3, 95 LRRM 1239 (1977); and other similar reasons.

Given Mr. Martinez' financial interest in the kitchen, it is not surprising that he would attempt to silence group protest by retaliating against individual complaints, before they became general.

Castro's complaint regarding the quality of kitchen services were made repeatedly, though not to Martinez due to Castro's reasonable belief that a co-worker had been fired for similar complaints on an earlier occasion. While Martinez and Orozco denied Castro's allegations, their financial and security interests along with their demeanor while testifying, render their denials less than credible. I therefore find Miguel Castro to have engaged in concerted activity.

b. Legal Standard:

With, regard to the second issue, attention must first be given to the problem of legal standard in discriminatory discharge cases. In Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (August 27, 1930), the NLRB held the test to be whether an employee's activity was a determinative factor in the discharge. Earlier, the U.S. Supreme Court decided the case of Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1979), under 42 U.S.C. 1983, holding that the test for constitutional protection was whether an employees protected conduct played a "substantial part" (at p. 284) in the decision to terminate, "or, to put it in other words, that it was a motivating factor." (at p. 287, citing Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252 at p. 270, 271, S. 21).

In Wright. Line, Inc., supra, the Board adopted the Mt. Healthy test, holding:

1. The General Counsel must a make a prime facie showing

sufficient to support an inference that protected conduct was "a motivating factor" in the employers' decision;

2. Once this has been established, the employer has the burden of demonstrating that the same action would have resulted in the absence of protected conduct.

The NLRB stated that "the Mt. Healthy procedure accommodates the legitimate competing interests inherent in dual motivation cases, while at the same time serving to effectuate the policies and objectives of Section 8 (a) (3)." This test, it explained, achieves the goal of "weighing" the interests of employees in concerted activity against the interests of the employer in operating its business in a particular manner. The employee is protected, since she or he is only required to show initially that protected activities played a part in the employer's decision, and the employer is provided with a formal framework in which to establish its asserted legitimate justification. See also, Federal-Mogul Corp, v. NLRB, 97 LRRM 2770 (CA 5, 1978), rejecting use of the "but for" test as contrary to Congressional policy and case law; NLRB v. Eastern Something Corp., 101 LRRM 2323 (CA 1, 1979).

Applying this test, it is clear that protected conduct was a motivating factor for the discriminatory refusal by Martinez to permit Castro to live in the camp and enjoy bus privileges. But for this discriminatory act by Martinez, Castro would not have been fired. Respondent may not now claim that Castro's assertion of his right to ride the bus to

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work provides adequate reason for his discharge, as will be seen below.

c. Company Rule on Bus Transportation:

Respondent asserts Castro was discharged for refusal to abide by a company order to leave the bus, based on a policy that only those who lived in the labor camps were permitted to use bus transportation.

While such a rule may reasonably be promulgated, it is axiomatic in both constitutional and labor law, that to be reasonable, a rule must be published. What Respondent has done is little different from the practice of Caligula, who placed his edicts atop towers so high that no one could read them, then prosecuted unknowing offenders. By its own admission, Respondent never notified workers of the existence of this rule, and General Counsel demonstrated that in some cases, Respondent had tolerated employees who lived in town to ride the bus. While the exception may, in some cases, prove the rule, it may not do so where observers are unaware that it is an exception. No worker indicated a knowledge of the existence of this rule, and Castro was not specifically informed, prior to his discharge, of its provisions. Instead, he was permitted to ride the bus, first, by "Chuco", who knew he had been expelled from camp; and second, by Boydstrum, out of frustration. Neither time was he told that a company rule prohibited his use of the bus.

I therefore conclude that the company rule regarding bus

transportation was not legally enforceable against Miguel Castro.

d. Just Cause for Dismissal:

If a rule is legally unenforceable without notice, refusal to obey an order based on the rule is likewise unenforceable, however insubordinate it may appear. The principle of the Nurenberg war crimes tribunal that orders must be lawful to be obeyed applies equally in labor law, protecting even employees who are terminable-at-will from orders which are illegal or contravene public policy. See, e.g. California Labor Code 923 1101, 1102; Lockheed Aircraft v. Superior Court, 28 C. 2d 481, 171 P. 2d 21 (1946).

While Respondent seeks to separate its discriminatory order to leave the labor camp from its discharge of Cascro for insubordination, this is plainly impossible, since its failure to transfer Castro to the "town crew" and denial of bus transportation made his expulsion from the labor camp a "constructive discharge," by denying him transportation, an essential condition of work.

Respondent argues Castro was not constructively discharged on the following rationale:

> "First, Castro did not quit when faced with the inconvenience of having to find his own way to work. Instead, he tried to set his own conditions of employment by continuing to ride the Employer's bus in defiance of his superiors' orders, and this insubordination eventually led to his discharge. Thus, whatever the legal situation might have been had Castro instead quit and filed a charge claiming constructive discharge, it is not before the ALO.

> "Second, denial of a fringe benefit, transportation to the work site, does not amount to the imposition of a condition so onerous that no one could be expected to submit to it. Indeed, it is uncontradicted[1] that the Employer operates an entire crew all of whose members are routinely subjected to this condition and somehow manage to find their own way to the fields. It is obvious that the employees in this so-called "town crew" could not quit and claim that they had been constructively discharged, and Castro was in no worse position."
>
> Respondent's Reply Brief, p. 6.

Yet Respondent is wrong here on several counts. First, the Act prohibits discrimination, not simply discharge, and it was unnecessary that Castro quit before he invoked the protection of the Act. Second, bus transportation was no mere "inconvenience," as Martinez was on notice that Castro's truck was not working. Third, Castro did not try "to set his own conditions of employment," but simply to work in the normal manner. Fourth, though transportation to a work site may be a fringe benefit, its denial, without alternative transport, makes work there impossible. Finally, it was precisely Martinez[1] failure to transfer Castro to the town crew where he might have secured alternative transportation that sealed his fate and finalized his constructive termination.

I therefore find that Miguel Castro's discharge for insubordination was pretextual, and the discriminatory result of his protected activity.

2. Discriminatory Lay-off of Arab Workers:

Given the inherently unbelieveable testimony of Ahmed Alomari, and Respondent's concession in its Brief, that "the

Arab employees were probably engaged in protected concerted activities when they first attempted to negotiate with Alomari concerning their lunch break" (p. 10), it is clear that these Arab workers were discriminatorily laid off, and did not engage in a voluntary work stoppage as Respondent claims. Respondent states, in its Brief:

> "With the discussions between Alomari and the employees thus at impasse, Alomari reiterated his initial directive that the employees return to the camp for lunch and be back in the fields ready to begin work within the customary one-half hour, i.e., at approximately 12:10. The final interchange between Alomari and the crew was perhaps best described by General Counsel's rebuttal witness, Ali Mosad, as follows:
>
> "...And Alomari said, 'Well, you guys, if you don't follow my orders you are not going back to work this afternoon, Friday afternoon and tomorrow. You are not going to work til Monday.'
>
> "...[W]e said, "okay, if--you know--' if you not going to have half hours to eat [sic], then we are not going to work, so we are going to the State.'"
>
> (Respondent's Brief pp. 9-10, citing RT VIII, 78, emphasis omitted.)

Yet this language adds credence to the opposite interpretation. It is clear that Alomari has changed the Arabs' working conditions, ordered them to eat their lunch in ten minutes, and told them they would not work until Monday unless they agreed. The workers subsequent acceptance of Mr. Alomari at his word can hardly be termed a work stoppage. His subsequent hire of non-protesting employees can only be considered a discriminatory lay-off in retatiation for protesting his change of working conditions. Alomari's offer of work was expressly conditioned on the surrender of a valuable right,

and the refusal to accept that offer cannot be considered a voluntary waiver. Respondent's objections regarding the amount of work missed are more relevant to a back-pay proceeding. If any work was lost due to discrimination, an unfair labor practice has been committed.

Section 1153 (d) of the Act provides that it is an unfair labor practice for an employer to "discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part." Here, employees had threatened to go to the ALRB, but had not actually gone. The issue of prospective coverage of "whistle blowers" need not be reached here, because of the prior indication of a violation under Section 1153 (c), yet it is proper to indicate that Section 1153 (d) would not have its intended effect of protecting ALRB witnesses and the commission of unfair labor practices if it could be circumvented by firing employees or imposing discriminatory lay-offs before they had been able to go to the Board, but after they threatened to do so. It would therefore appear that Section 1153 (d) is violated wherever an employee has been discriminated against for threatening future resort to Board processes.

3. Interrogation of Arab Workers:

Even accepting the discriminatee's version of their conversation with Luis Caratan, it is not clear that an unlawful interroaation has occurred. Assumina Mr. Caratan asked who

filed the charge, he did so only in order to direct his next statement, "why didn't you come to me first" to a particular employee. There was no atmosphere of coercion created by this exchange, other than that naturally associated with employer-employee conversations. The context was one of discovery, rather than intimidation, which is normally associated with interrogation. The testimony of Mr. Caratan regarding his telephone conversation with Mr. Metalka and intent in speaking with the Arab workers is entirely believe-able, particularly in the absence of contrary testimony by Mr. Metalka, who was available during the hearing, but not called.

I therefore find that Respondent did not unlawfully interrogate its agricultural employees, or coerce them for having filed an unfair labor practice charge, and direct that this portion of the Complaint be dismissed.

4. Discharge of Wilson Garcia;

Respondent cites three reasons in its Brief, why Martinez's testimony should be believed over that of Garcia:

1) "[I]t is incredible that Martinez would have responded to such a request by firing Garcia, because Martinez routinely reduces employees' board payments to take into account meals they do not eat so long as they give him advance notice."

2) "It is also incredible that Garcia would have remained at the camp and showed up for work the next morning if Martinez had already fired him."

3) "Garcia's story is flatly contradicted by the testimony of Gloria Orozco, a completely disinterested employee witness."

As to the first, it has already been shown that Martinez was highly sensitive regarding criticism of the kitchen, made a considerable sum each week by delivering less than was paid for, and by Respondent's admission, earlier evicted Miguel Castro from its labor camp for requesting a special meal. Martinez had ample motive and credible reason to discharge employees for attempting to reduce his weekly income.

Regarding the second of Respondent's reasons, Garcia would logically remain in the camp if he thought the discharge clearly unjustified, assuming, as he testified, that Martinez would think better of his highly emotional outburst, and change his mind.

Third, the cook is hardly a "completely disinterested employee." She works under Martinez's solitary control and by other employee accounts, was serving left-overs at meals. Martinez' desire to enhance his personal income is adequate motive to infer that he directed the cook to serve left-overs and keep quiet about it. Her denial, together with this inference, place her credibility in considerable doubt, a doubt increased by observation of her demeanor while testifying, and by her implausible testimony against Miguel Castro.

Moreover, Garcia had directly criticized Martinez shortly before, during the ALRB's presence on Respondent's ranch.

While Martinez was not physically present, his knowledge of Garcia's role may be inferred from "Chuco's" presence on the bus, and the presence of the cook's boy-friend, who lived with her in a company-owned house. In agricultural labor, residence in a company-owned house may be adequate reason for an employee to inform management of union activities. Martinez[1] uncontroverted statement that workers' rights were "nonsense" shows anti-union animus on his part. There is ample evidence of Martinez' history of anti-union comments and actions in prior decisions by the ALRB and Administrative Law Officer, which have been judicially noticed in this proceeding.

There is further, in support of Garcia's version of this incident, the omission from Gloria Orozco's testimony of reference to Garcia's removal of his shirt, the failure to call Martinez' half-brother, who was alleged to have been present during this incident, the absence of any motive on Garcia's part to jeopardize his entire employment future by offering to fight over a few days work, his prior defense of Castro, and observation of the demeanor of the witnesses.

Garcia's motivation is unclear and in doubt, if we believe Martinez, whereas Martinez's anti-union sentiments and desire for personal agrandizement are clear and unequivocal, if we believe Garcia. His refusal to pay for kitchen services which would decrease Martinez' income, his criticism of Martinez on several occasions, including over the termination

of Miguel Castro, his selection as employee representative, his reading rights under the ALRA to fellow employees, all of these are adequate grounds to infer a discriminatory purpose in the discharge of Garcia. Martinez's failure to fire Garcia on the spot is suspect, if he really was assaulted, and he need not have feared for his safety in doing so with his half-brother and the cook present. The failure to call the half-brother is completely unexplained, and in all, it is clear that Garcia must be believed over Martinez.

I therefore conclude that Wilson Garcia was discharged pretextually for engaging in concerted activity, and not for threatening his supervisor, as Respondent has alleged.

I therefore issue the following Order and Notice.

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent M. Caratan, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee with regard to hire, tenure or any terms or conditions of employment because of that employee's involvement in concerted activities.

(b) In any like manner interfering with, restraining or coercing employees exercising their rights guaranteed under Labor Code Section 1152.

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

(a) Immediately offer Miguel Castro and Wilson Garcia reinstatement to their former positions without prejudice to seniority or other rights and privileges.

(b) Make Miguel Castro and Wilson Garcia whole for any loss of pay and other economic losses, plus interest thereon at a rate of seven percent per annum, they have suffered as a result of their discharge by Respondent.

(c) Make all the members of its Arab crew who did not work as a result of its discriminatory lay-off whole for any loss of pay and other economic losses, plus interest thereon at a rate of seven percent per annum, they have suffered as a result of said lay-off.

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records and reports, and all other records relevant and necessary to a determination by the Regional Director, of the back pay period and the amount of back pay due under the terms of this Order,

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

(f) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous

places at its Salinas offices, the times and places 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) Mail copies of the attached Notice, in all appropriate languages, to all employees employed in the Mexican/Puerto Rican and Arab crews at any time during the payroll periods from May, 1980 to August, 1980.

(h) Arrange for a Board agent or a representative of Respondent to distribute and read the attached Notice in all appropriate languages to its Mexican/Puerto Rican and Arab crew employees, assembled 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.

(i) Notify the Regional Director, in writing, within 30 days after the date of 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: January 36 , 1980

KENNETH CLOKE Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing was held at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the right of workers to discuss and attempt to change their working conditions. The Board has told us to send out and post this Notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join or help unions;
3. To bargain as a group and choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect one another; and
5. To decide not to do any of these things.

Because this is true we promise that:

WE WILL NOT do anything in the future that forces any employees to do, or to stop doing, any of the things listed above.

Especially:

WE WILL NOT discharge or otherwise discriminate against any worker because of his or her union activity or union sympathy.

WE WILL offer Miguel Castro and Wilson Garcia their old jobs back and will reimburse any pay or other money they lost because we discharged them,

WE WILL reinburse all the members of the Arab crew for the hours they did not work because we laid them off on June 16, 1980.

WE WILL NOT threaten employees with loss of employment benefits or with other changes in wages, hours, or working conditions because of their joining or supporting a union or exercising any of the rights set forth in this Notice.

Dated: M. CARATAN

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.