

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

VENUS RANCHES, INC.,)	
)	
Respondent,)	Case No. 79-CE-60-EC
)	
and)	
)	
CRUZ MOLINA,)	8 ALRB No. 60
)	
Charging Party.)	
)	

DECISION AND ORDER

On August 1, 1981, Administrative Law Officer (ALO) Leonard M. Tillem issued the attached Decision and recommended Order in this proceeding. Thereafter, General Counsel timely filed exceptions and a supporting brief, and Respondent filed a reply brief.^{1/}

Pursuant-to the provisions of California Labor Code section 1146^{2/} the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

^{1/}Respondent concurrently filed a Motion to Strike the General Counsel's exceptions or, in the alternative, to strike General Counsel's post-hearing brief which the exceptions incorporate by reference, citing Title 8, California Administrative Code, section 20282(a). Both motions are hereby denied. We find that General Counsel substantially complied with the requirements of the regulations and that no prejudice to Respondent was shown. (Colace Brothers, Inc. (Jan. 7, 1982) 8 ALRB No. 1.) Respondent's claim that section 20282(a) prohibits a party from incorporating by reference its post-hearing brief is entirely without merit as the regulation expressly contemplates incorporation by reference.

^{2/} All code citations will be to the California Labor Code unless otherwise specified.

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

While we find that the ALO's statement of the facts is supported by the evidence, we disagree with the inferences he has drawn from those facts and his accompanying legal analysis. The ALO found that since employee Cruz Molina was mistaken in his understanding of Respondent's policy regarding the level to which bins of oranges were to be filled, his protest against the presumed policy was not protected. The ALO then concluded that Molina was not discharged but chose voluntarily to leave Respondent's employ. General Counsel excepts to the ALO's findings and conclusions, contending that Molina was discharged in retaliation for presenting to Respondent his and other workers' protests about their working conditions. We find merit in General Counsel's exceptions and conclude that Respondent violated the Act by discharging Molina and threatening other employees with discharge because of Molina's and the other employees' participation in protected concerted activities.

Respondent is a corporation engaged in growing and harvesting oranges in Holtville; its ranch encompasses 480 acres, 440 of which are planted in citrus. The ranch is managed by Brad Nussbaum who is also president of the corporation. Under his supervision are Julio Gallegos, who is in charge of Respondent's

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ranch operations, and Julian Cabrales,^{3/} who is foreman of Respondent's sole harvesting crew.

The crew consists of approximately 35 workers who harvest the oranges. Each worker places the picked fruit in a sack slung over the shoulder. As sacks are filled, they are emptied into a meter-square wooden bin encompassed by a metal band two inches below the top. It takes 17 sacks to fill a bin.

The grower's monetary return is based on the number of bins sent to the packing shed; the workers are also paid by the bin. The rate paid by the packing shed to Respondent is the same whether the bins are filled level with the top of the bin or whether they are "crowned", i.e., overfilled. The crew also receives the same rate per bin whether the bins are level-filled or overfilled.

Employees Cruz Molina and Raul Murillo each gave uncontroverted testimony, that foreman Julian Cabrales required the crew to overfill the bins, and that most of the crew engaged in a work stoppage to protest that requirement. Brad Nussbaum, Respondent's sole witness, testified that he did not order his foreman to require the bins to be overfilled because any oranges piled above the top of the bins would have been damaged in stacking the bins for transit to the packing shed, and that the packing shed gave no additional compensation to the employer for bins which were overfilled. The ALO found a conflict between the testimony of Molina and Murillo on the one hand and Nussbaum on the other,

^{3/} Nussbaum, Gallegos, and Cabrales admitted, and were found, to be supervisors within the meaning of section 1140.4(j).

which he resolved by finding that Molina and Murillo must have misunderstood the instructions of foreman Cabrales.

Molina did not claim that the topping requirement was in fact Respondent's official policy. Rather, Molina felt, in light of his long experience as a citrus picker, that Cabrales must be mistaken and that Nussbaum would explain the true practice if acquainted with the facts.^{4/} As the workers had no formal grievance procedure, they engaged in a work stoppage in order to address their protests directly to Nussbaum after their complaints to the foreman had failed to resolve the problem.

Even assuming, as the ALO found, that the employees' protest was based upon a misunderstanding as to how the bins were to be filled, it was nevertheless a protected concerted activity. It is a firmly established principle of labor law that the protected nature of a concerted activity is in no way based upon the merit of the employees' complaint. (Industrial Steel Stampings, Inc. (1978) 238 NLRB 357, 363 [99 LRRM 1638]; Flynn Paving Co. (1978) 236 NLRB 721 [98 LRRM 1344]; C & I Air Conditioning, Inc., McKeon Construction (1971) 193 NLRB 911 [78 LRRM 1417] enf. den. on other grounds (9th Cir. 1973) 486 F.2d 977 [84 LRRM 2625]; John Sexton & Co., a Division of Beatrice Foods Co. (1975) 217 NLRB 278 [88 LRRM 1502].) Even if the employee's concerted protest about working conditions was based on an erroneously held belief,

^{4/} The ALO makes much of Nussbaum's testimony that on one occasion he personally demonstrated to the crew the proper way to fill the bins, i.e., level with the top of the bins. Although neither Molina nor Murillo testified as to that incident, it is likely that Nussbaum's demonstration further convinced the crew that the foreman's requirement was at odds with Respondent's official policy.

the protected nature of their conduct would not be affected. (The Marlin Firearms Co. (1956) 115 NLRB 1834 [39 LRRM 1111]; cf., Bettcher Manufacturing Corp. (1948) 76 NLRB 526 [21 LRRM 1222].)

In this case, the employees' protest was based on their good-faith belief that their foreman wrongfully required them to overfill the bins. The issues which Molina attempted to bring to Respondent's attention were of mutual concern to all employees. (Maryland Shipbuilding and Dry Dock Co. (1981) 256 NLRB No. 69 [107 LRRM 1283].) Cruz Molina had worked for many years as a citrus picker but had never before been asked to crown the bins. Molina believed the foreman's requirement that the employees do so was unjust and he spoke to his co-workers about the problem. Raul Murillo testified that when he first began working for Respondent the workers were not required to crown the bins. Later, some of the workers discussed the requirement among themselves but did not agree to take action until Molina spoke to them about the problem. The foreman's instructions clearly affected the pickers' working conditions by requiring them to pick more oranges per bin, with no increase in pay.

When Molina complained to Cabrales, he did so on behalf, of the crew as a whole, and spoke about a concern shared by all the workers. (See Bill Adam Farms (Dec. 21, 1981) 7 ALRB No. 46.) The protests were preliminary to the crew's work stoppage on March 30, 1979. On March 29, Cabrales became angry at the crew and told them that the boss was unhappy because the bins were not topped. Molina again told Cabrales that the requirement was unjust, Cabrales responded by saying that he would fire Molina. Molina

then asked him, "Are you firing me?" "Yes, a rooster could not crow any clearer," Cabrales said. Molina spent the remaining time left in the workday in organizing a work stoppage to take place the next morning. Cabrales, a supervisor and agent of Respondent, clearly bound Respondent by discharging Molina because of his protected concerted activity. Therefore, even assuming that Nussbaum subsequently believed, or was informed by Cabrales, that Molina had quit, his discharge by Cabrales was nevertheless a violation of the Act attributable to Respondent. (See generally Lawrence Scarrone (June 17, 1981) 7 ALRB NO. 13.)^{5/}

On March 30, Molina arrived at the work site about 7:15 a.m. and found most of the other pickers were working. After he reminded them of their agreement to engage in a work stoppage, all but two employees stopped working. When supervisor Gallegos arrived soon thereafter, he asked Molina why he was preventing the employees from working. Molina testified as follows:^{6/}

He asked me why I was keeping the workers from working. "I'm not keeping them from working. We are all in agreement that we will stop because what they are doing to us is unjust."

He [Gallegos] said, "If you are not going to work, everybody should leave this ranch."

^{5/} We note that Respondent, by failing to call Cabrales as a witness, elected to leave uncontradicted the corroborated testimony of Molina. In these circumstances, Evidence Code section 412 permits an inference adverse to Respondent, i.e., that if Cabrales had testified, he would have confirmed Molina's account. We so infer.

^{6/} Respondent did not call Gallegos to testify or to deny Molina's corroborated testimony as to this Gallegos/Molina conversation, and we therefore infer that, if Gallegos had been called as a witness, his testimony would have supported that of Molina. (See fn. 5, above, and Signal Produce Company (Aug. 22, 1980) 6 ALRB No. 47.)

I told him, "I am not going to leave, because I believe that we have the right to agree amongst us, the workers."

Then he said, "If you don't leave, I am going to call Mr. Brad [Nussbaum] so that he can come and lay you off."

Then we optioned for leaving from the ranch. Then we waited for Mr. Brad. He arrived more or less about 11 in the morning, and he got to where we were gathered, outside the ranch, and he arrived in a pickup and he asked, "Who is Cruz Molina?"

At that point, Molina had already been discharged by Cabrales, and all but two of the other crew members had been threatened by Gallegos with discharge, in each instance for engaging in protected concerted activities.

The ALO found that Nussbaum presented a more logically consistent recounting of his final confrontation with Molina, and accepted Nussbaum's statement that he believed Molina had voluntarily resigned. As we have concluded that Molina had previously been discharged by Cabrales for engaging in protected concerted activity, we find Nussbaum's characterization of the discharge as a resignation to be neither material nor probative, especially since Nussbaum was not even present when the discharge occurred.

On the basis of the record herein, we find that on March 30, Cruz Molina and the other members of his crew engaged in protected concerted activity with Molina acting as spokesperson for the group. Further, we find that Molina's previous protests to Cabrales, Gallegos, and Nussbaum about the crew's working conditions were activities protected by the Act. Moreover, we find that Respondent was aware of Molina's concerted activity and, by the act of Cabrales, discharged him because of that activity, thereby violating section 1153(a) of the Act, and that Respondent,

by Gallegos' threat to the crew, committed a separate independent violation of section 1153(a). Although the ALO made no finding or conclusion as to this independent violation of section 1153(a), the record is uncontroverted as to its occurrence, the matter was clearly related to issues raised by the pleadings, and it was fully litigated at the hearing. (Prohoroff Poultry Farms (Nov. 23, 1977) 3 ALRB No. 87, enforced sub nom. ALRB v. Prohoroff Poultry Farms (1980) 107 Cal.3d 622 [167 Cal.Rptr. 191].)

ORDER

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

1. Cease and desist from:

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

(b) Threatening any agricultural employee(s) with discharge or other reprisal for engaging in any protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

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

(a) Immediately offer to Cruz Molina full reinstatement to his former job or equivalent employment, without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Cruz Molina for all losses of pay and other economic losses he has suffered as a result of his discharge, reimbursement to be made in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(c) 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.

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from March 30, 1979, to June 30, 1979, or any other 90 day period deemed appropriate by the Regional Director.

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

property, the period(s) 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.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at 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 and/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.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: August 31, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro 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 discharging employee Cruz Molina on March 29, 1979, because he complained to his foreman on behalf of himself and other employees, about a requirement that orange pickers overfill the bins. 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.

Because it is true that you have these rights, we promise that:

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 NOT hereafter discharge, lay off, or in any other way discriminate against any employee for acting with or on behalf of any other worker(s) to help or protect one another or to protest about, or to seek to improve, their working conditions.

WE WILL NOT threaten to discharge any agricultural employee because he or she has engaged in any activity with or on behalf of any other employee(s) to improve their working conditions.

WE WILL reinstate Cruz Molina to his former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse him for any pay or other money he has lost because of his discharge on or about March 29, 1979, plus interest on such amounts computed in accordance with ALRB precedents.

Dated:

VENUS RANCHES, 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 319 Waterman Avenue, El Centro, California. The telephone number is 714/353-2130.

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

Venus Ranches, Inc.
(Cruz Molina)

8 ALRB NO. 60
Case NO. 79-CE-60-EC

ALO DECISION

The ALO concluded that the Charging Party, Cruz Molina, misunderstood the orders of his supervisor, Julian Cabrales. Molina had concluded that he and his co-workers were being directed to overfill bins with harvested oranges with no increase in pay. The ALO credited Respondent's sole witness that it was not Respondent's policy to require that the bins be overfilled. He therefore concluded that any protests over this non-existent policy were not protected by the Act.

BOARD DECISION

The Board, while agreeing with the ALO's statement of facts, corrected the ALO's legal analysis. Concerted protests do not lose their protection under section 1152 of the Act even if concerning non-existent policies. Finding that Respondent left uncontroverted the Charging Party's corroborated testimony that he had been discharged for leading this protest and that another of Respondent's supervisors had threatened the crew with discharge for engaging in a protest over the non-existent policy, the Board concluded that Respondent had violated the Act.

* * *

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

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

VENUS RANCHES,

Respondent,

and

CRUZ MOLINA,

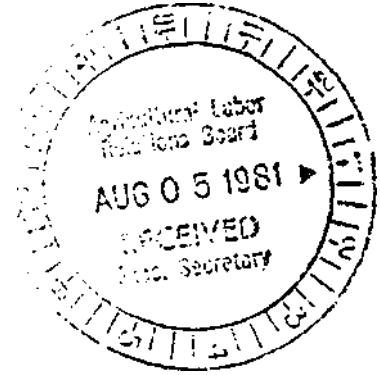
Charging Party.

Case No. 79-CE-60-EC

DECISION

Jose Antonio Barbosa, and
Casimiro Urbano Tolentino
For General Counsel

James W. Hall, and
David E. Smith
For the Respondent



STATEMENT OF THE CASE

Leonard M. Tillem, Administrative Law Officer.

This matter was heard before me in Indio, California, on October 23, 1980. The hearing was held pursuant to the complaint issued by the Regional Director of the San Diego Regional Office on December 27, 1979, upon an unfair labor practice charge filed by the Charging Party, United Farm Workers of America, AFL-CIO, (hereinafter "UFW") on April 4, 1979, and thereafter duly served upon Respondent, Venus Ranches, Incorporated, (hereinafter "Venus Ranches," or "Respondent," or "Employer"). The Complaint alleges the Employer discriminatorily discharged Cruz Molina, for engaging in protected concerted activity, and thereby the Employer engaged in unfair labor practices which violated Sections 1153(a) and (c)

of the Agricultural Labor Relations Act (hereinafter "Act"). During the hearing, Paragraph Six of the Complaint was amended by Stipulation as follows, "By the acts described in Paragraph Five, Respondent has engaged in unfair labor practices within the meaning of Section 1153(a) of the Act". The Section 1153 (c) violation of the Act was therefore stricken from the Complaint.

All parties were given a full opportunity to participate in the hearing and after the close thereof, General Counsel and Respondent, filed briefs in support of their respective positions. Upon the entire record, including my observations of the demeanor of the witnesses and the consideration of the briefs filed by the parties, I make the following findings of fact, analysis and conclusions of law, and determination of relief.

FINDINGS OF FACT

A. Jurisdiction

Venus Ranches, Incorporated, is a corporation engaged in the growing and harvesting of oranges in Holtville, California. The ranch which encompasses 480 acres is run by Brad Nussbaum, President of the Company. (RT 65: 28; 75:7). Employer admits it was at all times material to the charge contained in the Complaint, an agricultural Employer within ^{the meaning of /} Section 1140.4(c) of the Act, and I so find.

Respondent admits and I find that Brad Nussbaum, Julio Gallegos and Julian Cabrales were supervisors within the meaning of Section 1140.4(j) of the Act and I so find.

I further find that Cruz Molina is an employee of Employer within the meaning of. Section 1140.4(f) of the Act.

B. Alleged Unfair Labor Practice

The Complaint as further amended at hearing alleges that Employer interfered with, restrained and coerced its agricultural employees in the exercise of their rights guaranteed by Section 1152 of the Act by:

Discriminatorily discharging Cruz Molina on March 30, 1979, for protesting the wages and working conditions on behalf of himself and other employees.

C. The Testimony of the Alleged Discriminatee Cruz Molina

At Venus Ranches working under Mr. Nussbaum is Julio Gallegos who is in charge of the company's operations and Julian Cabrales who is in charge of the crew in which the alleged discriminatee worked. (RT 10:5-6). During the harvest, each worker is given or is equipped with a set of clippers, a sack or bag and a bin. The picker (piscador) uses clippers to remove the fruit from the trees. He then places them in a three foot sack which is hung on the shoulder and draped across the front of the upper part of his body. (RT 11:3-9, 23). Upon filling the sack the worker empties the sack into a wooden bin which is approximately a meter square and has a metal band binding the bin approximately two inches from the top. (RT 15-16). It normally takes approximately seventeen sacks to fill a bin. (RT 15:5).

Mr. Molina was an orange picker employed by Venus Ranches in 1976 and again in 1979. In 1976 he worked for the company from September 1976 to January 1977. In 1979, Molina testified he could not remember when he started working but that he believed it was no later than the month of March and sometime possibly prior to that. (RT: 8, 9, 28). He was instructed at the time of hiring by Mr. Julian Cabrales to fill the bins until they were completely topped. (RT 13:2-21). Molina explained that "completely topped" meant that the bin was filled with fruit beyond the wooden rim until a crown or dome shaped topping was affected. (RT 11) Molina, prior to working at Venus Ranches, worked for four and one-half years as a piscador at S & F Farms in Fillmore, from 1969 to 1973, and at another farm in Yuma. He had never been instructed prior to this to fill the bin beyond the top. (RT 13-16). He testified that he had in his

past experience been instructed to fill the bin only to the metal band which is approximately two inches from the top. Mr. Molina testified that by filling the bin beyond the top the worker is required to fill an extra one and one-half to two sacks but was not being paid for the extra work. (RT 17:2). He testified that when he began working and prior to March 29, 1979, he complained to JulianCabrales on various occasions about the company's order to fill the bins beyond the top. He does not remember how many days after he began working that he stated it was unjust. Only that he did complain on various occasions. (RT 19:4-27; 31:8-15). Molina testified that Julian Cabrales responded that those were the orders and that he could not do anything else. (RT 19:11). On March 29, 1979, JulianCabrales approached Molina while he was working. Cabrales told Molina that the boss was unhappy because the bins were not filled as he wished. Molina responded that the company's orders were unjust because the work had not been done like that at other places. Cabrales told Molina that he was fired and that he was to turn in his equipment. (RT 20':" 1-28). He did not turn in his equipment on this date because the equipment belonged to him. Later on that day, at 1:00 p.m., Mr. Molina approached every worker in the crew and discussed the company's orders to fill the bins beyond the top. All the workers agreed to participate in a work stoppage in order to discuss their grievance with Brad Nussbaum. No company agent was present during these negotiations. (RT 21:3-13). On March 30, 1979, the next day, Mr. Molina arrived at the ranch at 7:15 in the morning and found that a majority of the crew, contrary to their prior/^{discussion and} agreement with him, had started working. He spoke with the workers and reminded them of their agreement to participate in a work stoppage.

After this discussion the piscadors, according to his testimony, stopped working except possibly two who continued to work. (RT 21-22).

At 9:00 a.m. Julio Gallegos arrived and asked Molina why he was keeping the workers from working. He responded:

"I'm not keeping them from working.
We're all in this agreement that we
will stop because what they are doing
to us is unjust".

Gallegos told Molina that if he was not going to work then everyone must leave the ranch. Gallegos warned the workers that if they did not leave he would call Brad Nussbaum so that he would fire them. Molina and the other workers left after that. (RT 22:10-14).

Mr. Nussbaum arrived at the ranch at approximately 11:00 a.m. in the morning in a white pickup accompanied by Julio Gallegos. Mr. Molina testified to the following conversation with Brad Nussbaum. Mr. Nussbaum asked who was Cruz Molina and Molina stepped forward and said, "I am the one." Mr. Nussbaum asked, "What is the problem? What is the reason why you don't want to work." Molina responded that the workers were complaining because they were being asked to fill the bins beyond the top. Nussbaum responded, "I don't believe that." (RT 22-24). Molina invited him to go and look. Nussbaum did not respond. Molina then told him that another one of the problems was that the company was not allowing the workers to bring their cars into the field. He asked him whether the company could provide the workers with a means of transportation since it was very far to walk in the morning and afternoon. (RT 23).

Mr. Molina testified that the distance was approximately one and one-half miles from the parking lot to the work site and the company in the past had provided transportation for the workers. Nussbaum

then told Molina:

"The ranch is mine, and I am the one in charge. And you are fired. I am going to go pick up the check so that I can pay you." (RT 23:10-13).

Nussbaum returned and gave Molina two checks, one a payroll check (RXA) and another a personal check. (RXB).

Mr. Molina testified that Mr. Nussbaum told the workers that if they wanted to return to work they could do so. (RT 24:2). Cruz Molina was given his checks and he and the workers went home. (RT 25: 16-20). He did not return to work after that. (RT 24:17-18). All the workers who participated in the work stoppage returned either the next day or Saturday or the following Monday. (RT 25:6-12).

When Mr. Molina was asked whether or not he would have gone back to work for Venus Ranches knowing the manner in which the company wanted its bins filled, he replied that he would not do so. (RT 39: 6-11). With respect to the grievance concerning transportation to and from the workers' cars into the grove, Mr. Molina stated he complained because on the one day it rained some of the workers got wet. There was no one to give them a ride and the workers had to walk a long distance. He estimated they had to walk as much as a mile and one-half and that it took between 25 and 30 minutes. They were not paid for this time. (RT 41: 2-16).

D. The testimony of Raul Murillo

Mr. Raul Murillo was called by General Counsel to testify on behalf of the Charging Party. Mr. Murillo testified that he worked for Venus Ranches in Holtville from April to June, (about two and one-half months) in 1979. (RT 43-44: 25-3). Mr. Murillo was employed as an orange picker. At the time he commenced working at Venus Ranches, he stated that the employees had already had an agreement with the company and that the company wanted the bins filled to the top, even with the edges. (RT 44: 6-20).

Mr. Murillo indicated that after he had commenced working for Venus Ranches, a change was made with respect to how the company wanted the bins filled above the top edge of the bin so there was a crowning effect on it. He stated that the company wanted one or two more bags in each bin. (RT 45:12-18). When asked by General Counsel whether or not Mr. Murillo was aware of any of the other workers complaining because of the company's policy with respect to filling the bins, he replied, "No," stating that no one said anything until the Charging Party told them that it was a lot of work. (RT 47-48:26-5)

Mr. Murillo testified that his employment with Venus Ranches in 1979 was the first experience he had had with picking oranges. He stated that he did not know Cruz Molina prior to coming to Venus Ranches. (RT 48:18-22). In fact, Mr. Murillo testified that he only had a conversation with Mr. Molina at the ranch on the Thursday prior to the Friday on which the work stoppage occurred. (RT 51-52:21-1). The testimony of Mr. Murillo indicates that Cruz Molina spoke with him and all of the other employees in the crew on an individual basis Thursday afternoon. (RT 52:

6-18). He stated that all agreed they would support Molina. (RT 53:24-26).

Mr. Murillo testified that he did have a conversation with Cruz Molina on the day before the work stoppage occurred and that after the conversation he felt that they were in agreement. (RT 56:6-11). He stated that on the day of the work stoppage the employees arrived to work, but after Mr. Molina spoke with them, they left their jobs. (RT 56: 12-19). He explained that Julio told everybody that if they wanted to engage in a work stoppage, they could, but they would have to get off the ranch. After Julio told them this, the workers (about thirteen or fourteen) did leave the ranch. (RT 57:4-16).

Approximately two hours after leaving the ranch, Mr. Murillo stated that the boss arrived and directed himself toward Cruz Molina. (RT 57:17-25). Mr. Murillo indicated that the boss arrived with Julio and called Cruz over and had a conversation with him. (RT 58:1-5). Mr. Murillo testified that he did not hear the first part of the conversation, which took place between Molina and Brad.

The testimony of Mr. Murillo indicates that he spoke with Julio. He asked Julio for his check because he did not feel he was being treated fairly. He stated that this conversation took place outside the ranch on a Friday morning at about 11:00 o'clock in the presence of about thirteen or fourteen of his co-workers. (RT 59:18-27). When asked why he could not hear more of the conversation between Brad and Cruz Molina, Mr. Murillo stated that although he and his fellow workers agreed to stand by Cruz Molina, when the boss arrived they left Mr. Molina by himself. (RT 60: 1-2). The workers stood about twenty-five or thirty feet away.

At the time Mr. Murillo approached Julio, the conversation between Cruz Molina and Brad was still going on. Mr. Murillo first informed Julio that he wanted his check. Julio then approached Brad telling him that Mr. Murillo told him he wanted his check. (RT 60: 3-15).

Mr. Murillo reiterated the fact that he heard nothing of the conversation between Cruz Molina, Brad and Julio Gallegos. The only thing he heard was that he was not being stopped from work, but that the company had seventy-two hours to give him his check. (RT 60: 23-28). When asked if he received his check, he stated that he had the following day, Saturday, because he continued to work. He stated that he did not quit after all. He also stated that he knew of no other workers that were discharged. (RT 61:1-9).

The testimony of Mr. Murillo indicates that Julio told him that he was not being fired and that he was free to continue work if he desired to do so. This same announcement was made to the other worker's who had participated in the work stoppage. Mr. Murillo testified that all of them eventually went back to work, although some went back to work at that instant, and some went home only to report for work the next day. (RT 61:10-20).

On cross-examination, Mr. Murillo testified he had commenced work on the day the work stoppage occurred. He worked for Venus Ranches until the orange season ended. (RT 62:7-12). He stated that Brad Nussbaum told the employees that all those who wanted to work could continue to work so long as they followed the company rules with regard to filling the bins. (RT 62:22-28).

Mr. Murillo testified that despite the fact that he asked for his check, he and all the other employees returned to work. (RT 63:2-6). He stated that the conversation took place on the day of the work stoppage in the presence of about thirteen or fourteen other workers. He further stated that Julio announced on behalf of the boss that whoever would like to stay, could, as there was work available. (RT 63:12-24). He stated that he along with his fellow workers continued to work for Venus Ranches until the end of the season. (RT 63-64:25-5).

E. The testimony of Brad Nussbaum

Mr. Brad Nussbaum, called on behalf of Respondent in this matter, testified that he was the President of Venus Ranches. (RT 65: 24-28). Mr. Nussbaum stated that while en route to a ranch in the Holtville area, to deliver the payroll for the previous work week and to take care of the normal ranch business, he heard about a problem at the ranch. He indicated that he normally spends at least one-half a day each week in the Holtville area with his foreman. (RT 66-67:17-3).

The testimony of Brad Nussbaum indicates that the work week at Venus Ranches runs from Monday to the following Sunday. The payroll for the employees in Holtville is normally sent to Indio, where the office of Venus Ranches is located and where the payroll checks are made out. When the checks are prepared, they are taken back to Holtville by truck or by Mr. Nussbaum for distribution. (RT 67:6-16).

Respondent's Exhibit "A" is a copy of a blank payroll check used by Venus Ranches.

Upon arriving at the ranch in Holtville, Mr. Nussbaum testified that there was a group of employees who had been working for Venus Ranches gathered outside the property, "just hanging around." (RT 68: 16-24). He indicated that he did not stop at that time as he had some people waiting for him on the ranch that he was to meet with and he was already late for that. (RT 68:16-28).

Later he returned with Julio to the ranch entrance where the workers were located. When he arrived, he asked what the problem was. One of the workers stepped forward and began complaining about the working conditions. (RT 69:6-17). He asked the worker what his name was and

the worker replied, "Cruz Molina."(RT 70:1-4).

Mr. Nussbaum testified that Mr. Molina spoke to him in a very heated manner. Brad told him to calm down and speak in a more respectful manner. When Mr. Molina did so, he explained to Brad about the foreman, who he said was requiring the bins to be overfilled by the workers and also about having to park his car in a central area away from where the work was being done and having to walk that distance. (RT 70:5-16).

With respect to Mr. Molina's first complaint, Mr. Nussbaum testified that he had been in the citrus business for nineteen years, including 1976 and 1979. He stated that the citrus bins were packed the same way in 1979 as they were in 1976. He indicated that the proper way to fill a bin would be to fill it to the top. Mr. Nussbaum testified that it would be foolish to fill it over the top with a crowning effect, because to do so would cause the fruit at the top to be smashed or torn when they were loaded onto the truck. He stated that the company policy was to fill the bins level full. (RT 70, 71:22-18).

The testimony of Mr. Nussbaum indicates that the bins were transported from the fields to the shed on trucks with trailers. (RT 71:19-27). He stated that the bins were placed on the truck by fork-lift and that they were placed in tiers, two or three high. If the fruit were crowned above the level of the bin, the fruit above the level of the bin would be smashed by the middle runner, located on the bin. (RT 72:1-15).

Mr. Nussbaum stated that he was responsible for delivering the fruit to the packing shed in a packable condition. (RT 72:15-17).

The testimony of Mr. Nussbaum also indicates that it would not be in his interest to overfill the bins. He stated that in the citrus industry a return is made to the grower by the packing shed. A conversion is made from bin to field boxes at the rate of a standard bin to sixteen field boxes. Mr. Nussbaum stated that if the bin is level, the grower receives credit for sixteen field boxes; if the bins were crowned or heaped over, he would still receive credit for only sixteen field boxes. If the bins were not filled to the top, but were shallow or less than full, the grower still receives credit for sixteen field boxes, however, that grower would lose credibility with the packing shed. (RT 73-74:4-1).

With respect to the second complaint made by Mr. Molina concerning the parking of employees' vehicles, Mr. Nussbaum testified that at one time employees were allowed to drive their vehicles into the field where they were picking. However, that practice was terminated or changed. Mr. Nussbaum related an incident where one of the employee's' cars was backed into by one of the company forklifts.

He also stated that a large amount of fruit was disappearing under suspicious circumstances. At one time he observed some of the workers taking fruit home with them. (RT 74:6-26).

He indicated that the location where the employees had to park their cars was approximately one-eighth or one-fourth of a mile away from where they were picking. He also stated that they would transport them to where they were working, or they could walk if they so desired. (RT 75:1-4).

At the time the work stoppage occurred, the ranch upon which the employees were working was approximately 480 acres, of which 440 acres were citrus. At the time of the work stoppage on March 30th, the workers had been working in a mature orchard bearing a heavy crop. (RT 75:3-27).

With respect to the conversation between Mr. Molina and Mr. Nussbaum, Mr. Nussbaum testified that Mr. Molina did not want to fill the bins as full as the company wanted. He stated that Mr. Molina appeared to be the spokesman for the rest of the workers. (RT 76:6-12).

Mr. Nussbaum testified that a week prior to the time of the walkout, he had been in the grove with workers, checking each individual crew member's work to see that they were filling the bins in conformity with company policy. He found that while half of the workers complied with the company policy, the other half were doing a less than satisfactory job. They were not filling the bins to the levels required by the company. (RT 76-77:22-7). In order to rectify the situation, Mr. Nussbaum called all the crew around one particular worker and the bin he just filled. The worker had been doing a good job and the bin was filled properly. He pointed out to the other workers what constituted a full bin and reminded them that they had negotiated an agreement based on a full bin. The workers indicated that they understood what was expected of them and the bins thereafter were consistently full.

Mr. Nussbaum stated that he reminded Mr. Molina of the meeting where he personally showed the workers what was expected of them and that they agreed to do it. He also stated that he explained to Mr.

Molina the problem regarding the forklifts and reminded him of the possibility of accident with cars. Mr. Nussbaum further reminded Mr. Molina that that was company policy, that's what had been agreed to by the workers, and that's what they had been doing all along. If Mr. Molina was not willing to do it the way the company requested and the way they had been doing it up to that point, he was free to seek employment elsewhere. (RT 77-78:8-5).

When asked if Mr. Molina made any reply to Mr. Nussbaum's position, Mr. Nussbaum stated that Mr. Molina told him he was not going to do it, and that he wanted his check. (RT 78:6-11). Mr. Nussbaum then spoke to the other workers in the group who had taken part in the work stoppage. He offered to let everybody come back to work that wanted to work. (RT 78:23-25). However, Mr. Molina refused to come back to work.

Brad Nussbaum testified that he had carried the payroll with him for the preceding week to Holtville on that day, although it was payable on Saturday, the following day. At that time he gave Mr. Molina his check for the previous week and also a second check covering the time he worked up until the time that he quit. The second check is marked Respondent's Exhibit "B". (RT 79:1-23). Mr. Nussbaum testified that Respondent's Exhibit "B" is a trust check that he happened to have in his wallet. The check itself had nothing to do with Venus Ranches, but it was the only blank check he had with him at the time. He expressly denied going to Holtville with the payroll check with the intent of firing Cruz Molina. (RT 80:1-4).

Mr. Nussbaum thereafter testified that a Venus Ranches check, Respondent's Exhibit "C", was used to repay the account from which the trust check, which Mr. Nussbaum had with him, was paid on.

ANALYSIS AND CONCLUSIONS OF LAW

It is concluded that the General Counsel has not demonstrated by a preponderance of the evidence, that Respondent in his dealings with Cruz Molina violated the Act. This conclusion is grounded upon my determination that Mr. Molina was not required by Respondent to fill bins over the top. He was not engaging in concerted or protected activity. Additionally, I find he was not discharged but rather, in view of the surrounding circumstances, chose to leave work. These findings are based upon credibility resolutions that I am making.

Section 1152 of the Act as its Federal Counterpart Section Seven of the National Labor Relations Act declared that employees "shall have the right...to engage in...concerted activities for the purpose of collective bargaining or other mutual aid and protection." Interference, restraint or coercion in the exercise of this right is an unfair labor practice under both the National Labor Relations Act and the Agricultural Labor Relations Act. Discrimination against employees for engaging in concerted activities is just a step removed from discrimination for the purpose of discouraging Union membership.

Section 1153 (a) of the Act provides that:

employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives, of their own choosing, and to engage in other concerted activities for the purposes of collectively bargaining or other mutual aid or protection... .

Concerted activity also encompasses both actions by an individual which further a group goal, (Edward Blankenstein, Inc. v. NLRB (C.A.3,

1980) 104 LRRM 3004; United Credit Bureau of America, Inc. (1979) 242 NLRB No. 138 (1979), 101 LRRM 1277; Ambulance Services of New Bedford, Inc. (1977) 229 NLRB No. 3, 95 LRRM 1239; Air Survey Corp. (1977) 229 NLRB No. 155, 95 LRRM 1212), and actions undertaken by a group to protect working conditions.

Concerted activities must have lawful objectives and must be carried on in a lawful manner. (23 NLRB Ann. Rep. 64 (1959). There does not appear to have been any lawful objective to Mr. Molina's activities.

It makes no rational sense for a worker to be considered engaging in concerted or protected activity and thereby be granted the benefits or protections of the Act when the conduct the worker engages in is one which protests a policy which does not exist.

I find it difficult, perhaps impossible, to accept the testimony elicited by the General Counsel indicating that the Employer wanted the employees to over-fill the bins. To require the bins be over-filled would have meant an economic loss to the Employer. The oranges crowning the bins would have been damaged in loading and transit to the packing shed and the packing shed did not give additional compensation to the Respondent for bins which were over-filled.

It has been held that an Employer has a right to take disciplinary action for good cause related to the maintenance of order and efficiency in the plant. (See Associated Press v. NLRB, 301 U.S. 103, 1 LRRM (1937)) Indeed, so long as the Employer's motivation is not encouragement or discouragement of Union membership, the Employer may discharge without any cause whatsoever. (See Associated Press v. NLRB, supra.) To prove a violation of Section 1153(c), there must be some act of discrimination,

it must be in regard to tenure, terms or conditions of employment, and it must be intended to encourage or discourage membership in a union. (See NLRB v. Great Dane Trailers, 388 U.S. 26, 65 LRMM 2465 (1967)).

Therefore, even if one were to make the determination that Cruz Molina was fired rather than voluntarily leaving his employment with Venus Ranches one could still not view his firing as a violation of the Act. Discharging an employee who disrupts work to protest unfair working conditions which do not exist is certainly permitted disciplinary action for good cause. I further apply the same evaluation and credibility resolutions to the issues regarding the parking of employees' cars and trucks.

The General Counsel bases his contention that Molina was unlawfully discharged on two principal theories:

1. That Molina was discharged on March 29, 1979, in retaliation for individually protesting working conditions; and
2. That Molina was discharged in retaliation for his functioning' as a spokesperson during the work stoppage by the crew.

Little, if anything, in the record indicates that such an inference can be supported.

General Counsel cites in his brief case law which relates to protected concerted activity:

It must appear at the very least that (the conduct) was engaged in with the object of initiating or inducing or preparing group action or that it had some relationship to group action in the interest of the employees. Edward Blankenstein, Inc. v. NLRB, (C.A.3, 1980) 104 LRMM 3004, at 3005.

Additionally, General Counsel cites Foster Poultry Farms, (198) 6 ALRB No. 15, wherein an individuals actions are protected and held to be concerted

in nature, if they relate to conditions of employment that are matters of mutual concern to all affected employees.

I do not however find that there was a dispute as to the level the bins were to be filled and, therefore, there were no issues raised which related to "conditions of employment" or were "matters of mutual concern to all affected employees".

It appears that there may have perhaps been some misunderstanding by Mr. Molina as to how the bins were to be filled. Prior to March 30, 1979, one-half of the workers were not filling the bins full enough and Mr. Nussbaum had a meeting with the workers to discuss this problem. He told the workers he wanted the bins filled.

This testimony was not contradicted and I find it credible. This would have been an appropriate time for Mr. Molina to discuss his grievance concerning over-filled bins. He did not do this however.

Therefore, in view of the foregoing, I find that General Counsel has not by a preponderance of the evidence demonstrated that Respondent violated the Act.

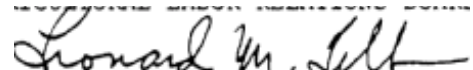
RECOMMENDED ORDER

It is hereby recommended that the complaint in this case be dismissed in its entirety.

Dated: August 1, 1981

AGRICULTURAL LABOR RELATIONS BOARD

By:



Leonard M. Tillem
Administrative Law Officer