STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MIKE YUROSEK & SON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, TIMOTEO MAGALLANES AND JESUS SANCHEZ, Charging Parties.	)	Case Nos. 82-CE-5-EC 82-CE-28-EC 82-CE-39-EC 82-CE-43-EC 9 ALRB No. 69

DECISION AND ORDER

On April 27, 1983, Administrative Law Judge (ALJ) Morton P. Cohen issued the attached Decision in this proceeding. Thereafter, Respondent Mike Yurosek & Son, Inc. and the General Counsel each timely filed exceptions with a supporting brief to the ALJ's Decision. Respondent and the General Counsel also filed reply briefs.

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

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs and has decided to affirm the

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

rulings, findings[2/] and conclusions of the ALJ and to adopt his recommended Order, with modifications.

Respondent has excepted to the ALJ's conclusion that Marilu Najera was discharged in violation of section 1153(c) and (a) of the Agricultural Labor Relations Act (Act). We find, in conformity with the ALJ, that the record clearly establishes that a contributing factor in Respondent's decision to terminate Najera was her prior union activity, including the events which occurred on December 30, 1981. Since General Counsel has persuaded us that anti-union animus contributed to Respondent's decision to discharge Najera, Respondent could only avoid a finding that it violated the Act by demonstrating by a preponderance of the evidence that it would have discharged Najera even if she had not participated in the events of December 30, or otherwise been involved with the United Farm Workers of America, AFL-CIO. (Royal Packing Company (1982) 8 ALRB No. 74; NLRB v. Transportation Management Corp. (1983) ____U.S.____ [113 LRRM 2857]; Wright Line (1980) 251 NLRB 1083 [105 LRRM 1191], enforced (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].) The evidence herein does not demonstrate that Najera would have been terminated absent her protected activity.

ORDER

By authority of Labor Code section 1160.3, the

[2/] Respondent has excepted to certain credibility resolutions made by the ALJ. 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 (1978) 4 ALRB No. 24.) Our review of the record herein indicates that the ALJ's credibility resolutions are supported by the record as a whole.

Agricultural Labor Relations Board (Board) hereby orders that Respondent Mike Yurosek & Son, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, issuing warning notices, changing work assignments, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Offer to Marilu Najera immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other employment rights or privileges.

(b) Make whole Marilu Najera for all losses of pay and other economic losses she has suffered as a result of the discrimination against her, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Expunge from the personnel files of employees Timoteo Magallanes, Marilu Najera and Jesus Sanchez, all warning

notices found to have been discriminatorily issued to them by Respondent, and notify these employees that such action has taken place.

(d) 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.

(e) 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.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees in the bargaining unit employed by Respondent at any time between December 30, 1981 and December 30, 1982.

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

(h) 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 their 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.

(i) 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 with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: December 5, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, 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 (Board) issued a complaint which alleged that we, Mike Yurosek & Son, Inc., 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 issuing warning notices to Marilu Najera and Jesus Sanchez for seeking clarification of the wage rate, subsequently firing Najera, issuing warning notices to Timoteo Magallanes and assigning Magallanes difficult work because of his involvement with the United Farm Workers of America, AFL-CIO. 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 other farm workers in California 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 about 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 and protect one another; and
6. To decide not to do any of these things.

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

WE WILL NOT issue warning notices, assign difficult work or discharge you because you engage in activities protected by the law.

WE WILL reinstate Marilu Najera and make her whole for lost wages, plus interest.

WE WILL remove improperly issued warning notices from the personnel files of Timoteo Magallanes, Marilu Najera and Jesus Sanchez.

Dated: MIKE YUROSEK & SON, 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, 92243. The telephone number is (619) 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

Mike Yurosek & Son, Inc.
(UFW, Timoteo Magallanes
and Jesus Sanchez)

9 ALRB No. 69
Case Nos. 82-CE-5-EC,
et al.

ALJ DECISION

The ALJ found that when two employees delayed the start of work among a broccoli harvesting crew so as to obtain a definitive statement on the rate of pay, they were engaged in protected concerted activity. He therefore ordered that the warning notices issued for this activity be expunged from the employees' records. He also ordered one of the two employees reinstated, finding that the above protected concerted activity was a basis for the employee's discharge. The ALJ determined, however, that other warning notices issued to these two employees were not issued in violation of the ALRA.

As to another employee, the chief spokesperson of the crew, the ALJ found that the crew foreman discriminatorily issued warning notices for a work stoppage engineered by the foreman to discredit the spokesperson. The ALJ also found that the spokesperson was discriminatorily assigned difficult and arduous work solely because of his status as a leader of the crew.

BOARD DECISION

The Board affirmed the findings, rulings and conclusions of the ALJ. The Board specifically noted the recent U. S. Supreme Court affirmation of the test utilized to analyze "mixed motive" discharges. When the General Counsel establishes that a contributing factor in a respondent's decision to terminate an employee is prior union activity, a respondent may avoid a finding that it violated the Act by demonstrating through a preponderance of the evidence that the employee would have been terminated even absent union activity. (NLRB v. Transportation Management Corp. (1983) 113 LRRM 2857.)

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MIKE YUROSEK & SON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, TIMOTEO MAGALLANES and JESUS SANCHEZ, Charging Parties.	Cases Nos. 82-CE-5-EC 82-CE-28-EC 82-CE-39-EC 82-CE-43-EC

DECISION

MORTON P. COHEN, Administrative Law Judge

APPEARANCES

JORGE VARGAS, Graduate Legal Assistant
Agricultural Labor Relations Board
319 Waterman Avenue
El Centro, CA 92243
(619) 353-2130
For the General Counsel

MICHAEL L. WOLFRAM, ESQ.
Morgan, Lewis & Bockius
611 W. Sixth Street, 23rd Floor
Los Angeles, CA 90017
(213) 612-2570
For the Respondent

I.

ALLEGATIONS

Four different sets of charges are involved in the instant matter. The first, Case No. 82-CE-5-EC, originated in a claim filed on January 8, 1982 by Jesus Sanchez alleging that on or about January 4, 1982 written reprimands were issued to claimant by respondent which reprimands were in violation of the Agricultural Labor Relations Act (hereafter "ALRA") in that they discriminated against claimant in his union and concerted activities. The second claim, Case No. 82-CE-28-EC, alleged that similar written reprimands, in the form of warning tickets, were issued discriminatorily to Timoteo Magallanes in violation of his rights under the ALRA. The third claim, Case No. 82-CE-39-EC, alleged that on or about February 1, 1982, dangerous and difficult work assignments were discriminatorily given to Timoteo Magallanes, resulting in violations of the ALRA. The last case, Case No. 82-CE-43-EC alleged that Marilu Najera was both discriminatorily given a warning notice and subsequently discriminatorily discharged, in violation of the ALRA.

These charges resulted in a consolidated complaint issued May 28, 1982 alleging: that copies of the aforesaid charges had been served on respondent herein, that the charging party UFW was a labor organization within the meaning of the ALRA and, as well, the exclusive bargaining representative of respondent's agricultural employees during all relevant times, that Ignacio Villalobos was respondent's company foreman and

Jim Johnson its general foreman during all relevant times, and therefore supervisors within the meaning of the ALRA, and that Jesus Sanchez, Marilu G. Najera and Timoteo Magallanes were all agricultural employees within the meaning of the ALRA. The aforesaid facts were admitted by respondent in its answer dated June 4, 1982. The consolidated complaint as well alleged that: respondent, through its agents, issued discriminatory warning notices to Jesus Sanchez and Marilu G. Najera on January 4 and 11, 1982, that on January 29, 1982 respondent through its agents discriminatorily issued a warning notice and discharged Marilu G. Najera, that on February 1, 1982 respondent, through its agents, discriminatorily issued two warning notices to Timoteo Magallanes, and that on February 1, 1982 respondent, through its agent, discriminatorily assigned Timoteo Magallanes to a dangerous and difficult work assignment. Respondent, in its answer dated May 28, 1982, denied each of the aforesaid charges, which General Counsel claimed, in its consolidated complaint, were violations of Labor Code §1153(a) and (c).

Hearings to determine the above charges commenced on October 5, 1982 and continued on October 6, 7 and 8, 1982, and November 3, 4 and 5, 1982. All parties were given full opportunity to present witnesses and exhibits. At the end of the hearing all parties were given full opportunity to present briefs. All such testimony, exhibits and briefs have been reviewed and considered, and based upon such evidence and argument relevant thereto, as well as the credibility of the witnesses, decision was made by the Administrative Law Judge as follows subsequently herein.

II.

JURISDICTION

The complaint alleges, and the answer admits, that respondent is an agricultural employer within the meaning of §1140.4(c) of the ALRA and is now and has been such at all times relevant to these proceedings. The complaint further alleges, and the answer admits, that the United Farm Workers, AFL-CIO (hereafter "UFW") is now and has at all times relevant hereto been a labor organization within the meaning of §1140.4(f) of the ALRA. The complaint further alleges, and the answer admits, that the alleged discriminatees, Jesus Sanchez, Marilu G. Najera and Timoteo Magallanes are and were during all times relevant to the proceedings herein agricultural employees within the meaning of §1140.4(b) of the ALRA. Thus, pursuant to the ALRA, the Agricultural Labor Relations Board (hereafter "ALRB") has the power to determine whether an unfair labor practice has occurred, and if it is determined that an unfair labor practice has occurred, to remedy such practice.

III.

FACTS

A. Background

Respondent Mike Yurosek & Son, Inc. is an agricultural employer, located in various geographic areas within the state of California (including, but not limited to, the Imperial Valley) which is engaged in the growing, harvesting,

packing and selling of various crops, including carrots, turnips, rutabagas and mixed lettuce, as well as broccoli. In harvesting broccoli, it uses crews of considerable numbers of people whose responsibility is to pick the broccoli for eventual deposit in bins to be transported to market. The process whereby the broccoli is harvested, and transferred to the bin, is by the use of a large mobile machine having a long conveyor belt which straddles a series of rows of broccoli and moves along such rows with the workers following the moving conveyor belt, picking broccoli, and placing the broccoli on the belt for its eventual insertion into the bin. One individual drives the machine while another stands on top of the machine near the end of the belt so as to direct the broccoli into the bin. The harvesting season occurs between December and February. All of the instances of complaint involved in this matter arose in the 1981-2 harvesting season, particularly December, January and February thereof, and concerned one crew, its foreman Ignacio Villalobos, and several members of the crew, Marilu G. Najera, Timoteo Magallanes and Jesus Sanchez. Both because of the chronology of the events, and the fact that both parties have in their briefs and presentations adhered to such chronology, the remaining facts and resolutions thereof in the various incidents will be determined herein in accordance with such chronology.

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IV.

CHARGES OF UNFAIR LABOR PRACTICES AS TO ACTIVITIES OF JESUS SANCHEZ AND MARILU G. NAJERA ON DECEMBER 30, 1981.

On the morning of December 30, 1981, at the commencement of work, several members of the crew voiced the fact that the particular field on which they were working that day had been cut several times previously and they therefore became concerned with whether adequate amounts of broccoli remained in the field to insure adequate wages for the work they would do therein, given that they were normally paid on a piece work basis. Although there had been occasions in the past where hourly wages were paid to the crew when insufficient broccoli was available to insure adequate piece rate wages, a number of the crew determined that the question of pay should be settled before the cutting of the field occurred.

Marilu G. Najera and another member of the crew approached Jesus Sanchez concerning the problem, and Sanchez thereafter spoke with the foreman, Villalobos, about it. Villalobos indicated he didn't know the answer but that he would speak with Jim Johnson about it, and in fact Villalobos did speak with Mr. Johnson. Thereafter Johnson approached Magallanes and informed him that if piece rate wages were insufficient, the workers would be paid by the hour. During this period of time no work was performed, as Sanchez and Najera, together with Marcela Romero, had informed the crew not to work until such time as the pay issue was resolved. The entire episode took between 10 and 20 minutes, General Counsel's

witnesses indicating 10 minutes and respondent's witnesses indicating 20 minutes--the distinction not being crucial of resolution for purposes of the allegations herein, as will be further explained in the ensuing paragraphs. Immediately upon the resolution of the problem, the crew commenced its work.

Soon thereafter, Villalobos approached Sanchez, Najera and Romero and told them that they had incited a work stoppage by the crew, and would be given a warning notice for having done so. In fact, several days thereafter Najera and Sanchez were given warning notices. Subsequently, upon their complaint to the ALRB, these warning notices became the subject of allegations of unfair labor practices in the instant matter.

It is my conclusion that indeed the allegations of unfair labor practices as to the issuance of the warning notices for activities of Najera and Sanchez on December 30, 1981 were correct. Since the Act provides that discrimination against agricultural employees because of protected concerted activities constitutes an unfair labor practice, the first consideration is whether the actions herein were protected concerted activities. According to respondent, although these activities concerned wages and therefore would seem to be protected concerted activities, they lost their protection in that this was nothing more than another in a series of partial or intermittent "quickie strikes" which had their inception in the previous season [see Mike Yurosek & Son, Inc., 8 ALRB No. 37 (1982) (ALOD at 8, 10-11)].

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In support of its argument, respondent cites to the Ninth Circuit's decision in Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200 (9th Cir. 1974). (Indeed, both sides cite to Shelly & Anderson Furniture Mfg. Co. v. NLRB, supra, to support their respective conclusions.) The fact is that the Shelly case does indeed state the general rule as to whether concerted activity will be protected. It requires four elements to determine such protection, those being: (1) a work-related grievance, (2) the furthering of some group interest, (3) the seeking of a specific remedy and (4) that the activity is not otherwise improper. As to the fourth, the Court concluded that activities would be "improper" if "... employees had reported for work and, while receiving their usual wages, have repeatedly and without warning engaged in work stoppages, slow-downs or sit-ins" (497 F.2d at 1203). Going on, the Court explained its rationale as to such rule, saying "Such actions disrupt production schedules and impede the employer from using replacement or temporary employees while the protesting employees continue to draw their wages. Thus, they are unprotected because they make it impractical for the employer to operate his business properly." (497 F.2d at 1203).

In determining in Shelly, supra, that the activity therein was protected, the Court stated, interalia, that "Finally, the demonstration lasted only ten to fifteen minutes and would not have a significant impact upon the operation of the business. By Anderson's own admission, the demonstration did not severely disrupt his production schedule or otherwise

necessitate any unusual action on the part of the company." (497 F.2d at 1203).

The instant matter fits almost precisely into the situation alleged in Shelly, supra. That is, the activity lasted between ten and twenty minutes, was not disruptive to the employer, had no significant impact upon respondent's business, and in no way resulted in the crew profiting at the expense of the employer. Thus all four of the elements suggested in Shelly, supra, to indicate that protected activity is present, are present herein.

Respondent also claims that there is no indication of good faith on the part of the claimants and that such is necessary to protect the activities under the Act. In so concluding, respondent cites to Prescott Industrial Products Co., 205 NLRB 51 (1973), Enf. denied on other grounds, 500 F.2d 6 (8th Cir. 1974), and to Ben Pekin Corp., 181 NLRB 1025 (1970), Enf'd., 452 F.2d 205 (7th Cir., 1971), as well to Venus Ranches, Inc., ALRB No. 60 at 5 (1982), a case which does not indicate that good faith is necessary to insure that conduct is protected, but only that the activity in that case was based upon a good faith belief. Nevertheless, presuming that the ALRB has adopted a good faith requirement for purposes of protecting concerted activities, there is no showing in the instant matter that the activity was not in good faith. Respondent claims that good faith was absent during the December 30 activity since the crew knew that if it were not able to make piece work rates, it would be guaranteed hourly rates (see Respondent's brief at pages 12-13). This conclusion

respondent bases upon the fact that Timoteo Magallanes had testified that in previous seasons the crew had been paid an hourly rate when its efforts did not produce sufficient results to grant adequate piece rate wages. From this fact respondent extrapolates the conclusion that therefore the remainder of the crew knew and relied upon this fact and further that their efforts were not in good faith on that day. Such extrapolation is both unfounded and against the weight of the other evidence. To begin with, it must be remembered that this was both Villalobos' first season as the crew's foreman, and indeed as a broccoli crew foreman, and Jim Johnson's first occasion as supervisor of this crew. Secondly, this event occurred only eight days into the season. Thus, while the crew may have had ample experience in the past in regard to a particular policy, even presuming that Magallanes' knowledge was that of the crew generally, it had no knowledge as to whether the policies under Villalobos and Johnson would be the same. There is thus not merely no reason to presume that the crew acted in bad faith, but instead every reason to believe, as I conclude, that the crew acted in thorough good faith in insuring that the policies did remain the same and that they would not be taken advantage of under the circumstances.

I therefore conclude that the warning notices issued to Marilu G. Najera and Jesus Sanchez for their concerted activities on the morning of December 30, 1981 constituted unfair labor practices in that they discriminated against agricultural employees due to such protected concerted activity.

V.

CHARGES OF UNFAIR LABOR PRACTICES FOR ISSUANCE OF WARNING NOTICE OF JANUARY 11, 1982 TO JESUS SANCHEZ.

At the commencement of work on the morning of January 11, 1982, Villalobos, the foreman of the crew, sent Hector Perez, a tractor driver, to work on top of the broccoli machine. This decision was not in keeping with a rotation system which had been established and was customarily used by the crew. According to that rotation system, the person who should have worked on top of the machine, an ordinarily favorable position, was Valentino Romero. This fact was recognized by Jesus Sanchez, the person who ordinarily kept track, by means of a written list retained by Sanchez, of the rotation system. Sanchez, without speaking with Villalobos, ordered Perez to get off the machine and told Valentino to replace him, which position change in fact occurred. Thereafter Villalobos told Sanchez that Sanchez had acted improperly. Nonetheless, no written warning was given to Sanchez at that time.

Subsequently, at midday, Sanchez complained to Villalobos, on behalf of the crew, that drinking water had not yet been brought to the crew. Normally, the foreman, Villalobos, would have brought drinking water to the crew earlier in the day. Villalobos, in his testimony, admits that he would normally bring water to the crew but didn't on that day prior to Sanchez's complaints because of the field conditions and the particular difficulties on that day of moving the water into the field, since the road was blocked by tractors.

In voicing his complaints concerning the water, Sanchez admits that he called Villalobos a "... son of a bitch." (Transcript, Volume III, page 18) [There is some question as to whether the phrase used by Mr. Sanchez, "hijo de la chingada", was properly interpreted as "son of a bitch" or "mother-fucker". (Transcript, Volume III, pages 18-20) The interpreter at the time of the hearing insisted that the phrase meant "son of a bitch" and for purposes of this decision I am obliged to conclude that the interpretation was accurate, although I must admit that the interpreter appeared reluctant to use the phrase "mother fucker" and therefore may have erroneously interpreted the phrase.] According to Mr. Villalobos, and his wife, both of whom testified, Mr. Sanchez, at various times during this incident, called Mr. Villalobos "mother-fucker", "son of a bitch", "fool" and other names, and as well told Villalobos that if the foreman wanted to give him a warning he could "... give it to me so I can clean my ass with it." (Transcript, Volumes V, pages 106-7 and VI, pages 130-134)

In keeping with the testimony of all of the witnesses, I have determined that the version given by Mr. and Mrs. Villalobos is the accurate one as to the nature of and verbiage used during the exchange. None of the testimony indicates that Mr. Villalobos, either prior to or during this incident, responded with profanity to Mr. Sanchez. Soon after the incident in question, Mr. Sanchez was given his second warning notice for the reasons that "Employee will not do the job according to foreman's orders. Employee's attitude is

disrupting the crew. Employee used profanity & abusive language against foreman." (General Counsel's Exhibit "8-B").

I have concluded that the issuance of this warning did not constitute an unfair labor practice by the respondent. As was stated in Royal Packing Co. v. Agricultural Labor Relations Board, 101 C.A.3d 826 (4th District Court of Appeal, 1980), "The burden is on the charging party to prove the motive for ... discharge was punishment for engaging in protected union activity." (101 C.A.3d at 837). In that case both foreman and discharged employee were volatile people given to bursts of shouting or profanity, the discharged employee also being a union activist. In determining that the Board had failed to meet its burden, the Court, citing to Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, at page 97, stated, "'Where the employer was motivated by both valid and invalid reasons, a rule of causation is indispensable'", and further that "'the rule of causation applied in this Circuit is that 'the General Counsel must at least provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one.'" (101 C.A.3d at 833).

The instant matter is an even stronger one than that found in Royal Packing Co., supra, since in the instant matter there is no proof whatsoever of profanity or volatility by the foreman aimed at the employee, while there was ample showing of such excessive profanity aimed at the foreman by the employee. General Counsel points to cases such as Publishers Printing Co., Inc. (246 NLRB No. 36) and Webster Clothes, Inc. (222

NLRB No. 195) for a conclusion that the real reason was anti-union animus on Villalobos' part and that profane language was commonplace in the working area. The facts of both Webster and Publishers are quite different from the instant matter. In Webster, there was ample proof that the manager had used profanity consistently toward the employees, such as saying that the "attitudes of the sales people were fucked", while in Publishers Printing, the hearing officer had determined that "... there is no evidence that employees used such language toward supervisors in an angry or offensive manner ....", situations entirely different from the one herein.

The instant matter is far closer to that which occurred in Chemvet Laboratories, Inc. v. NLRB (8th Cir., 1974) 497 F.2d 445, where an employee called the owner a "son of a bitch" and where the Court, in concluding that no unfair labor practice had resulted from the discharge of the employee, stated that "... the judge was unable to refer to any evidence which indicated that the Chemvet employees regularly or even occasionally referred to their superiors in profane terms in the presence of those superiors. Such an act is different in kind from the general use of profane language." (497 F.2d at 452).

Thus I conclude that no unfair labor practice resulted from the warning notice given to Mr. Sanchez as a result of the incidents on January 11, 1982.

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VI.

INCIDENTS OF JANUARY 13 AND JANUARY 29, 1982 CONCERNING MARILU G. NAJERA

A dispute existed between the foreman, Villalobos, and a number of the crew as to the proper method for picking broccoli. Villalobos had insisted, and often informed the crew, that all leaves should be picked from the broccoli before it was placed on the belt, and to do otherwise meant that "dirty" broccoli was being picked, while to the crew, at least in part motivated by the piece work rates, it was not necessary that all leaves be picked. On the morning of January 13, 1982 Villalobos informed Najera that she was picking "dirty", having previously informed her of her poor work habits. On this occasion Najera was given a warning for not doing her work "... according to foremans (sic) orders" (General Counsel's Exhibit "8-D"). Although other workers did their work poorly, they were not given warnings for such work "Because the others would accept. When I would tell them, they would accept that it's ok, and they would never say anything besides. But Mary Lou she was always--her answer was always rebel type: to hell with it, and that sort of thing." (Transcript, Volume V, page 113)

On January 29, 1982, Villalobos approached six people on the crew (Domingo Ortuno, Timoteo Magallanes, Jesus Sanchez, Ofelia Ruiz, Dora Ortuno and Marilu Najera) and informed them

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that they were doing "dirty" work. Of the six, only Najera responded, saying that the "dirty" work was being done by other workers than themselves. At approximately this time, one of the other workers, Dora Ortuno, took one of the broccoli heads and "... I took all the leaves off of it. And I said, 'look, Mari, that they won't be calling your attention, do the work this way.' and I threw that broccoli on the conveyor belt." (Transcript, Volume III, page 129) In response, Marilu Najera gestured with her hand by flipping it backwards over her shoulder. At this point Villalobos approached her and, mistakenly concluding that Najera had uttered profanities towards him, told her that she would be fired. Soon thereafter, she was given a final notice, stating "Marilu G. Najera disobeyed foremans (sic) orders to remove leaves & cut the correct size broccoli. She also used profane and obusive (sic) language towards foreman. This is the 3rd & final warning letter. Employee is terminated." (See General Counsel Exhibit "8-E")

General Counsel alleges that the warning notices of January 13 and 29 culminating in the discharge of January 29 constituted unfair labor practices in violation of the Act. I conclude otherwise. I do so although I have determined that Villalobos was wrong in regard to Najera's use of profanity on that occasion toward him, in that I have previously determined to credit the testimony of General Counsel's witnesses in that regard, and particularly that of Dora Ortuno. However, I have determined to credit Villalobos' testimony in regard to the "dirty" work done by Najera, and further the fact that, unlike other employees such as Ortuno, Najera was defiant and

rebellious in regard to her refusal to accommodate the work required by the foreman. This is particularly evident in the testimony of Ortuno quoted above. Ortuno did, on the occasion of the January 29 incident, exactly what Villalobos had previously indicated. When told that her work was "dirty", she not only did not reply to Villalobos, but instead suggested to Najera exactly how the work should be performed, to which Najera responded with a negative gesture.

General Counsel would have the hearing officer conclude that Villalobos' statement that Najera was a rebellious worker permits of no inference other than his anti-union animus directed toward her. Indeed, such inference is speculative and unfounded. Again, as was previously stated, General Counsel has the burden of proving that the warning notices and subsequent discharge were caused by Najera's involvement in protected activities. Further, if there are both valid and invalid resons for such warnings and resultant discharge, no unfair labor practice will be found. Thus, since improper work habits are not protected activity, no unfair labor practice occurred resulting in Najera's third warning notice (see, e.g., O.P. Murphy Produce Co., 5 ALRB No. 63).

VII.

WARNING NOTICES OF FEBRUARY 1, 1982 GIVEN TO TIMOTEO MAGALLANES

As has been indicated earlier herein, and not seriously contested by the respondent, Timoteo Magallanes was one

of the outstanding spokespersons for the crew. It was to Magallanes that other crew members went with work problems, scheduling problems, rotation problems and pay problems. Further, the crew and their new foreman had had, since the commencement of the season, several clashes as to working conditions and pay rates. On the morning of February 1, 1982 the crew was cutting broccoli in a field which had been previously cut once and was then being cut for the second time. All agree that the crew was then working on a piece rate basis and that it was the opinion of the crew, as voiced through Timoteo Magallanes, that the pace at which the machine was moving through the field, which determined the pace at which the crew could work, was so slow that an excessive period of time would be expended in order to fill the quota set by the company. Magallanes therefore asked the machine operator, Ruben Perez, to speed up the machine, but Perez stated that that was the foreman's decision and not his. The crew then stopped work while Magallanes, as spokesperson, went to Villalobos to request that the machine be speeded up. Villalobos did not want the machine speeded up, since he wanted to insure that all leaves be cut off the broccoli, and felt that the slow speed of the machine would better insure the high quality of the work. Nevertheless, although he had the right to do otherwise, the foreman agreed to have the machine speeded up. He told Perez to speed up the machine and to continue to watch Villalobos for instructions concerning the speeding up of the machine. As the machine speeded up, Villalobos continued to instruct Perez, via hand signals, to make the machine go

faster and faster, thereby insuring that the crew could not keep up with it in order to do adequate work. Soon thereafter, Magallanes gave orders to the crew to stop work until such time as the machine was returned to a normal working speed. At this point, Villalobos informed Magallanes that he could be given a warning for activities, and thereafter Villalobos in fact gave Magallanes two warnings, the first because he "stopped the crew from working--disobeyed foremans (sic) orders" (see General Counsel Exhibit "8-F"), and the second because he "stopped the crew from working according to company standards: employee has repeatedly disobeyed foreman's orders" (General Counsel Exhibit "8-G").

Respondent asks the hearing officer to determine that the machine speeded up excessively, not at the order of Villalobos, but at the order of Magallanes, and that the testimony by Magallanes, Ruben Perez, and Dora Ortuno to the contrary is not worthy of belief. Such conclusion is not founded either upon the facts or upon logic. It is undoubtedly the fact that Magallanes was the primary crew spokesperson, and that Villalobos had had previous trouble with him as spokesperson and was highly desirous of putting Magallanes in his place. It therefore is sensible to conclude that what Magallanes, Perez and Ortuno testified was correct and based upon Villalobos' ordering the machine to speed up excessively in order to insure that he would show that if Magallanes got what he wanted, the crew could not perform its work properly.

Respondent would also have the hearing officer determine that Magallanes had insulted Villalobos and that this was

a further reason for issuing the two warning notices. I determine that Magallanes did not insult the foreman, and further, as may be seen from a reading of the notices themselves, insults were not the basis for the issuance of the warnings, but solely the facts that Magallanes had stopped the crew from working.

Given the above facts, I determine that the issuance of both warnings to Timoteo Magallanes on February 1, 1982 constituted unfair labor practices in violation of the Act. There is no doubt that Magallanes' activities in first seeking to speed the machine up and subsequently, when excessive speeds were attained, in seeking to have the machine's speed slowed, were performed on behalf of the crew and were therefore work-related complaints of a concerted nature furthering the interests of he crew and seeking specific remedies, as those terms were used in Shelly & Anderson Furniture Manufacturing Co., Inc., supra. Thus the activities would be protected under the Act unless they were otherwise unlawful or improper. Respondent cites to several cases seeking to have the hearing officer determine that the incidents of February 1 constituted improper behavior on Magallanes' part, including NLRB v. Blades (8th Cir. 1965) 344 F.2d 998, and Liberty Mutual Ins. Co. v. NLRB (1st Cir. 1979) 592 F.2d 959, as well as Shelly & Anderson Furniture Manufacturing Co., supra. The instant matter is entirely unlike Blades Manufacturing Corp., supra, in which walk-outs occurred for three full days during a period of twelve days, a result easily determined to be improper as disruptive of the employer's production schedules. In the

instant matter, whatever disruption occurred was so slight as to be inconsequential, unless one considers the disruption caused by the foreman's retaliatory speeding-up of the machine. In Liberty Mutual Ins. Co., supra, where the employee in question proposed an infinite series of employee absences, threatened to be disruptive at meetings, failed to meet with clients, failed to show up at meetings, left work early on occasion and completely failed to report on other occasions, the Court concluded that the employee's behavior was similar to that of employees in another case who agreed among themselves to report only two days out of each week (593 F.2d at 605). Again, such facts are completely different from the ones found herein where, similar to those in Shelly, supra, the incident lasted only a few minutes. Indeed, in Electromec Design & Development Co., Inc. v. NLRB (9th Cir., 1969) 409 F.2d 631, the Court upheld as protected a work stoppage to protest working conditions which lasted for at least half of a working day. I have therefore reached the conclusion that the activity of Magallanes on February 1st was not improper, and, since as was stated before, I have determined that the motivation for the issuance of the warning notices was Magallanes' engaging in protected concerted activities, I determine that the issuance of the two warning notices on that day constituted unfair labor practices in violation of the Act.

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VIII.

ALLEGATION OF DIFFICULT WORK ASSIGNMENT FOR TIMOTEO MAGALLANES IN RETALIATION FOR PROTECTED CONCERTED ACTIVITY.

On the morning of February 1, 1982, prior to any issues concerning the speed of the broccoli machine, a new rotation system was imposed on the crew by the foreman. In the past the individuals within the crew would change positions on a rotating basis so that different people would work in different positions at different times. On February 1, 1982, the foreman changed the rotation system so that the positions were essentially permanent, with changes being made based only upon the direction in which the machine was moving through the field. The end result was that Timoteo Magallanes was obliged to work on a permanent basis close to a large wheel attached to the machine by an arm, the entire apparatus termed by the crew "the Bola" (see Respondent's Exhibits 11, 16-20). This wheel was not one used for steering, and thus was capable of swerving, together with the hydraulic cylinder attached to it, as it moved through the field. For that reason, it was considered by members of the crew to be a difficult, dangerous, unnerving and onerous position to work in due to the fear of being hit by it while working. To eliminate these problems, it was possible to work behind the wheel and thus further away from the conveyor belt, but this would require substantially more work by the employee in that position, since the broccoli would either have to be thrown or carried past the wheel and onto the belt. According to Villalobos, the reason for changing the rotation

system, which resulted in permanent placements and Magallanes' remaining near the Bola for the remainder of the season, was to increase the efficiency of the crew. Further, according to Villalobos, the only reason that Magallanes wound up having to work near the Bola was "Magallanes happened to be working in that position when places became permanent, and for that reason, he, like the rest of the crew, was required to remain working in the same position for the rest of the season ...." (Respondent's Brief, at page 61).

Given the fact of Magallanes' being the primary spokesperson for the crew, and Villalobos' problem with Magallanes in that capacity, I find it inherently and totally incredible that Magallanes just "happened to be" put in what was undoubtedly the most onerous position of any of the working positions of the crew. There is no question that working near the Bola was more difficult than any of the other positions, since, although no one had been injured working near the Bola, there was always the possibility of it. Further, what must be considered is that avoidance of injury made the physical exertions of the worker near the Bola that much greater than any of the other workers.

Based upon the facts stated above, I conclude that the placement of Timoteo Magallanes next to the Bola constituted an adverse action taken against Timoteo Magallanes because of his protected concerted activities under the Act, and therefore constituted a violation of the Act.

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IX.

REMEDY

Having concluded that respondent has violated Section 1153(a) and (c) of the Act, my recommendation shall be an Order to cease and desist therefrom, as well as to take such affirmative action as appears reasonable to effectuate the policies of the Act.

Thus, it would appear reasonable to order respondent to cease and desist from issuing warning notices, changing work assignments or otherwise discriminating against agricultural employees because of their participation in protected concerted activities. It would further appear reasonable to recommend that respondent be ordered to expunge from the personnel files of employees Jesus Sanchez, Marilu G. Najera and Timoteo Magalanes all warning notices determined by this decision to have been discriminatorily issued to them by respondent and to mail a notice to the discriminatees notifying them that such action has been taken. As to Marilu G. Najera, since it was the company's policy not to discharge employees unless three warning notices were given, and since it has been determined herein that one of the three was improperly given, it is reasonable to recommend that she be given immediate and full reinstatement to her former position, or substantially equivalent work should her former position no longer exist, and that she be made whole for all wage and other economic losses suffered as a result of her discharge, the formula for such make-whole order to be in keeping with Board determinations.

It would further seem reasonable, and will be recommended that copies of the notice be appropriately posted, mailed to all employees, and read to employees for a reasonable period of time.

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Upon the basis of the entire record, the findings of fact and conclusions of law, I hereby issue the following recommendations:

ORDER

Respondent MIKE YUROSEK & SON, INC., its officers, agents, representatives, successors and assigns shall:

1. Cease and desist from discharging, issuing warning notices, changing work assignments, or otherwise discriminating against, agricultural employees because of their participation in protected concerted activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Expunge from the personnel files of employees Jesus Sanchez, Marilu G. Najera and Timoteo Magallanes, all warning notices found to have been discriminatorily issued to them by respondent, and mailing notice to such discriminatees notifying them that such action has been taken.

(b) Offer Marilu G. Najera immediate and full reinstatement to her former position or substantially equivalent work, without prejudice to her seniority and other rights and privileges of employment, and make her whole for all wage and other economic losses suffered as a result of her discharge, such make-whole to be computed in conjunction with the formulas set forth in Valley Farms v. Rose J. Farms, 2 ALRB 41, F.W. Woolworth Company, 90 NLRB 289, and Isis Plumbing &

Heating Co., 138 NLRB 716.

(c). Issue the attached NOTICE TO EMPLOYEES (to be printed in English and Spanish) in writing to all present workers, wherever geographically located, and post such NOTICE immediately for a period of not less than sixty (60) days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted, such locations to be determined by the Regional Director.

(d) Have the attached NOTICE TO EMPLOYEES read in English and Spanish at the commencement of the first working day following the filing of this Order by the Board, on company time, to all those then employed, by a company representative in the presence of a Board Agent, or by a Board Agent, and accord such Board Agent the opportunity to answer questions which employees may have regarding the NOTICE and their rights under the Act.

3. It is further ordered that the allegations in the consolidated complaint herein not specifically determined to be violations of the Act are dismissed.

DATED: April 27, 1983.

MORTON P. COHEN

Administrative Law Officer

Appendix

NOTICE TO EMPLOYEES

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we have discriminated against workers to discourage concerted activities of such workers. 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 the right to act together to try to help or protect one another.

We will expunge from the personnel records of employees Jesus Sanchez, Marilu G. Najera and Timoteo Magallanes all warning notices discriminatorily issued to them.

We will reinstate Marilu G. Najera to her former job or similar work, and give her back pay for any loss that she suffered while not working here as a result of our discriminatory activities.

We promise that:

We will not issue warning notices to employees for protected concerted activities.

We will not fire employees because of their

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protected concerted activities.

DATED: _____

MIKE YUROSEK & SON, INC.

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.