

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PAPPAS & COMPANY, INC., and	)	
PAPPAS ENTERPRISES, INC.,	)	
	)	
Respondent,	)	Case No. 79-CE-23-F
	)	
and	)	
	)	
JESUS MANUEL GUTIERREZ,	)	8 ALRB No. 97
	)	
Charging Party.	)	
	)	

AMENDMENT TO DECISION

On December 24, 1982, we issued a Decision and Order in the above-captioned matter. After careful consideration of a Motion for Reconsideration filed by the General Counsel and a Response to that Motion filed by Respondent, we have decided to amend that Decision and Order as follows:

The last full paragraph on page 2 of the aforesaid Decision is hereby deleted and the following paragraph is hereby substituted therefor:

As the record establishes that each crew usually consists of 13 employees (a crew captain and 12 pickers), the Regional Director shall determine during the compliance stage of this proceeding the names of all employees who were members of Crews Nos. 36 and 37 at the time the strike began, all of whom we conclude were discriminatorily discharged on August 3, 1979. Our remedial Order providing for reinstatement and backpay will therefore apply to the 20 employees named in paragraph 2(a) of the Order and to any and all other employees who were members of Crew No. 36 or Crew No. 37 on that date.  
(George Arakelian Farms (1982) 8 ALRB No. 36.)

Paragraph 2(a) on page 3 of the aforesaid Order is hereby

deleted and the following paragraph is hereby substituted therefor:

(a) Offer to the employees referred to below immediate reinstatement to their former jobs or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges:

Angel Carbajal  
Asencion Carbajal  
Ceferino Carbajal  
Elias Carbajal  
Jose Carbajal  
Margarito Carbajal  
Rufino Carbajal  
Jesus Gomez  
Jesus Manuel Gutierrez  
Jesus Llamas  
Jose Martinez

Juventino Mejia  
Lucio Moreno  
Refugio Nunjaray  
Jaime Quesada  
Jesus Quesada  
Santiago Quesada  
Francisco Rebolledo  
Jesus Rubalcava  
Geldardo Vargas  
Any other members of Crews Nos. 36  
and 37 who were discharged on  
August 3, 1979.

Dated: January 28, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

PAPPAS & COMPANY, INC., and	)	
PAPPAS ENTERPRISES, INC.,	)	Case No. 79-CE-23-F
	)	
Respondent,	)	
	)	
and	)	8 ALRB NO. 97
	)	
JESUS MANUEL GUTIERREZ,	)	
	)	
Charging Party.	)	
_____	)	

DECISION AND ORDER

On December 9, 1980, Administrative Law Officer (ALO) Beverly Axelrod issued the attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Labor Code section 1146, 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 attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO, as modified herein, and to adopt her recommended Order with modifications.<sup>1/</sup>

We reject Respondent's contention that Elias Carbajal, as the captain of Crew No. 37, is a supervisor not subject to the protection of the Act. Consistent with industry practice,

<sup>1/</sup> We do not read the ALO's conclusions as being based on a theory of condonation, as our concurring colleague seems to imply. Rather, the ALO found the timing of the discharges to be one factor that supported a finding of discriminatory motivation.

Respondent customarily hires full crews rather than individual workers, such crews having been pre-assembled by the workers themselves or by a self-designated captain or crew leader. Labor Code section 1140.4(j) defines "supervisor" as someone who, in the interest of the employer, has the authority to effect or to effectively recommend various personnel actions requiring the use of independent judgment. It is the person's power to act as an agent of the employer in exercising the powers set forth in the statute which confers supervisory status. While Carbajal may act as an agent for his fellow crew members, such as when he receives work assignments for the crew, transports the crew or allocates to the individual crew members their share of the crew's collective earnings, there is insufficient evidence to establish that he is, or was, a supervisor within the meaning of the Act. Carbajal lacks any role in formulating or affecting management's policy and he has no authority over any other of Respondent's employees.

As the record establishes that each crew usually consists of 13 employees; i.e., a crew captain plus 12 pickers, the Regional Director will determine during the compliance stage of this proceeding the exact number of workers in each of these crews at the time the strike began and the number of strikers who made an unconditional offer to return to work after it ended and were refused reinstatement. (George Arakelian Farms (May 20, 1982) 8 ALRB No. 36.)

#### ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor

Relations Board (Board) hereby orders that Respondent Pappas & Co., Inc., and Pappas Enterprises, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to hire or rehire, or otherwise discriminating against, any unreplaced economic striker, upon his or her unconditional offer to return to work, because he or she has engaged in a lawful strike or work stoppage, or any other concerted activity protected by Labor Code section 1152 of the Act.

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

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

(a) Offer to the employees referred to below immediate reinstatement to their former jobs or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges:

Angel Carbajal	Juventino Mejia
Asencion Carbajal	Lucio Moreno
Ceferino Carbajal	Refugio Nunjaray
Elias Carbajal	Jaime Quesada
Jose Carbajal	Jesus Quesada
Margarito Carbajal	Santiago Quesada
Rufino Carbajal	Francisco Rebolledo
Jesus Gomez	Jesus Rubalcava
Jesus Manuel Gutierrez	Geldardo Vargas
Jesus Llamas	Any other members of Crews Nos. 36
Jose Martinez	and 37

(b) Make whole each of the employees referred to in paragraph 2(a), above, for all losses of pay and other economic losses they have suffered as a result of Respondent's discriminatory

refusal to reinstate them after their one-day strike, 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. (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 periods and the amounts of backpay and interest 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 agricultural employees employed by Respondent at any time from August 2, 1979, to the date of mailing of the Notice.

(f) 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.

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

Dated: December 24, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member



MEMBER McCARTHY, Concurring:

I concur in the result reached by my colleagues. However, I find merit in Respondent's exception to the ALO's finding that its failure to terminate workers at the time the rock throwing occurred is evidence that the discriminatees were discharged for engaging in concerted activity, implying thereby that Respondent condoned the alleged misconduct, and therefore do not rely on this evidence.

A United States Court of Appeals has stated that the National Labor Relations Board's doctrine of condonation "prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven." (Packer's Hide Association, Inc. (8th Cir. 1966) 360 F.2d 59 [62 LRRM 2115].) This is not a case where workers were allowed to return to work with assurances that their employer intended to overlook the alleged conduct. (See generally, Chesty Foods, Division of Fairmont Foods Company (1974) 215 NLRB 388

[87 LRRM 1750].) The record reveals that Respondent's supervisors met to discuss the incident after the workers had left the fields and, at that time, decided to deny reinstatement to workers they had observed throwing objects and so advised those workers immediately upon their arrival at the work site the following morning.

Dated: December 24, 1982

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Regional Office, the General Counsel of the Agricultural Labor Relations Board (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 refusing to rehire the employees referred to below on August 3, 1979, because they engaged in a one-day strike in protest against their pay and working conditions. 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 (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 you have these rights, we promise that:

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

SPECIFICALLY, the Board found that it was unlawful for us to discharge:

Angel Carbajal	Rufino Carbajal	Lucio Moreno
Ascencion Carbajal	Jesus Gomez	Refugio Nunjaray
Ceferino Carbajal	Jesus Manuel Gutierrez	Jaime Quesada
Elias Carbajal	Jesus Llamas	Jesus Quesada
Jose Carbajal	Jose Martinez	Santiago Quesada
Margarito Carbajal	Juventino Mejia	Francisco Rebolledo
Any other members of Crews Nos. 36 and 37.		Jesus Rubalcava
		Gelardo Vargas

WE WILL NOT hereafter refuse to reinstate any unreplaced economic striker, who makes an unconditional offer to return to work, because he or she has engaged in any lawful strike or other protected concerted activities.

WE WILL reinstate the employees listed above to their former or substantially equivalent employment, without loss of seniority or other employment privileges, and we will reimburse them for all losses of pay and other money they have suffered because of our refusal to rehire them after the one-day strike.

Dated:

PAPPAS & COMPANY, INC., and  
PAPPAS ENTERPRISES, INC.

By: \_\_\_\_\_  
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Pappas & Co., Inc., & Pappas  
Enterprises, Inc.

Case No. 79-CE-23-F  
8 ALRB No. 97

ALO DECISION

The ALO found that Respondent unlawfully laid off two cantaloupe harvesting crews plus one individual from another crew (a total of 20 employees) following their participation in a one-day strike by eight crews as a means of protesting the Company's rate of pay. The ALO rejected as pretextual Respondent's asserted defense that it laid off these workers as a means of disciplining them for their having thrown dirt clods and/or rocks at other employees and equipment at the start of the protest. The ALO found that the wage protest constituted protected concerted activity and although the laid off workers engaged in the throwing of objects in conjunction with the protest, such conduct was inconsequential and therefore did not strip this activity of its otherwise protected nature. She ordered Respondent to offer reinstatement, with back pay, to all employees who were laid off on the basis of the alleged misconduct (i.e., the throwing of dirt clods and/or rocks) but dismissed, for lack of evidence, allegations in the complaint to the effect that the Company unlawfully laid off 33 additional employees for the same reason.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions but observed that the record established that each cantaloupe crew normally consists of 13 workers. Accordingly, the Board deferred to the compliance stage of this proceeding a determination as to whether additional crew members were laid off and whether they should be included in the order of reinstatement.



STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of: )  
)  
PAPPAS & COMPANY, INC., )  
PAPPAS ENTERPRISES, INC., )  
)  
Respondents, )  
)  
and )  
)  
JESUS MANUEL GUTIERREZ, )  
)  
Charging Party. )  
\_\_\_\_\_ )

Case No. 79-CE-23-F

Ricardo Ornelas  
of Fresno, California for the  
General Counsel

Dressler, Stoll, Quesenbery, Laws &  
Barsamian, by  
Marion I. Quesenbery  
of Newport Beach, California and  
Howard J. Silver  
of Sacramento, California for  
Respondents

DECISION

Statement of the Case

BEVERLY AXELROD, Administrative Law Officer: This case was heard before me in Fresno, California on May 12, 13, 14, 15, and 16, 1980. The Complaint, issued on December 12, 1979, alleges violations of Section 1153(a) of the Agricultural Labor Relations Act (herein called the Act). The Complaint is based on charges filed on August 3, 1979 by Jesus Manuel Gutierrez and duly served on the Respondents.

During the hearing the General Counsel moved to amend the Complaint by adding Pappas Enterprises, Inc. as a Respondent. There was no opposition thereto and the motion was granted.

All parties were given full opportunity to participate in the hearing, and after the close thereof the General Counsel and the Respondents each filed a brief in support of its respective position.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

#### FINDINGS OF FACT

##### I. Jurisdiction

Respondents admit, and I so find, that at all times material to this case the Respondents (hereinafter called the company) were agricultural employers within the meaning of Section 1140.4(c) of the Act.

I also find that the following twenty named persons were, at all material times, agricultural employees within the meaning of the Act: Angel Carbajal, Asencion Carbajal, Elias Carbajal, Ceferino Carbajal, Jose Carbajal, Margarito Carbajal, Rufino Carbajal, Jesus R. Gomez, Jesus Manuel Gutierrez, Jesus Llamas, Jose Martinez, Juventino M. Mejia, Lucio Moreno, Refugio Nunjaray, Jaime Quesada, Jesus Quesada, Santiago Quesada, Francisco Rebolledo, Jesus Rubalcava, and Geldardo G. Vargas.

##### II. The Alleged Unfair Labor Practice

The Complaint alleges that the company violated the Act by discharging the above-named employees for engaging

in protected activity.<sup>1/</sup>

Respondents assert that they had just cause to discharge the named employees for engaging in unprotected activity.<sup>2/</sup>

A. The Operation of the Farm

Although much testimony was given concerning the company's operations, the issue in this case is quite precisely focussed and only a brief summary of the company's business need be presented here.

The company<sup>3/</sup> farms in two locations, West

1/I dismissed charges relating to thirty-three other employees because no evidence was adduced with regard to them: Pedro Allala, Artemio Andrade, Alvino Rios, Dolores Medel, Ramon Moreno, Ovidio Abarca, Juan Castro, Luis Alonso, Camilo Barrera, Ruben Carcia M., Robert Arrellano, Jorge Arellano, Juan Martinez, Miguel Chacon, Bernardo Mendoza, David Orellano, Felix A. Ramos, Pedro A. Yrabeta, Pastor Torres, Joel Perez, Luis M. Soria, Cenobio Ramirez, Crisoforo Mercado, Marco Torres, Guadalupe Martinez Daniel Nevarez, Manuel Rodriguez, Anselmo Moreno, Humberto Santoyo, Francisco Nungaray, Enrique Vega, Secundino Valadez, and Clemente Mejia. See Tr. IV, 30-42. With regard to Felix Ramos, I inadvertently left his name out in listing those I dismissed (Tr. IV, 34). However it is clear that his name was included in the Respondents' motion and that I ruled that his name was to be among those dismissed. (See entire discussion, Tr. IV, 33-34). General Counsel's brief does not include Ramos as one of the twenty individuals still in the case. (See Post-Hearing Brief on Behalf of the General Counsel, p. 4, n. 4). General Counsel reserved the right to later move to put any of the dismissed individuals back in the case upon a showing that evidence was presented as to them (see Tr. IV, 34), but the General Counsel has made no such motion.

2/Respondents in the Answer initially asserted that the Complaint had been improperly issued, but Respondents' brief relies solely on the defense that the discharges were justified.

3/There are five corporations involved in Respondents' business. Pappas Enterprises, Inc. is responsible for the farming of the crops; Pappas Farms, Inc. leases the farming equipment; Pappas Land and Mendota Land Companies own the land and lease it to Pappas Enterprises; Pappas & Company, Inc. is responsible for packing the produce. The entities involved in this case are Pappas Enterprises, Inc. and Pappas & Company.

Valley Ranch (8700 acres) and Mendota Ranch (5000 acres). Its operations include cotton, barley, safflower and melons, but only the melon harvest is at issue here.

The melons are harvested by crews composed of thirteen individuals. The crews are put together by the individuals in them, not the company. Members of the crew choose one person as "captain", and that individual is the one to whom the company usually communicates instructions.<sup>4/</sup> The captain informs the company that a crew is available for work, and if work is available a company supervisor hires the crew. This is done on a daily basis. Once hired, the crew is given a truck to load and the work begins.

In early August, 1979, the company had eight crews harvesting melons in Mendota. Four of the crews were under the direction of a company supervisor, Samuel Bernal, and four were under the supervisions of a labor contractor used by the company, Ben Zamudio.<sup>5/</sup>

The melons are harvested by the truckload. Each crew is given a truck to load. The truck beds are generally 24 feet long, and rigged with a chain and backboard so that the effective length for melons is about 22 feet. The crews are paid by the number of feet of melons loaded.<sup>6/</sup>

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<sup>4/</sup>The captain has no special status with the company and is paid the same and works the same as the other members of the crew.

<sup>5/</sup>Under Section 1140.4(c) of the Act, employees of a farm labor contractor are deemed employees of the Respondents.

<sup>6/</sup>The wage rate in August, 1979 was approximately \$5.70 per foot of melons.

The harvesting generally begins at 6:00 a.m. each morning.

B. The Events of August 2, 1979 and the Discharge of the Employees

On August 2nd the crews assembled as usual around 6:00 in the morning. However on this day the company had trouble finding enough trucks for the harvest, and no trucks had arrived by 8:00 a.m. When the trucks did arrive they were rented trucks, which many workers believed were a few feet larger than the normal company trucks. At this point a commotion began.

When one of the crews (Crew #38) began getting into a truck to begin work, other employees began shouting for that crew not to work. Shortly thereafter dirt clods and rocks were thrown by some of the employees towards the truck into which Crew 38 was being loaded. There is a great discrepancy regarding the nature of the throwing--from two or three dirt clods (as described by one witness for General Counsel) to a barrage of rocks lasting several minutes (as described by one witness for Respondents).

It is undisputed that after a short while (ranging from estimates of thirty seconds to a few minutes) the supervisors present quieted things down and no more objects were thrown. It is also undisputed that the employees involved in the incident were complaining to the supervisors about matters directly relating to their employment: they were complaining about the large size of the trucks they would have to load that day, about the height of truck beds, about the late starting time and about their pay rate.

Shortly after this some people from the company came, including Phil Pappas. Pappas met with the captains of the crews, and after discussions with them he agreed to make certain changes in the size of the truck beds. He also asked them to work that day, but they refused partly in protest and partly because it was several hours past the usual starting time.

Three individuals were identified by the supervisors as having thrown rocks/dirt clods. Two of these, Pedro Allala and Jesus Gutierrez were under the supervision of Luis Zamudio (field representative of the labor contractor), and these individuals were told the next day by Zamudio that they were discharged. In addition, two crews (Crews #36 and 37) were identified by company supervisor Sam Bernal as having among them members who threw rocks. When these crews arrived for work the next day the entire crews were discharged.<sup>7/</sup>

### III. Discussion of the Issues and Conclusions

The single issue presented in this case is whether the discharge of the twenty employees was unlawful retaliation for protected concerted activity over wages and working

<sup>7/</sup>During the hearing there was some testimony about whether these crews had in fact been discharged. However, in its brief Respondent relies solely on the defense that the discharges were justified by the rock throwing conduct. In any event, I specifically find that these two crews were discharged. Nineteen of the twenty individuals in this case (see above, Section I, Jurisdiction) were in these two crews. The twentieth, Jesus Gutierrez, was in a different crew; I find that he also was discharged.

conditions, or whether it was a justified response to unprotected conduct of throwing dirt and rocks.

At the outset, certain general propositions should be kept in mind.

First, it is a violation of Section 1153(a) of the Act for an employer to discharge employees because the employees have engaged in concerted activity to complain about working conditions. S & F Growers, 4 ALRB No. 58; Matsui Nursery, Inc., 5 ALRB No. 60.

Second, where the General Counsel shows by a preponderance of the evidence that there has been a prima facie case of discharge for protected activities, the burden shifts to the Respondent to produce a valid reason for the discharge. Arnaudo Bros., Inc., 3 ALRB No. 78.

Third, violent activities by workers can constitute a valid reason for discharge. See, e.g., Kayser-Roth Hosiery Co., v. NLRB, 447 F.2d 390 (6th Cir., 1971).

Fourth, the actions of the employer must be evaluated in light of the entire context of the incident. It must be determined by an overall evaluation of the evidence whether the employer actually discharged the employees for a valid reason, or whether the discharge was pretextual and really in response to the concerted activity. Martori Brothers Distributors, 5 ALRB No. 47.

With these considerations in mind, I first find that the employees' complaints about the size of the truck-beds and the rate of pay were protected concerted activity under the Act. Indeed, this was virtually a classic case of concerted protest and "on the spot" bargaining over a sudden change in

working conditions.

I also find that the General Counsel has shown by a preponderance of the evidence that the discharges of those employees was because of the concerted activity. There is really no dispute that the employees were discharged over this incident; the Respondents' position is simply that the discharge was because of the rock/dirt throwing aspect of the incident. I turn, therefore, to the Respondents' claim that the discharges were justified.

In evaluating this claim, I will divide the employees into two groups: those who were not identified individually as throwing any rocks/dirt, and those who were. The vast majority of the employees discharged were in the former category.

A. Employees Not Identified as Throwing Rocks/Dirt

With regard to this category of employees, I find that their discharge was unlawful under the Act, done in retaliation for their concerted protest and not because of actual rock throwing. I make this finding for a number of reasons.

1. The rock/dirt throwing incident appears to have been relatively brief and minor. Respondents' main witness, supervisor Bernal, testified that the incident ended within thirty seconds after he told the workers to stop. Tr. IV, 52. Further, although it was testified that a few of the employees in the truck were hit, there was no evidence of any injuries. I wish to stress that I am in no way condoning violent behavior. As stated above, such behavior can be grounds for valid discharge.

However, in viewing the overall context of the incident I am taking into account the relative nature of the actions of the employees in this particular incident. I am not, of course, basing my finding simply on this aspect; rather, this is only one factor and my finding is based on the combination of factors listed below.

2. The Respondents did not attempt to fire any of the employees at the time. The company talked with the employees' captains on the spot, and agreed to make certain changes in the trucks. The next day, when the employees came to work they were told they were discharged.

3. I find significant the testimony of Respondents' witness Ben Zamudio, the labor contractor supervisor. He testified that he and company supervisor Sam Bernal met and that: "When he and I got together to discuss the incident, we felt that only the persons that were recognized throwing clods should not be allowed to go into the field." Tr. III, 145. However, the next day Bernal discharged the entire crews #36 and #37.

4. There is testimony, which I credit, from employee Angel Carbajal which demonstrates supervisor Bernal's actual motivation. He testified that when Bernal discharged the crews the next day they appeared for work. Bernal said, "(t)hat we didn't feel like working, that we were only strikers." Tr. III, 101.

For this combination of reasons, then, I find that the discharge of they employees in Crews 36 and 37 who were not identified as throwing rocks/dirt was actually in retaliation for their protected concerted protest against their working

conditions. Cf. Martori Brothers Distributors, 5 ALRB No. 47.<sup>8/</sup>  
Thus, I find that the following employees were unlawfully discharged: Angel Carbajal, Asencion Carbajal, Ceferino Carbajal, Jose Carbajal, Margarito Carbajal, Rufino Carbajal, Jesus R. Gomez, Jesus Llamas, Jose Martinez, Juventino M. Mejia, Lucio Moreno, Refugio Nunjaray, Jaime Quesada, Jesus Quesada, Santiago Quesada, Francisco Rebolledo, Jesus Rubalcava, and Geldardo G. Vargas.

B. Employees Identified as Throwing Rocks/Dirt

Witnesses for Respondents indentified three employees as actually having thrown rocks/dirt: Pedro Allala (Tr. III, 28), Jesus Gutierrez (Tr. III, 28), and Elias Carbajal (Tr. IV, 50).

With regard to Pedro Allala, I have already dismissed him from the case after the General Counsel's concession that the only showing regarding his discharge was that it was for misconduct in throwing rocks. Tr. IV, 42.

8/This is not a case like Kayser-Roth Hosiery v. NLRB, 447 F.2d 390, cited by Respondents in their brief. There the group of employees were all involved in the incident, shielding the rock throwers from attempts to reach them and to get them to stop. There is no evidence in this case of cooperative efforts by all the employees in the crews to conduct violent acts. Rather, this case appears more like Advance Ind. Div.-Overhead Door v. NLRB, 540 F.2d 878 (1976), where the court held that "the Company only proved that one of the two [employees] threw the rocks but not which one. These facts provide an insufficient basis on which to justify discharging the two." Ibid, at 883. The whole context of this case, including the testimony of Ben Zamudio and Angel Carbajal, makes it clear that the wholesale discharge of the entire crews was in retaliation for the concerted activity of those crews.

Regarding Elias Carbajal, supervisor Sam Bernal testified that he saw Carbajal throwing rocks. Carbajal was not asked by either counsel about this incident during his testimony. Based on Bernal's own testimony, however, I find that Carbajal was not discharged because of rock throwing, but rather he was also discharged for his participation in the concerted protest. Bernal testified that he did not fire Carbajal at the time, but simply told him to stop. Nothing more was said until his crew (#36) reported to work the next day, at which time they were all discharged.<sup>9/</sup> Further, I have already credited (above) the testimony of Angel Carbajal that Bernal explained the discharges as being because they were "strikers." Thus it appears that there was no attempt to single out Carbajal for his actions; rather he was discharged along with the entire crew. Since I find that the motivation for Carbajal's discharge was retaliation for his having been involved in his crew's protest over working conditions, I find that his discharge was a violation of Section 1153(a) of the Act.

Although I have not had difficulty in concluding that the discharges of the employees of Crews #36 and #37 were retaliatory, I find the case of the final employee, Jesus Manuel Gutierrez, much more closely balanced. Nonetheless, after careful consideration and for all the reasons discussed below, I have concluded that the reason for his discharge was also retaliation for having participated in the work stoppage and protest, and not for throwing dirt/rocks.

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<sup>9/</sup>In fact, Bernal testified that when Phil Pappas arrived on the scene on August 2nd, Bernal did not mention to Pappas that Elias Carbajal had been throwing rocks. Tr. IV, 77.

Initially there is the question whether Gutierrez actually threw any rocks or dirt clods. Two witnesses for Respondents, supervisor Sam Bernal and contractor-supervisor Luiz Zamudio, testified that they saw Gutierrez throwing objects. Tr. III, 28; Tr. IV, 87-88. Gutierrez denied that he threw anything. Tr. II, 27. In evaluating the testimony, I cannot credit fully either version. Bernal, by his own testimony, was focussing on the actions of his own crews and was not paying much attention to Zamudio's crews, of which Gutierrez was a member. Zamudio testified he saw Gutierrez throwing things, but he first stated that he was throwing rocks (Tr. III, 28), then later stated it was dirt clods (Tr. III, 86). He also said he did not know how many dirt clods Gutierrez threw. The vagueness of Bernal and Zamudio's testimony regarding Gutierrez contrasts with the clear and voluminous descriptions they gave regarding another employee, Pedro Allala, who threw rocks. However, even though I do not fully credit their testimony, I also do not fully credit Gutierrez' complete denial. Therefore, I conclude that Gutierrez did in fact throw some dirt or rocks, although I also conclude that his role was minor.

There are two reasons, however, that lead me to conclude that Gutierrez was really discharged for being part of the work protest. First, the testimony of contractor supervisor Luis Zamudio reveals that Gutierrez was acting in something of a leadership role in the protest. He testified that when Pappas came to talk with the captains, Gutierrez, who was not a captain, came forward to participate in the meeting. Gutierrez stated that he was doing so, according to Zamudio,

because "I'm a spokesman." Zamudio responded, "you're not a spokesman, you're a worker." Zamudio then ordered Gutierrez to move away from the meeting, which Gutierrez did. Tr. III, 37, 86. During this time Zamudio did not tell Gutierrez that he was fired, and did not say anything to him about throwing rocks.

Second, I find a significant contradiction among Respondents' witnesses as to the decision to fire Gutierrez. Ben Zamudio (Luis Zamudio's father and head of the labor contracting firm) testified that he came to the ranch the next day and that company supervisor Sam Bernal had told him that Gutierrez was not to be allowed to work in the field. Tr. III, 144-147. However, Bernal testified that he never told Zamudio that Gutierrez should not be allowed to work:

A: ... I never tell him [Zamudio] what to do.

Q: Didn't you recommend what he should do?

A: I don't recommend nothing to a contractor.

Q: Didn't he ask you what he should do?

A: No.

Tr. IV, 88.

In view of the vagueness and contradictions in the testimony of Respondents' witnesses as to how and why Gutierrez was discharged, and in view of the testimony that Gutierrez had put himself forward as a "spokesman" for the workers, I find that in fact Gutierrez was discharged because of his role in the concerted protest, in violation of Section 1153(a) of the Act.

### C. Summary of Conclusions

I have concluded that on August 2, 1979 the named employees engaged in concerted activity, protected by the Act, protesting wages and conditions of employment. During this activity there was a brief period in which some workers engaged in unprotected conduct of throwing dirt and/or rocks. I have further concluded that although the Respondents have sought to justify the discharges of the employees on the basis of the rock/dirt throwing, this justification is simply pretextual and the real reason the employees were discharged was retaliation for having engaged in the protected activity. Accordingly, the discharges were in violation of Section 1153(a) of the Act.

### IV. Remedy

Having found that Respondents have engaged in certain unfair labor practices within the meaning of Section 1153(a) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents unlawfully discharged the employees listed in the footnote below,<sup>10/</sup> I will recommend that Respondents be ordered to offer them immediate and full reinstatement to their former or substantially equivalent jobs. I shall further recommend that Respondents make them whole

10/The employees are: Angel Carbajal, Asencion Carbajal, Ceferino Carbajal, Elias Carbajal, Jose Carbajal, Margarito Carbajal, Rufino Carbajal, Jesus R. Gomez, Jesus R. Gomez, Jesus Manuel Gutierrez, Jesus Llamas, Jose Martinez, Juventino M. Mejia, Lucio Moreno, Refugio Nunjaray, Jaime Quesada, Jesus Quesada, Santiago Quesada, Francisco Rebolledo, Jesus Rubalcava, and Geldardo G. Vargas.

for any losses they may have incurred, pursuant to the formula set forth in Sunnyside Nurseries, 3 ALRB No. 42 (1977).

I will also recommend that a Notice shall be posted in Respondents' place of business, and also given to each of the discharged employees, stating that Respondents will cease and desist from interfering with the protected rights of employees under the Act, such notice to be printed in both English and Spanish.

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondents, their officers, their agents, and representatives, shall:

1. Cease and desist from interfering in any manner with, restraining, and/or coercing employees in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act.

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

(a) Offer the employees listed in Footnote 10,

supra, immediate and full reinstatement to their former or substantially equivalent job without prejudice to any rights and privileges which they may have had as employees, and to make them whole for any losses they may have suffered as a result of their termination, in accordance with the procedures described above in the section entitled "Remedy."

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the back pay due.

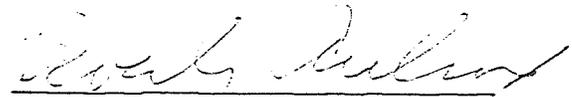
(c) Give to each of the employees described in section (a) above a copy of the notice attached hereto and marked "Appendix", such notice to be printed in both English and Spanish. Copies of this notice shall be furnished Respondents for distribution by the Regional Director for the Fresno Regional Office. Respondents are required to explain to each employee at the time the notice is given to him or her that it is important for the employee to understand the contents of the notice. Respondents are further required to offer to read the notice to each employee if the employee so desires. Respondents shall also post the notice in a prominent place or places at Respondents ranches.

(d) Notify the Regional Director in the Fresno Regional Office within twenty (20) days from receipt of a copy of this Decision of steps Respondents have taken to comply therewith, and continue to report periodically thereafter until

full compliance is achieved.

It is further recommended that all allegations in the Complaint involving persons other than those listed in Footnote 10, supra, be dismissed.

Dated: December 9, 1980



BEVERLY AXELROD  
Administrative Law Officer



Appendix

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act and has ordered us to notify all employees of the following:

1. We will reinstate the following employees to their former jobs and give them back pay for any losses that they had while they were off work: Angel Carbajal, Asencion Carbajal, Ceferino Carbajal, Elias Carbajal, Jose Carbajal, Margarito Carbajal, Rufino Carbajal, Jesus R. Gomez, Jesus Manual Gutierrez, Jesus Llamas, Jose Martinez, Juventino M. Mejia, Lucio Moreno, Refugio Nunjaray, Jaime Quesada, Jesus Quesada, Santiago Quesada, Francisco Rebolledo, Jesus Rubalcava, and Geldardo G. Vargas.

2. We will not discharge, lay-off, or in any way punish or interfere with the rights of our employees to act together to get a contract or to help and protect one another.

3. We will not interfere with the rights of our employees to engage in these and other activities which are guaranteed to them by the Agricultural Labor Relations Act.

Signed: Pappas Enterprises, Inc.

Dated:

By: \_\_\_\_\_ (Title)

