Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. R. NORTON COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 80-CE-117-SAL 80-CE-145-SAL 80-CE-188-SAL 9 ALRB No. 9

DECISION AND ORDER

On December 3, 1982, Administrative Law Judge (ALJ)[1/] Robert LeProhn issued the attached Decision in this proceeding. Thereafter, General Counsel timely filed exceptions and a supporting brief, and Respondent filed a brief in reply to the General Counsel's exceptions.

Pursuant to the provisions of Labor Code section 1146,[2/] 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 of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions and to adopt his recommended Order.

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[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

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

ORDER

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

Dated: March 8, 1983

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

J. R. Norton Company

9 ALRB No. 9
Case Nos. 80-CE-117-SAL
80-CE-145-SAL
80-CE-188-SAL

ALJ DECISION

The ALJ found that a statement by a forelady to an employee who was a member of the union's negotiating committee not to go to a negotiation session because he might get burned was not a threat because it was isolated, an expression of a personal view, was made in the absence of other section 1153(a) misconduct by the forelady, was accompanied by permission to go to the negotiation session and was tempered by her comment that it was up to the employee whether to go to the negotiation session.

BOARD DECISION

The Board adopted the rulings, findings and conclusions of the ALJ and dismissed the complaint in its entirety.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Agricultural Labor Relations Board
DEC 3 1982
RECEIVED
Exec. Secretary

In the Matter of: J. R. NORTON COMPANY, Respondent, and UNITED FARM WORKERS OR AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 80-CE-117-SAL 80-CE-145-SAL 80-CE-188-SAL

APPEARANCES:

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DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer:

This matter was heard before me on June 8 and June 9, 1982, in Salinas, California. Complaint issued on August 5, 1981, grounded upon charges filed by the United Farm Workers of America, AFL-CIO (UFW) in cases number 80-CE-117-SAL and 80-CE-188-SAL. Respondent filed and duly served its Answer on August 15, 1981. On November 19, 1981, General Counsel issued an order and complaint consolidating the above numbered cases with 80-CE-145-SAL. Respondent filed its Answer to this Complaint on December 1, 1981.

Charging Party moved to intervene by motion made prior to the prehearing conference. Its motion was granted.

At the close of General Counsel's case in chief, counsel for the General Counsel moved to dismiss the allegations of Paragraph 5(b) of the Complaint (Case No. 80-CE-188-SAL) due to an inability to locate a witness necessary to prove the allegations of that paragraph. The motion was granted.[1/]

Respondent moved, at the close of General Counsel's case in chief to dismiss the allegations of Paragraph 5(a) (Case No. 80-CE-117-SAL). The motion rested on two grounds: (1) General Counsel failed to make a prima facie case "there was a bargainable change in May or June 1980 in the number of people in the crews;" and (2) assuming such a change, General Counsel presented no

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1. Paragraph 5(b) alleged Respondent discriminated against Daniel Barraza by transferring him from a position as closer in a machine wrap crew to the position of cutter, thereby violating sections 1153(a) and (c) of the Act.

evidence the change had any effect upon wages or conditions of employment of Respondent's employees.

Respondent's motion was granted on the ground that General Counsel failed to adduce evidence that the utilization of an additional packer in a lettuce machine harvest crew was a change in "other conditions of employment" regarding which Respondent had a duty to bargain.[2/] An alternative ground for granting Respondent's motion was that if a violation occurred it was de minimis.

At issue is the allegation that Respondent violated section 1153(a) by warning one of its employees not to go to a union meeting.

All parties were given full opportunity to participate in the hearing; Respondent and General Counsel filed briefs in support of their respective positions. Charging Party did not participate in the proceedings.

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

In its Answer Respondent admitted it is an agricultural employer within the meaning of 1140.4(c) and that the UFW at all times material was a labor organization within the meaning of section 1140.4(f). At the hearing Respondent amended its Answer to admit the filing and service of the charges in the above-captioned

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2. Though not cited in ruling on the motion, Rod McLellan Company (1977) 3 ALRB No. 71 supports the ruling.

cases.

II. RESPONDENT'S OPERATIONS

Respondent's operations are described in some detail in J. R. Norton Company (1982) 8 ALRB No. 76, in the decision of the Administrative Law Officer at pages 6 through 9. Some testimony was offered in the instant case regarding Respondent's annual harvesting cycle. It is unnecessary to recite that testimony.

III. SUPERVISORY STATUS OF SARAH FAVILA

Sarah Favila is the person charged with uttering the threat contended to be violative of section 1153(a). The Complaint alleged, and Respondent denied, she is a supervisor within the meaning of the Act. There is some evidence in the record to support the conclusion Favila is a supervisor.[3/]

Wrap machine supervisor, Roberto Santa Maria Medina testified that Favila as a machine crew foreman takes on an additional packer in her crew when the need arises without consultation with him. She also adds workers when there are absences in her crew. This testimony was uncontroverted and is credited.

Favila testified without contradiction that she has the authority to grant workers time off, that she has done so and that

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3. Administrative notice has also been taken of the ALO's decision in J. R. Norton Company, supra, in which the ALO stated, "It was not disputed that the harvesting foremen are supervisors within the meaning of section 1140.4(j) of the Act" (fn. 13, p. 7). Sarah Favila is among those listed as a foreman during the 1979 season in New Mexico, Arizona, Blythe, California and the Imperial Valley. See Sunnyside Nurseries, Inc. (1978) 4 ALRB No. 88, p. 3, fn. 4, regarding the appropriateness of taking administrative notice of Board decisions and ALO Opinions appended thereto.

she granted Lopez time off to attend a union meeting. An indicia of supervisorial status as defined in section 1140.4(j) is the authority to grant time off. This authority, coupled with the uncontroverted testimony that Favila has authority to hire workers into her crew suffices to establish her as a supervisor within the meaning of the Act.[4/]

IV. THE UNFAIR LABOR PRACTICE

Paragraph 5(c) of the Complaint alleges that Favila in violation of section 1153(a) threatened Maximo Lopez with reprisals if he attended a union meeting. Lopez and Favila were the only witnesses to the conversation during which the alleged threat was made. Each testified at the hearing.

In 1980, while working in Favila's machine wrap crew, Lopez was appointed to the UFW negotiating committee. The appointment was made by UFW representative Celestino Rivas in the presence of Favila.

On the day before he was to attend his first negotiating meeting, Lopez had a conversation with Favila. It was initiated by Favila and no one else was present. Favila asked whether Lopez was going to the negotiating committee meeting. Lopez responded he was. Favila said she was going to give him a jacket as a gift; Lopez responded he didn't need any jackets. Favila asked again whether he

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4. It is not necessary that an individual possess all the indicia of supervisory status set forth in section 1140.4(j) in order to be found to be a supervisor. Section 1140.4(j) like NLRA section 2(11) is to be read in the disjunctive, and one having any of the authorities spelled out in the section is properly found to be a supervisor. Arizona Public Service Company v. N.L.R.B., (9th Cir. 1971) 453 F.2d 228, 230; N.L.R.B. v. Fullerton Publishing (9th Cir. 1960) 283 F.2d 545, 548.

was going to the meeting; he again said yes. "Then she said that she was advising me that I should not go because I was going to get burned but that it was up to me and I told her that yes, that I was going."[5/] Nothing further was said.

Favila had little recollection of the conversation with Lopez. She recalled only that it occurred during 1980. She denies knowing the nature of the meeting which Lopez wanted to attend. At another point, Favila testified she had no recollection of whether Lopez was in her crew in 1980. Her testimony was inconsistent and contradictory regarding a request by a crew member to attend a negotiating meeting. Initially she recalled no such request; a question or two later she recalled having received such a request. Favila denied offering to give Lopez a jacket; she also denied ever threatening any worker who requested permission to attend a meeting; she denied uttering the words attributed to her by Lopez.

ANALYSIS AND CONCLUSIONS

The threshhold question is whether Lopez or Favila should be credited with respect to their conversation between them regarding Lopez's attendance at a negotiating meeting. If Favila is credited, clearly there was no violation of the Act.

Respondent argues that General Counsel has failed to prove by a preponderance of the evidence that a violation of 1153(a) because the testimony upon which he relies to establish the violation was uncorroborated and controverted, citing S. Kuramura, Inc. (1977) 3 ALRB No. 49. In Kuramura, the Board, when faced with

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5. Lopez' testimony.

a direct conflict in the testimony of General Counsel's witness and Respondent's witness in a situation in which there was no additional evidence to shed light on the truth of the allegation, found General Counsel failed to meet his burden of proof and dismissed the allegation. In Kuramura, there was partial corroboration of the testimony of Respondent's prime witness; such is not the case here.[6/] However, the corroboration was provided by Kuramura's wife and does not appear to have been dispositive. Notwithstanding Kuramura, there is, in the instant case, a difference in the quality of the testimony which entitles Lopez and not Favila be credited.

Although Favila specifically denied making the allegedly threatening statement, her lack of recollection and vagueness regarding her 1980 interaction with Lopez, and the contradictions in her testimony cast doubt on her credibility. Therefore, her denial she made the statement attributed to her by Lopez is not credited. Lopez's testimony that Favila advised him not to go to the committee meeting because he would get burned is credited.[7/]

Having found that Favila spoke the words attributed to her by Lopez, we proceed to determine whether her utterance was a "threat" and thus coercion of Lopez in the exercise of his section

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6. It should also be noted that General Counsel produced two witnesses testifying to the same statement by Respondent.

7. During this conversation Favila purportedly asked Lopez whether he was going to a union meeting. The Complaint does not allege, nor has General Counsel argued, unlawful interrogation or the impression of surveillance. Similarly, the purported offer of a jacket was neither pleaded nor argued as an illicit offer of benefit. Since neither question was fully litigated no finding is made with respect to whether Respondent's conduct in said respects violated the Act.

1152 rights. General Counsel's brief provides no assistance at this stage of the analysis, apparently adopting the position that the threatening character of Favila's statement is beyond doubt. Would the problem were so simple.

It is only that speech attributable to an employer which contains a threat of reprisal or force or promise of benefit which constitutes evidence of an unfair labor practice.[8/] The test of whether a particular employer contains a threat of reprisal is whether, taking account of all the surrounding facts and circumstances, the person or persons to whom the statements are made could reasonably be expected to regard them as precursors of reprisals if he continued to engage in activities protected by section 1152.[9/] It is not necessary that General Counsel prove Respondent intended its speech have a coercive effect;[10/] nor is it necessary that the speech in fact have had a coercive effect.[11/] In the instant case, Favila need not have intended to threaten Lopez when she told him he would get "burned" if he attended the negotiating meeting, nor is it necessary that Lopez felt threatened.

Authorities have noted it is difficult to determine how to characterize statements which standing alone may reasonably be read

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8. Labor Code section 1155; Merrill Farms v. Agricultural Labor Relations Board (1980) 113 Cal.App.3d 176.

9. Jack Brothers and McBurney, Inc. (1978) 4 ALRB No. 18, p. 3.

10. Merrill Farms v. Agricultural Labor Relations Bd., supra, p. 184.

11. Gorman, Basic Text on Labor Law, p. 132; Republic Aviation Corp. v. N.L.R.B. (1945) 324 U.S. 793.

either as threats of reprisal or "as information concerning possible adverse consequences" of participating in union activity of which an employee should be aware.[12/]

> Each case requires a fine assessment of the record, with no case serving as much of a precedent for others because of different combinations of facts such as the commission or non-commission of independent unfair labor practices, the identity of the speaker, the subject matter of the communication, the exact language employed . . . and the employer's history of past encounters with collective bargaining.[13/]

In the instant case we have one brief conversation between Lopez and a first level supervisor. Favila's statement was directed solely to Lopez and was not overheard by others. Respondent is chargeable with 1153(a) conduct of its supervisors, unless specifically repudiated, irrespective of whether that conduct was authorized; and when speech rather than conduct is involved, Respondent is reponsible for that speech of its supervisors which can reasonably be perceived as a threat of reprisal or promise of benefit.[14/]

Merrill Farms is dispositive of the question of whether Favila's isolated statement to Lopez supports a finding Respondent committed an unfair labor practice. As in Merrill Farms there is no evidence that Favila's statement was more than an offhand expression of a personal view suggesting what might happen in the event of unionization. There is no evidence of other 1153(a) conduct by

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12. Gorman, Basic Text on Labor Law, p. 151.

13. Ibid., pp. 151-152.

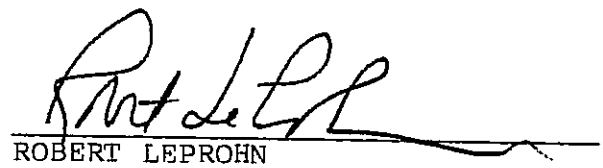
14. Merrill Farms v. Agricultural Labor Relations Board, supra.

Favila. Moreover, her statement was accompanied by granting the requested time off and tempered by her comment that it was up to Lopez to decide whether to attend the meeting. General Counsel has failed to prove by a preponderance of the evidence that Favila's statement was violative of section 1153(a).[15]

RECOMMENDED ORDER

I recommend the Complaint be dismissed in its entirety.

DATED: December 2, 1982



ROBERT LEPROHN
Administrative Law Officer

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15. In reaching this conclusion no reliance has been placed upon the fact that Favila participated in a UFW strike the preceding year or upon the fact she has been a member of the UFW. Having found no violation of the Act, it is unnecessary to consider arguments regarding whether the violation was de minimis.