

Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. G. BOSWELL, INC. ,)	
)	
Respondent ,)	Case No. 80-CE-82-D
)	
and)	
)	
FERNANDO MONTELONGO)	8 ALRB No. 31
and ANA MONTELONGO ,)	
)	
Charging Parties.)	
)	

DECISION AND ORDER

On November 3, 1981, Administrative Law Officer (ALO) Arie Schoorl issued the attached Decision in this proceeding, recommending that the Complaint be dismissed. Thereafter, Respondent timely filed its exceptions and supporting brief, which, although objecting to no part of the ALO's Decision, sought the recovery of attorney's fees and litigation costs against General Counsel. No other party took exception to the ALO's proposed decision.

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

The Board has considered the record and the ALO's Decision in light of Respondent's exceptions and brief, and has decided to affirm the ALO's rulings, findings, and conclusions, and to adopt his recommended order.

Respondent contends that an award of attorney's fees

and costs is needed as a deterrent to the prosecution of meritless and vexatious charges. Respondent thereby requests that the Board reconsider its Decision in Neuman Seed Company (Oct. 27, 1981) 7 ALRB No. 35.

We are not persuaded by Respondent's argument. We note the ALO's finding that the General Counsel established a prima facie case of an unfair labor practice against Respondent. Further we note that the ALO found that Respondent failed to show that the General Counsel acted frivolously in its prosecution of the Complaint. We hereby affirm our decision in Neuman Seed Company, supra, 7 ALRB Mo. 35, wherein we decided that the Board lacks authority to award fees and costs against the General Counsel. Accordingly, we reject Respondent's request for such a remedy.

ORDER

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

Dated: May 10, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

J. G. Boswell, Inc.

8 ALRB No. 31

Case Ho. 80-CE-82-D

ALO DECISION

Administrative Law Officer (ALO) Arie Schoorl found that Respondent had not violated Labor Code section 1153 (a) when it discharged two employees, Ana and Fernando Montelongo. The ALO found that although General Counsel presented a prima facie case of an unfair labor practice, Respondent overcame that case with its evidence of a valid business justification for the two discharges.

The ALO found that General Counsel had established: that Fernando Montelongo and his co-workers had engaged in protected concerted activities; that they had discussed among themselves the problem of shortened hours in May of 1980; that through Fernando Montelongo they complained about the problem to a supervisor, Bill Sandrini; that the discussion with Sandrini was neither illegal nor improper; that Respondent knew or should have known about the concerted nature of Fernando Montelongo's conversation with Sandrini; and the layoffs occurred only 10 days after the protected concerted activity.

However, the ALO found that Respondent had a valid business justification for discharging the Montelongs. Respondent was engaged in a plan to reduce the number of workers in its employ through a redesign of the ranch. Furthermore, a threat made by one of Respondent's foremen to Fernando Montelongo concerning Montelongo's complaint about the reduction in work hours was not a factor in Respondent's decision to lay off either Fernando or Ana Montelongo. As further evidence that Respondent did not lay off the employees for a discriminatory reason, the ALO noted that Respondent had recalled both of the Montelongs for the 1980 cotton harvest. The ALO recommended that the complaint be dismissed.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALO, dismissed the complaint, and reaffirmed its holding in Neuman Seed Company, Inc. (1981) 7 ALRB No. 35 that it lacks the authority to award attorney's fees against the General Counsel.

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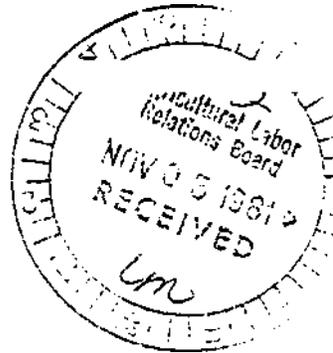
This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
)
J. G. BOSWELL, INC.,)
)
Respondent,)
)
and)
)
FERNANDO MONTELONGO)
and ANA MONTELONGO,)
)
Charging Parties.)
)

Case No. 80-CE-82-D



Raquel Leon, Esq.
for the General Counsel

Hugh Fielder, Esq. and
Jerrold Rishe, Esq. for
Respondent

DECISION OF THE ADMINISTRATIVE LAW OFFICER

ARIE SCHOORL, Administrative Law Officer: This case was heard by me on June 21, 22, and 23 in Delano, California. The complaint which issued on May 13, 1981, based on a charge filed by Tomas Flores, an employee of Respondent's, J. G. Boswell, Inc., (hereinafter called Respondent), and duly served on Respondent on June 5, 1980, alleged that Respondent committed a violation of the Agricultural Labor Relations Act (hereinafter referred to as the ALRA or the Act). General Counsel filed an amended Complaint on June 17, 1981, which limited the charging parties to just Fernando Montelongo and his wife Ana Montelongo, and specifically alleged that Respondent had discriminatorily laid off the Montelongs because Fernando Montelongo had protested to Respondent's supervisors, Bill Sandrini and Ricardo Valencia, regarding the short working hours of members of Montelongo's crew on or about the week before the layoff.

The General Counsel and the Respondent were represented at the hearing. The General Counsel and the Respondent timely filed briefs after the close of hearing. Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the post-hearing briefs submitted by the parties, I make the following findings of fact:

I. Jurisdiction

I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act. I also find that Fernando Montelongo, Refugio Torres, Manuel Moreno and Ana Montelongo are agricultural employees within the meaning of Section 1140.4(b) of the Act.

II. Background Information

J. G. Boswell raises cotton and wheat on its Kern Lake Ranch near Bakersfield. Since 1977 it has been implementing a plan to reduce the number of irrigators needed to irrigate its fields at said ranch. The plan consists of the leveling of land, converting many smaller fields into fewer larger ones, and using larger pumps and longer furrows so that each irrigator can tend to a larger number of acreage. Respondent has permanently laid off irrigators in May of 1979, 1980 and 1981. The month of May was chosen because irrigation work slacks off at that time of the year.

A maximum amount of irrigators is needed from March through May to irrigate the wheat. Then in July, the irrigation requirements pick up again as the cotton plants near maturity. In October, November and December, irrigation requirements diminish; however, the cotton harvest is going on and a full complement of irrigators continues to be employed switching back and forth between irrigation and harvesting work. During the first months of the year, once again the irrigation work is reduced.

During 1980, Bill Sandrini was the manager of the Kern Lake Ranch, and Les Carey was the supervisor in charge of the irrigators. Carlos Rubio was the foreman of the crew which included Fernando Montelongo, Refugio Torres and Manuel Moreno, and Eliobardo Aldana was the same crew's assistant foreman.

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III. Respondent Allegedly Laid Off Fernando Montelongo and Ana Montelongo Because the Former Protested About Working Conditions at Respondent's

A. Facts

Fernando Montelongo has worked at Respondent's as an irrigator since 1977. He worked from March or April to December of every year. His wife, Ana, had also worked at Respondent's since 1977. She had worked in the weeding during the spring and summer months and in the harvesting of the cotton during the autumn.

On May 27, 1980, Respondent permanently laid off 5 irrigators including Fernando Montelongo. On June 6, Respondent laid off Ana Montelongo along with 6 of her coworkers on the weeding crew. Respondent later rehired the two Montelongs for the cotton harvest season but have never recalled them to work for either irrigation or weeding work, respectively.^{1/} Respondent hired approximately 5 new irrigators after the cotton season in 1980. Respondent has no seniority system.

A few days before the May layoff, Fernando Montelongo complained to Respondent's ranch manager, Bill Sandrini, about shorter hours for the irrigators "when there was a lot of work". General Counsel contends that this complaint constituted protected concerted activity and was the reason why Respondent laid off Fernando Montelongo and never rehired him as an irrigator. General Counsel also contends that Respondent laid off Ana Montelongo as a member of the weeding crew and never rehired her again as such because of her husband's protected concerted activity.

^{1/} Respondent maintains though that both of them are still eligible for recall for these two job assignments.

Respondent maintains that it permanently laid off Fernando Montelongo as part of a long-range plan to reduce the number of irrigators needed to irrigate their Kern Lake Ranch properties. Because of the success of the plan, Respondent was able to reduce the number of irrigators in 1980 from 27 to 21 and then in 1981 from 21 to 16. Respondent explained it had not rehired Montelongo for irrigation work because he did not possess the ability to perform the tasks to such a high degree as those individuals who were hired to fill the irrigation job openings. However, Respondent contends that Montelongo is still eligible for reemployment as an irrigator at Respondent's.

Fernando Montelongo testified that approximately 3 weeks before the May 27 layoff, Guillermo Rubio, the night foreman for the irrigators, told him that Respondent planned to lay off 7 irrigators, but he would not be included. However, Guillermo Rubio credibly testified that he knew nothing about the pending layoff and never talked to Montelongo about the subject. He claimed he hardly had conversations with Montelongo because the latter worked on the day shift while he worked on the night shift so they would only see each other when one was starting to work and the other was leaving.

Refugio Torres, Montelongo's fellow irrigator, testified that one of the foremen, Eliobardo Aldano, known as "Sammy", had told him that a layoff of irrigators was imminent. Aldana in his testimony denied ever making such a remark and explained that he had no knowledge of the layoff until it occurred. On the other hand, Bill Sandrini, the ranch manager, testified he was sure the irrigators were informed by management of the impending layoffs "a

little bit ahead of time " .

During the two-week period preceding the layoff, Respondent had reduced the irrigators¹ work time from 6 days to 4 or 5 days per week. Several days before the layoff, Fernando Montelongo discussed this problem with his coworkers, Refugio Torres and Manuel Moreno. They agreed he should talk to Bill Sandrini, the ranch manager, about increasing the work hours.

At the end of the workday, these three employees, along with Jacinto Macias ^{2/} went to the shop at the Kern Lake Ranch and Montelongo informed Carlos Rubio that they would like to talk to Sandrini about the short hours. Rubio replied that he had already talked to Sandrini about the subject but, if they insisted, Sandrini was present in the shop office at that time.^{3/} The four entered the shop building and found Sandrini in an office with Richard Valencia. Montelongo entered the office while Refugio Torres stood just outside the closed door^{4/} while Manuel Morena and Jacinto Macias remained inside the building at a soft drink vending machine.

^{2/} Macias testified that he was not involved in any conversation about this subject with his fellow irrigators and was only present because he rode to and from work in the same motor vehicle with the other three irrigators.

^{3/} In his testimony Rubio denied that Montelongo had approached him about talking to Sandrini about short hours. However, Montelongo and Torres testified to this fact and also Respondent's witness Jacinto Macias confirmed that Montelongo had talked to Rubio that afternoon about meeting with Sandrini. Accordingly, I discredited Rubio's testimony in this respect.

^{4/} There were windows in the office so Torres was visible to the occupants of the office.

Montelongo complained to Sandrini about the short hours and the fact that some irrigators, including himself, would be laid off for the following day and requested that Sandrini provide the irrigators with more work hours since there was a lot of work.^{5/} Sandrini responded that he could not since there was not enough work. Montelongo left the office and reported the conversation to Torres and Morena.

A day or two later, on a Friday, Bill Sandrini and Les Carey, the irrigation superintendent, met to discuss for the first time the problem of too little work and too many irrigators. They agreed that the time had come to implement the annual permanent layoff of irrigators in keeping with the overall plan of reducing the number of irrigators at Respondents. They decided that 8 irrigators in all would be laid off and that Carey would decide which ones.

Montelongo claimed that on the same Friday that he, Refugio Torres and Avelardo Herrera, another irrigator, were riding with Carlos Rubio in the cabin of the latter's pickup and Rubio told Montelongo that he should not have talked to Sandrini because it

^{5/} Sandrini could remember that the conversation took place, but could not remember the subject matter or contents. Montelongo and Torres in their testimony both confirmed this version of the facts. Richard Valencia testified that Montelongo only talked about "work the next day", but I found Montelongo's and Torres' testimony in this respect more credible than Valencia's. In fact, Montelongo and Torres testified in a straight forward manner, and their versions of the facts were consistent both on direct and cross-examination. Torres' testimony as to he and Manuel Morena conversing with Montelongo about speaking to Sandrini was convincing and substantiated Montelongo's testimony that he had informed Sandrini that he should not rest the irrigators because there was a lot of work.

would turn out bad for him. Refugio Torres in his testimony confirmed this conversation, but Carlos Rubio denied ever making such a comment.

By Monday, May 26, Carey had decided which irrigators would be laid off, and he met with Rubio on that day to find out what his opinion would be in this respect. Rubio indicated his agreement with Carey's selections.

On Tuesday, May 27, 1980, Respondent laid off permanently irrigators Fernando Montelongo, Tomas Flores, Guadalupe Villabuel, Everardo Aguilar and Manuel Aguilar. On June 11, Respondent permanently laid off irrigators Refugio Torres and Israel Estrada. On June 4, 1980, Respondent recalled Tomas Flores to work on laying irrigation pipes, but he failed to report for work.

On June 6, Respondent laid off Ana Montelongo along with six other members of a weeding crew. On or about October 14, 1980, Respondent recalled Ana Montelongo along with 5 of the other 6 employees to work in the cotton harvest. In October, Respondent recalled Fernando Montelongo, Everardo Aguilar and Manuel Aguilar to work in the cotton harvest. In December 1980, Respondent recalled Israel Estrada to work as an irrigator. Respondent failed to call back-either Refugio Torres or Guadalupe Villabuel for any type of work.

After the cotton harvest in 1980, Respondent hired Francisco Rivera, Jose Luis Herrera, Angel Esparza, and Corona^{6/} as irrigators. All of them had worked for Respondent in the 1980

^{6/} No evidence in record as to first name.

cotton harvest, but none had worked as an irrigator for Respondent previously.

Respondent also hired Juan Cisneros as an irrigator after the 1980 cotton harvest, but he had had previous experience as an irrigator in Respondent's employ. Carey testified that the criteria for hiring irrigators were based on Respondent's evaluation of an individual's ability to perform the particular irrigation job where the opening occurred rather than any seniority system.

B. Analysis and Conclusion

General Counsel contends that Respondent laid off Fernando and Ana Montelongo because of the former's protected concerted activity in protesting about working hours at Respondents.

The Board in Lawrence Scarrone, 7 ALRB No. 13 (1981), held that the same criteria used in deciding section 1153(^) discrimination cases, involved discrimination based on employees' union activities should be used in deciding section 1153(a) discrimination cases, based on employees' protected concerted activities. Accordingly, General Counsel must prove by a preponderance of the evidence that the employer knew, or at least believed, that the employee(s) had engaged in protected concerted activity and discharged or otherwise discriminated against the employee(s) for that reason.^{7/} in applying these criteria to determine the reason for the employer's discriminatory action, the Board in Scarrone also took into account the timing of the discriminatory action and the employer's explanation for its

^{7/} Jackson and Perkins Rose Co., 5 ALRB No. 20 (1979)

conduct.

In Shelly & Anderson Furniture Mfg. Co. v. N.L.R.B., 497 F.2d 1200 (9th Cir. 1974), the Court defined a protected concerted activity as follows: 1- there must be a work-related complaint; 2-the concerted activity must further some group interest; 3- a specific remedy must be sought; and 4- the activity should not be unlawful or otherwise improper.

In the instant case, it is clear that Montelongo, Torres and Morena engaged in protected concerted activities when they consulted about a work-related problem, the short hours, and then went to protest about it and seek a remedy, i . e . , longer hours. The method used consulting with the ranch manager was clearly neither illegal nor improper.

The next question to be answered is whether Respondent knew or should have known about the concerted nature of Montelongo's conversation with Sandrini. Montelongo mentioned to Sandrini the current shorter hours for all the irrigators and requested a remedy for them as a group not just for him personally. Moreover, Sandrini from his vantage point inside the office could see Torres just outside the office and could assume that Torres had accompanied Montelongo because of his interest in Montelongo's protest and request. Therefore, I find that Fernando Montelongo engaged in a protected concerted activity and Respondent knew or should have known about it.

The factor of timing herein infers an improper motive on the part of Respondent since the layoff of Montelongo occurred a scant five days after his concerted activity and the layoff of his

wife merely ten days after his layoff.

General Counsel has presented a prima facie case and the burden now rests on Respondent to come forward with a clear explanation that it laid off the Montelongs for a legitimate business reason.

First of all, I find that Respondent was actually engaged in a plan to simplify irrigation work at the Kern Lake Ranch and that it had a legitimate business reason in laying off irrigators in 1979, 1980 and 1981 on a permanent basis. The question to be answered is whether Respondent in selecting the irrigators to be laid off on May 27 determined that Montelongo should be included because of his recent protest to Sandrini about the irrigators' work hours. A concomitant question is whether Montelongo 's concerted activity was also a determining factor in Respondent's decision to lay off Ana Montelongo in June 1980.

General Counsel argues that originally Respondent had not slated Montelongo for a permanent layoff since Guillermo Rubio had told Montelongo about the pending layoff and that Montelongo would not be among those laid off. However, Sandrini and Carey both credibly testified that they did not reach a decision about the number to be laid off or the designated individuals until the Friday and Monday before the layoff, some two to three weeks after Guilermo Rubio had allegedly given Montelongo this information. So it would have been impossible for Guillermo Rubio to have this information at

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the time Montelongo claimed he talked to him about a layoff.^{8/}

The only other evidence pointing to an improper motive on the part of Respondent in selecting Montelongo for layoff was the testimony in respect to Carlos Rubio allegedly telling Montelongo three days after the conversation with Sandrini that things would go bad for him. Both Montelongo and Torres testified to this comment by Rubio, but the latter denied it. Rubio may very well have made such a comment, but if he did, and I am not convinced that he did so, it probably had more to do with Montelongo going over his head to complain to Sandrini. Rubio did not like the idea of Montelongo talking to Sandrini right from the start and tried to discourage him from doing so just before Montelongo consulted with Sandrini about the short hours. The weak part of General Counsel's argument in this respect is to tie Rubio's remark in with Sandrini's and Carey's decision to include Montelongo in the group of irrigators to be permanently laid off. After Sandrini and Carey conferred on Friday about the number of irrigators to be laid off, Carey met with Carlos Rubio on the following Monday to make firm the names of the layoffees. Carey had already determined who was to be laid off on his own. At the meeting with Rubio, he showed him a list of the names and asked his opinion. Rubio indicated to Carey his agreement with the list. Thus, according to the credible testimony of Carey, Rubio made no changes. It can be inferred from this that

^{8/} Montelongo did not deliberately falsify his testimony in regard to Guillermo Rubio's comment about a layoff. I believe that Rubio made a general comment about a future layoff, but without the specifics described by Montelongo and the latter thinking back, with an imperfect memory, filled in such details.

Montelongo's name was already on the list and Rubio had no effect in changing the list in the sense of having Montelongo's name added.

Furthermore, additional factors point to lack of an improper motive by Respondent. Respondent recalled both Fernando Montelongo and Ana Montelongo to work in the cotton harvest. At the same time, it recalled their co-workers, both irrigators, and weeders that had been laid off the same time they had been. This equality of treatment by Respondent of those who have engaged in concerted activity and those who had refrained from doing so leads credence to the fact that Respondent did not engage in discriminatory treatment of the alleged discriminatees.

It is true that Respondent employed new irrigators in December 1980, some 7 months after the concerted activity. General Counsel argues that as Respondent failed to recall Montelongo as an irrigator at that time, it indicates that it still harbored animus against him for his concerted activities, and it was this same animus which was the determining factor both in his layoff in May 1980 and Respondent's decision not to rehire him in December 1980.

I find this to be rather strained logic on the part of General Counsel. If Respondent did possess animus toward Montelongo for his May concerted activities, why did it rehire him and his wife for the October harvest? It appears that if Respondent hired him for the cotton harvest and not for further irrigating that the reason would not be his May concerted activities but the fact that the comparative degree of his ability to work in the cotton is higher than his ability to do irrigation work.

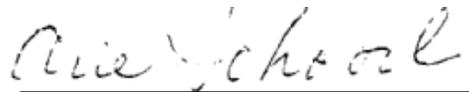
Another factor which weighs heavily against General

Counsel's case is the minor insignificant nature of Montelongo's concerted activity and the alleged prolonged punishment by Respondent for such a supposed transgression. Montelongo did not organize a work stoppage at Respondent's nor did he spread discontent among workers about shorter hours for irrigators. All he did was to drop in after work and request Sandrini, the ranch manager, to give more work to the irrigators. After Sandrini explained the reason, he left without protest or complaint and continued to work out his last few days at Respondent's without any further confrontations. Sandrini credibly testified that he could not remember the contents of the conversation. It is logical that a ranch manager would not remember the contents of a conversation of such minor import, and it would be logical that he would not take retaliatory measures against such inconsequential conduct by one of his subordinates.

RECOMMENDATION

Upon the foregoing Findings of Fact, Conclusions of Law, and the entire record, and pursuant to Section 1160.3 of the Act, I hereby recommend that the Complaint be dismissed in its entirety.

DATED: November 3, 1981



ARIE SCHOORL
Administrative Law Officer