

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

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| GOURMET FARMS, INC., |) | |
| |) | Case No. 81-CE-55-EC |
| Respondent, |) | |
| |) | |
| and |) | |
| |) | 10 ALRB No. 41 |
| RAUL M. ESTRADA, |) | |
| |) | |
| Charging Party. |) | |
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DECISION AND ORDER

On November 4, 1982, Administrative Law Judge^{1/} (ALJ) Thomas Patrick Burns issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions to the ALJ's Decision with a supporting brief and General Counsel timely filed a reply.

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

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 only to the extent consistent herein.

^{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 stated.

Concerted Activity

Respondent excepts to the ALJ's conclusion that a meeting occurred on April 13, 1981 between the irrigators and foreman Manuel Barajas concerning a new rule prohibiting irrigators from staying inside their cars during working hours. Respondent also contends that even if such a meeting occurred, irrigator Haul M. Estrada did not engage in concerted activity when he spoke up at the meeting because the evidence only established he was speaking on his own behalf and not on behalf of the group. A brief recitation of the evidence is necessary to resolve these exceptions.

Irrigator Raul M. Estrada testified that on April 13, 1981, foreman Barajas gathered all the irrigators together at the usual meeting place before work and announced that irrigators would no longer be able to rest inside their cars during working hours.^{3/} According to Estrada, the following conversation took place. One employee, Marcelo, asked if the workers could use their cars to store drinking water, and Barajas replied in the affirmative. Estrada then spoke up and stated that if the company did not want workers to stay inside their cars during working hours, the company should have a bus pick up workers in Calexico and transport them to and from work. Barajas responded that those who accepted the rule should return to work and those who did not, "should go on down the road." Estrada testified "we

^{3/} Several irrigators testified that during the summer and winter, the irrigators frequently need to use their cars during work for shade or warmth.

said we weren't going down the road, that we did not approve of the law (i.e., that newly announced rule) because we did not know of any company that had a law that did not let you use your cars." (Emphasis added.) Estrada also complained to Barajas at the meeting that although the work shift was 24 hours, irrigators were only paid for 22 hours of work and workers therefore had a right to be in their cars for 2 hours. Finally, Estrada also told Barajas that the company should pay for the gasoline costs incurred when irrigators reported to work at one ranch and were sent instead to another ranch. According to Estrada, Barajas replied that that was the worker's problem, not the company's.

Estrada testified that prior to that meeting with Barajas, he had conversations with workers concerning gas for transportation costs and not being paid for a full 24 hours of work. He stated that when he spoke up to Barajas he considered himself speaking not just for himself but on behalf of all the irrigators who were present.

Foreman Manuel Barajas testified that there is no rule prohibiting workers from using their cars during work and denied ever having a conversation with the irrigators about such a rule. Barajas stated that irrigators can sit in their cars during lunch when they want to drink water or when the weather is extreme, and it is only when they stay inside their cars for three to four hours that he may tell them to be more careful with their work.

Respondent produced one irrigator, Refugio Gutierrez,

who testified he was not present during any such meeting with fellow irrigators and Barajas concerning the use of cars during work. Gutierrez did remember Estrada talking to workers about striking to get a pay raise. General Counsel, on rebuttal, produced his own witness, irrigator Antonio Pacheco, who corroborated Estrada's testimony concerning Barajas' announcement of a rule and Estrada's reply that the company should provide a bus.

We reject Respondent's argument that Barajas' denial concerning the meeting of April 13, 1981 should be credited over Estrada's testimony. First, Estrada's testimony was corroborated by a disinterested witness, Antonio Pacheco. Second, employee Refugio Gutierrez' testimony that he was not present at such a meeting merely suggests that not all irrigators may have been present at the meeting. Similarly, a review of Respondent's time sheets does not establish that there was no meeting.^{4/}

The question still remains as to whether Estrada's speaking up at the meeting with Barajas constituted concerted activity. In Meyers Industries, Inc. (1984) 268 NLRB No. 73 [115 LRRM 1025], the NLRB recently announced what standards it

^{4/} In fact, Barajas' testimony explains how employees whose names might not appear in the records as having worked that day may well have been present at the meeting. Barajas admitted that the work shift typically ran from 6:30 a.m. one day to 6:30 a.m. the next morning, and that the shift is recorded as work done on the first day only. Barajas also testified that typically 10 to 12 irrigators work at the ranches and that 5 or 6 irrigators would be replaced at the end of one shift by another shift of 5 or 6 irrigators. Barajas also stated that an irrigator might show up at the usual morning meeting place for non-work related business and thus his name would not show up in the time records.

will henceforth use in deciding whether there exists concerted activity.

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in, with, or on authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. (268 NLRB No. 73, slip opinion p. 12 (footnotes omitted).)

The NLRB in Meyers stressed that in order to constitute concerted activity, there has to be some interaction between employees, such as an actual reliance on each other or an act intended to enlist the support of others in refusing to work.^{5/} If an employee's actions reflected merely individual concern, even if openly manifested by several employees on an individual basis, no concerted action would be found. In Meyers the NLRB found that a truck driver, Kenneth Prill, who refused to drive a truck cited by authorities for vehicular deficiencies, did not engage in concerted activity even though another driver had earlier complained to supervisors, in Prill's presence, about

^{5/} In Mushroom Transportation Co. v. NLRB (3rd Cir. 1964) 330 F.2d 686, 688 [56 LRRM 2034], the court stated that a conversation between two persons may be sufficient to constitute concerted action.

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

the conditions of the same truck and refused to drive it. The NLRB found that the two employees did not in any way join forces to protest the truck's condition; one employee merely stood by while the other made an individual complaint, and then later made the same complaint himself.

Applying Meyers to the case at hand, it is clear that no concerted activity could be found if the evidence simply showed that all the irrigators were gathered together for an announcement of a new rule and that Estrada merely spoke up in the presence of the rest of the workers to express his concerns. In the absence of evidence showing that the other workers joined in Estrada's concerns or authorized him to speak on their behalf, we would be faced with an employee merely expressing his individual concerns to management in the presence of other workers, in much the same way one employee in Meyers expressed his concerns about an unsafe truck in the presence of fellow employee Prill (who later protested the same truck's condition). However, in this case, we have evidence that Estrada intended to enlist the aid of his fellow workers by speaking to them before the meeting about pay for a full 24 hour shift and gas for driving from one ranch to another. Furthermore, Estrada's testimony indicates that Barajas took Estrada's complaints as being a group complaint when Barajas stated that those who did not accept the new rule could go on down the road and that the 24 hour pay and gas demands were the workers problems, not the company's. Lastly, while Estrada was vague as to whom he meant by "we," part of Estrada's testimony about the conversation with Barajas was

couched, in terms of "we said," indicating that there were other (although unspecified) persons who joined Estrada in expressing the same concerns to Barajas at the meeting. We find the preponderance of the evidence indicates that Estrada's action in speaking on behalf of the group was concerted activity and that Barajas understood it in that manner.

The Discharge

General Counsel clearly established a prima facie case that Estrada was discharged because he engaged in protected concerted activity. The discharge occurred only one week after the meeting in which Estrada spoke up about the use of cars, payment for a full 24 hour shift of pay, and gasoline costs. Estrada's discharge followed his open criticism of the new rule about the use of cars, to which Barajas reacted strongly, suggesting that those who didn't accept it could "go on down the road." Thus, the burden shifts to Respondent to show that it would have discharged Estrada in spite of his protected concerted activity.

Respondent's counsel stipulated that Estrada was discharged. Respondent's defense consisted of evidence that Estrada became drunk while at work on April 20, 1981, and had to be replaced with another irrigator. Additionally, Respondent argued that Estrada carried a gun with him at work, endangering other persons. However, general manager Joe Mallobox denied that he fired or laid Estrada off; instead, Mallobox claimed that foreman Barajas laid Estrada off and that he (Mallobox) turned in Estrada's time on the assumption that it was because

Estrada was drunk at work and had to be replaced. Barajas, however, denied firing or laying off Estrada, or recommending such action, claiming that after the April 20 incident, he expected Estrada back to work the next day and replaced him only when he did not return within two weeks. This curious situation caused the ALJ to reject Respondent's defense (that Estrada was fired for being drunk and for carrying a gun) as pretextual and insufficient to overcome the prima facie case.

Despite Estrada's denial that he was drunk, it is clear from the testimony of Respondent's witness, fellow irrigator Refugio Gutierrez, that Estrada was in fact drunk and had to be replaced by another irrigator on the night of April 20. Unlike the ALJ, however, we do not find that the testimony of foreman Barajas and supervisor Mallobox is contradictory. Although Barajas insisted he did not fire or lay off Estrada, or recommend such action, he testified that he spoke to Mallobox about the incident the following morning. Mallobox testified that he assumed from Barajas' account of what happened that Barajas had either fired or laid off Estrada. Based upon this assumption, Mallobox turned in Estrada's time. We find no violation of the Act since the reason why Estrada was fired was not because of his concerted activity but because he was drunk on the job. Although Barajas did not intend to fire Estrada over the incident, Mallobox mistakenly assumed Barajas intended to do so. In this regard, the NLRB in Meyers Industries, Inc. (1983) 368 NLRB No. 73, at page 12, footnote 23, stated that an employee:

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"may be discharged by an employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." [Citation.] Thus, absent special circumstances like *NLRB v. Burnup & Sims* 379 U.S. 21 (1964), there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct.

ORDER

The complaint is hereby dismissed in its entirety,

Dated: October 4, 1984

JOHN P. MCCARTHY, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

GOURMET FARMS, INC.

10 ALRB No. 41

Case No. 81-CE-55-EC

ALJ Decision

The ALJ found that irrigator Raul Estrada engaged in concerted activity when he spoke up at a meeting with his foreman to protest a newly announced rule and to demand certain other changes in working conditions. The ALJ concluded that Estrada was discharged for the concerted activity within a short time thereafter. The ALJ rejected Respondent's defense that Estrada was fired for being drunk on the job and for carrying a gun at work on the grounds that one supervisor's testimony contradicted the foreman's testimony that he did not lay off or fire Estrada, or recommend such action. The ALJ found that the reasons offered by Respondent for the discharge were pretextual and led to the conclusion that the discharge was in response to the concerted activity.

Board Decision

The Board affirmed the ALJ's finding that Estrada was engaged in concerted activity, relying on the application of the NLRB's recent decision in Meyers Industries, Inc. (1984) 268 NLRB No. 73 [115 LRRM 1025]. The Board found that Estrada had previously spoken to workers about the same matters he raised at the meeting with the foreman, that the testimony indicated that others in the group joined in the conversation, and that the foreman understood the conversation as a group statement. The Board, however, overruled the ALJ's conclusion that the reason for the discharge was related to the concerted activity. The Board found that the testimony of the foreman and supervisor was consistent, finding that the supervisor assumed from the foreman's report that he intended to fire Estrada because he was drunk at work, and therefore turned in Estrada's time. The Board therefore found no violation and dismissed the complaint.

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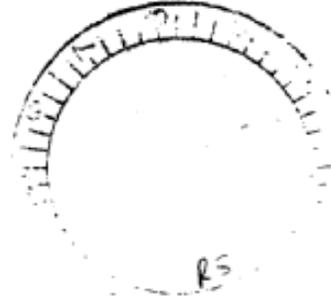
This Case Summary is furnished for information only, and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of)
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GOURMET FARMS , INC.,)
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Respondent,)
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and)
)
RAUL M. ESTRADA,)
Charging Party.)

CASE NO. 81-CE-55-EC



APPEARANCES :

Sarah A. Wolfe of
Dressler, Quesenbery, Laws & Barsamian
Attorneys at Law for Respondent.

Nicholas Reyes for General Counsel.

DECISION OF
ADMINISTRATIVE LAW OFFICER
STATEMENT OF THE CASE

THOMAS PATRICK BURNS, Administrative Law Officer: This matter was heard by me on August 10, and 11, 1982, in El Centro, California.

A Notice of Hearing and Complaint charging Respondent with having violated California Labor Code Section 1153 (c) was issued and served on December 18, 1981. A First Amended Complaint and Notice of Hearing charging Respondent with having violated Sections 1152 and 1153(a) of the California Labor Code was issued and served on June 2, 1982. Following Answers to the foregoing, Bill of Particulars and Response to Bill of Particulars, an additional amendment was made to paragraph 4 of the Complaint, issued and served at a prehearing conference on August 10, 1982.

During the hearing five witnesses testified including the Charging Party. There was no Intervenor in the case. All parties were given full opportunity to participate in the hearing and after the close thereof, General Counsel and Respondent each filed a brief in support of their respective positions. Upon the entire record, including my observations of the demeanor of the witnesses, and in consideration of the briefs filed by the parties, I make

the following findings of fact, analyses, conclusions of law, and determination of relief.

FINDINGS OF FACT

A. Jurisdiction

Gourmet Farms, Inc. is a California corporation that grows and ships a variety of agricultural products in the Imperial Valley. Respondent is an agricultural employer within the meaning of Section 1140.4 of the Agricultural Labor Relations Act (hereinafter, Act).

B. Alleged Unfair Labor Practice

This case involves the alleged discharge of agricultural worker, Raul M. Estrada, from his position as Irrigator at Gourmet Farms, Inc., on the grounds that he had engaged in protected concerted activity. General Counsel alleged that Raul Estrada had spoken up on his own behalf and for fellow workers to protest statements made by Company Foreman Manuel Barajas concerning the use of the employees personal vehicles during working hours. General Counsel alleged that because the Foreman was present and aware of the alleged protest and acting as Agent for the Company he and his Supervisor dismissed Estrada in violation of Labor Code Sections 1152 and 1153 (a).

Testimony of Raul Estrada (Martinez):

Mr. Estrada, the complainant in the case, was an agricultural employee for Gourmet Farms. He was employed November 11, 1980, as an irrigator under the supervision of a foreman named Manuel Barajas. He had been an irrigator in the Imperial Valley since 1970.

Mr. Estrada attended a Union meeting on March 4, 1981, where he signed his name and social security number on the attendance roster. At work the next day he told other employees of the meeting and that there would be another meeting at the end of March.

In mid-March, 1981, Mr. Estrada heard some news on the radio about workers being put back to work by the State of California Coastal Farms. He reported what he had heard to his co-workers. Foreman Barajas was present and said to Mr. Estrada, "what is that about Caesar Chavez; Caesar Chavez has already fallen. Has he already fallen or is he still giving trouble there?" Estrada answered, "Caesar Chavez has never fallen. Will he ever fall? The only thing is that the State is helping people to return to work."

Present during the foregoing conversation were Irrigators: Reymundo, Marcello and Jose, whose last names are unknown, and Pancho Pacheco.

On April 13, 1981, at 6:30 a.m., at a place where the irrigators gathered to be assigned to their respective work locations, Foreman Barajas called the workers together to speak to them. They included persons named: Antonio Pacheco, Marcello, Jose, Tony, and Reymundo, along with Mr. Estrada. Mr. Estrada testified as follows concerning that meeting: "Mr. Barajas said that the company had instituted a new law, that we did not have to use our cars during work. And Marcello said, 'Manuel, does that mean that we're not going to be able to use our cars even to drink water?' He said 'Well, drink water--drink your water, then return to work.' And then I answered--Raul Estrada answered, 'Manuel,' I said, 'if you don't want one to use his car during the hours of work, then why don't you have the company take a bus, which will pick us up in Calexico, those that come from Mexicali and you would leave us at work. The next day in the morning they can pick us up and take us back to Calexico. Only that way will we not use our cars. Because in our cars we bring our food and the water.' 'Those of you who want to accept the law that is initiated by the company, go to work and those of you that don't, go down the road."

"I answered him that I was not going to go down the road, that I was going to go to work, that if they weren't going to accompany me, that they should stop me. And another thing: Since they didn't pay us for 24 hours--they would only pay us for 22, which is the irrigating shift--then we had the right to be in our car those two hours because they didn't pay us for them. And I asked them, 'Give us the gasoline when they move from one place to another.' because there are times when one goes to Mexicali, the ranch, and they send you from the ranch to Holtville. He said that was our problem, not theirs. . . . Barajas said, 'For those of you for whom it's convenient, to go work; the rest of you go down the road. We told them we weren't going down the road, we were going to work, that we didn't approve of that law, because we didn't know of any company that had a law that didn't let you use their cars."

Mr. Estrada testified that he believed he was speaking for all of the employees, not just for himself. He further testified that he had had conversations concerning the problems of gasoline, transportation, etc. with his fellow employees during lunch breaks on earlier occasions.

On April 20, 1981, at 6:00 a.m., Mr. Estrada went to work as usual. He was assigned to work in Field Number 15. At about 11:00 a.m., Mr. Estrada and Mr. Barajas had a conversation. Estrada testified as follows: "Mr. Barajas arrived and asked me why, on the other side, there were two checks running. If the water had been turned in like two men from the same company were cutting wood, I told him that I didn't think the workers were there cutting wood, that would open the gates for the water to go in. Because I had seen Mr. Barajas in the field between about 9:00 and 10:00 in the morning. For me, he was the one who opened the gates. The field was wide, 160 acres. He did it so I wouldn't be making turns from this water to this water. Then I told him, 'I'm going to cut

out these checks, because I'm carrying my water from over there to here, not from here to there.' He said, 'Let them run, because it takes about 12 hours from them to finish.'

He came back and I stayed there irrigating. About 6:30 p.m., I came to Seeley to get food to take back and make a call to Mexicali.

On cross examination Mr. Estrada said, "I'm going to answer exactly how it was. Manuel Barajas told me not to let the water go out the drain, that I should close the drains so that the water would return and wet the points. About 4:00 in the morning he arrived, and he said, 'Raul, the water--the field is under too much water like a lake; open those so that the water can go out.'"

"One day earlier I had inspected the drain. Manuel had also inspected the drain; we didn't notice there was something impeding the flow of water. When I opened my rows, I didn't know that the drain, that the ditch was closed to the drain. When my relief came, I went with them to see--to help open the drain, and I stayed there working until 10:00 in the morning. They didn't pay me for that time from 6:00 to 10:00. Manuel himself told me to go, because we couldn't do anymore. We weren't able to open until they brought a machine with bars of steel to open it. There was a metal container blocking it. They took one of those little machines that has a hand on it to knock down the canal to take out the big tube, because it was the big tube that had the tin can, metal can. Manuel didn't blame me because no one knew that that can was crosswise in the pipe."

Mr. Estrada denied drinking on the job, he denied that the reason the field was flooded was that he was sleeping in his car and he denied that he carried the gun on his person, though he said he did carry it in the car. He further testified that others who had a gun with them at work included Manuel Barajas who has a 9 shot .22, and Francisco Pacheco with a .38 super. He said that he used it for protection against snakes and coyotes and one is very lonesome out there in the desert. He said that his foreman gave him the idea to buy small arms when he first started working there.

Mr. Estrada further testified that on the morning following the water problem, i.e., that last day of his employment on April 20, 1981, Mr. Barajas said to him, "Raul, the irrigating work is a little bit light. Would you like to come to cut wood tomorrow morning? If you don't come to cut wood, come Monday to irrigate."

Estrada testified, "I said I wasn't going to do wood because I get calluses too much, while I work with the shovel and then when I'm chopping on the axe. I wasn't going to come back to work until the following Monday."

On the following Friday, i.e., April 24, 1981, Mr. Estrada went for his pay check. He was surprised to receive two checks

instead of one. On his way across the field he came upon another foreman, i.e., "El Chasis", who had a radio in his car. He asked "El Chasis" to use his radio to call Mr. Barajas and ask why they were giving him two checks. One of the checks was for the week just finished and the other was for the shift that he was not going to finish until the following week.

"El Chasis" used the radio to call Mr. Barajas and he asked why Mr. Estrada was being paid for work not yet done. The voice that came back on the radio sounded more like Mr. Mallobox than that of Mr. Barajas. The person who answered said "Tell Mr. Estrada that he doesn't have any more work with this company."

Testimony of Manuel Barajas:

Mr. Barajas testified that he has been the assistant to Mr. Joe Mallobox, the "high foreman", for about eight years. He is responsible for the irrigators, the water pump and the ditches or canals. He assigns the irrigators to work on the two ranches of Gourmet Farms, i.e., the American Farms Ranch and the Gordon Valley Ranch, near the town of Seeley. The total area covers about three thousand acres.

There are no written rules of work conduct for the irrigators, according to Mr. Barajas. The unwritten rules he said are that their work is well done that water is not wasted; that areas do not remain dry. The irrigators may use their cars for their own protection in the field. They may eat lunch there. They can keep their cars near the place they are irrigating so that they may keep water in the cars. Mr. Barajas also testified that the workers may not drink any alcoholic beverages while working. (Later he admitted that a couple of beers was alright.)

Mr. Barajas denied ever talking to the workers about the use of their cars. (This contradicts the testimony of Mr. Estrada.)

Mr. Barajas said that he had spoken to Mr. Estrada sometimes when he "wasted a lot of water during his work in the field." He said, "Many times he would spill the water during his work. I would tell him to be more careful; for him not to spill too much water, because they could fine us and other things also. I told him to be very careful about that; that he not leave dry spots and for him not to spill a lot of water or waste a lot of water. This is what I would speak to him about."

Mr. Barajas further testified that on one occasion, i.e., the last day of his employment, as it turned out, Mr. Estrada was fine in the morning while irrigating a wheat field, but by 5:00 p.m. he noticed that he was drunk. "I said to him that he should not drink because he would then do his work wrong, or badly." According to Barajas, Estrada answered "Yes, I will try to do my work well.", but an hour later the main canal where he was receiving the water had some door that had been moved which should not have been moved. He noticed then that Estrada had the irrigation in the wheat field. He should have placed that

water in three of these areas. Instead of irrigating three melgas, or flat areas of irrigation, he had put it into eight areas. Barajas explained that every 60 feet is one melga or one area for irrigation. Estrada had approximately 13 feet of water which was enough for three irrigation areas because the length of that field was a half a mile. Very little water could be put in because the plants would burn. It is necessary to put the water in as fast as possible because of the length of the field. Barajas said that Estrada had paid no attention to him, so he had to bring in another man to do the job.

Barajas testified that when he saw the water going into the eight areas instead of three he told Estrada to bring it into the three irrigation areas. Estrada said he would do so, but failed to do it.

According to Barajas he was afraid the main canal would break, so he felt obligated to replace Estrada at about 6:30 p.m. by assigning Mr. Refugio Guitierrez to the work in Field 15. Later that night Barajas returned and found that Estrada was asleep in his car while Guitierrez was replacing him.

Barajas testified that he had seen Mr. Estrada on other occasions drinking in the field. He named five different fields and said he did not recall which other fields in which he had seen him drink alcohol. .

Barajas testified that he had seen Mr. Estrada carry a gun on his person many times including that night of the excess watering in Field 15. He admitted that another person was known to have a gun, but he had not seen it. He denied having a gun of his own while working. He said there are snakes and coyotes in the desert at night.

According to Barajas Mr. Estrada left the following morning, i.e., at 6:00 a.m., April 21, 1981, and did not return to work. Barajas insisted repeatedly that he neither fired Estrada nor did he lay him off. He had every expectation that Estrada would return to work the next day after the over watering incident. He contended that as far as he knew no one fired Estrada. (This was later contradicted by Joe Mallobox, who said it was Barajas who fired Estrada.) Barajas said he did not even have authority to fire anyone.

Mr. Barajas maintained that he saw Estrada two weeks later at the place where they gather to assign work, and when he was asked by Estrada for work, he told him that he could return on condition that he neither drink, nor carry a weapon on the job.

Mr. Barajas was asked if he had spoken to Mr. Mallobox about the problem of over watering by Estrada. He answered as follows:

"Well we did talk a little, because the previous day, he had seen him irrigating Field Number 15; so then, he--on the following day--saw Mr. Refugio on the road and asked him, 'Where

are you coming from?' And he said, 'I irrigated last night in Field Number 15.' But he said, 'How could this happen? Haul was there.' So then, later I saw him and he asked me what had happened to Haul and I said to him how his work had been done at night and the reason why we had placed Refugio in his place. . . . So, then, he (Mr. Mallobox) said to me, 'Well, I am going to talk to him.' But I do not know if he spoke to him or not."

Mr. Barajas said that neither Mr. Mallobox nor any other person told him that Mr. Estrada was fired. He denied knowing even at the hearing that Mr. Estrada was either fired or laved off.

Testimony of Refugio Guitierrez:

Respondent called Mr. Guitierrez who testified that he had been called in to replace Raul in Field 15 at 6:30 p.m., on the occasion in question. He testified that he worked the irrigation by himself. He also claims to have seen that same Raul with a gun on his person on that occasion. When asked if the person he knew as Raul was present in the Hearing Room, he replied no, though Raul Estrada was seated approximately four feet away from him in clear sight.

Testimony of Joe Mallobox:

Respondent called Mr. Mallobox, who testified that he is the grower foreman and supervises Manuel Barajas and Jose Tello at Gourmet Farms. He was familiar with the separation of Mr. Estrada, and said at first that he had been "laid off" by Mr. Barajas. Then he said that Mr. Barajas had fired Mr. Estrada for drinking on the job. He said that he (Mallobox) had turned in Estrada's time plus an additional day for a shift he had coming that same morning. He assumed that Mr. Barajas had fired Estrada since he had replaced him with another man. At that point in the testimony both counsel entered into a stipulation that Mr. Estrada had indeed been fired from his job as an irrigator at Gourmet Farms. (This was, of course, totally contradictory to all of the testimony of the foreman who had fired him, i.e., Barajas.)

Testimony of Antonio Pacheco:

General Counsel called Mr. Pacheco, another irrigator, who rebutted what Mr. Barajas had testified to earlier. He stated that Mr. Barajas had talked to the group about use of their cars, saying that during working hours he did not want them to go to their cars. Mr. Pacheco confirmed that Raul Estrada had spoken up on that occasion.

ANALYSIS

Was there concerted activity?

I find that Raul Estrada did speak up at a gathering of

agricultural workers in response to Foreman Barjas assertions that there had been a change in rules that would not permit the employees to use their cars for shelter, food and water and a place of rest during the times of their lunch breaks. I find that Estrada did make statements of objection to the stated policy change which would have affected the working conditions of the employees. He made such objections and demands for a bus to replace the use of their cars in the presence of Barajas. He did so on behalf of himself and the other irrigators. Accordingly, I find that there was concerted activity.

Respondent's Counsel argues in her brief that some of the persons named by Estrada to be present on the occasion of the alleged concerted activity were not shown by the work records to be working that day. We do not know whether the persons who were there were gathered for that purpose, or if all had been going to work. It would have been well for Respondent to bring in the irrigators named and prove or disprove the matter. As that was not done, we are left with the word of those who testified. Mr. Guitierrez did not recall such an incident. The fact that he was not present does not prove it did not happen.

In light of Mr. Barajas outright falsification of other testimony, I am left with the impression that his testimony is not to be trusted. This leaves me with the word of the complainant, who was not shown to have lied during his testimony.

Was the Employer aware of the Concerted Activity?

I find that Manuel Barajas was an Agent of the Company. He was vested with authority to hire and fire and assign work and control the comings and goings of the irrigators. Though he denied that he would hire and fire, this was contradicted by his own supervisor, Mr. Mallobox. Because Mr. Barajas was not only present during the concerted activity, but reacted openly in response to it, i.e., by saying that those who did not agree to it could take a walk down the road (that is leave the job), it made Respondent aware of the concerted activity.

In addition I find that Mr. Barajas was aware of Mr. Estrada's sympathies for the Chaves Union and that Barajas had expressed anti-union animus in his comments to Estrada in the presence of other workers.

Respondent Counsel argues that since Barajas does not admit to firing Estrada, and because it was Mr. Mallobox who turned in his time, then it should be construed that it was Mallobox who fired Estrada. She contends, then, that because there was no showing that Mallobox was aware of the alleged concerted activity we should conclude that such was not the cause of the termination.

As an Agent of the Company, Barajas knew of the concerted activity and his knowledge is inferred as that of the Company.

Does Case Law Support a Business Justification?

Respondent's Counsel cites several cases in support of her contention that the Respondent need not persuade the court that it was actually motivated by the proffered reasons, but that it is sufficient if Respondent's evidence raises a genuine issue of fact as to whether it discriminated against the Plaintiff.

Her citations are well taken, however, the issue of fact was not satisfied in favor of Respondent because Respondent's key witness, Barajas, is found to have been totally unreliable in his testimony. He said that neither he nor any other person to his knowledge had dismissed Estrada. He contends that he expected Estrada back to work the next day after the water incident. What are we to believe? If on the one hand the witness for the Company says he was willing for Estrada to continue employment and then comes to a hearing and testified to a multitude of reasons for his termination, and then denies that he was terminated, we can only be left in total disbelief.

If Barajas had testified to the fact that he had fired Estrada immediately upon discovery of his being drunk on duty, and or for having caused damage to company property, the case might well have swung in favor of the Employer. The strange thing was however, that he testified to Estrada's carrying a gun and putting others in danger, while Barajas himself and at least one other employee carried a gun (which he denied). There was an effort to show a poor work record of Estrada. There was no evidence of that. In fact, it became clear that Respondent's Counsel was fishing for a justifiable reason of some kind to support a discharge, only to discover during the hearing that Barajas denied using any of those reasons for a dismissal, and indeed, denied the dismissal. It was clearly a shock to Counsel when Mr. Mallobox totally contradicted the Barajas testimony by saying that Barajas had fired Estrada. Something is amiss.

Evidence showing the unconvincing justifications offered by Respondent and the quick timing of the discharge, are evidence of unlawful motive. *S. Kuramura, Inc.* 3 ALRB No. 49 (1977). Each of Respondent's justifications are pretextual and unconvincing, since each of the alleged acts of misconduct did not prompt any discipline whatsoever. *Martori Brothers Distributors*, 5 ALRB No. 47 (1979). Where an employer offers unconvincing reasons to explaining the discharge, a conclusion that the employee was discharged because of protected concerted activity is warranted. *Lawrence Scarrone*, 7 ALRB No. 13 (1981).

I find that General Counsel met his burden of demonstrating that concerted activity had taken place, that Mr. Estrada was a self appointed spokesperson for himself and other workers, that an Agent of the Company, who had previously expressed anti-union animus, was aware of the Estrada action, and that such Agent terminated Estrada on the basis of that concerted activity.

CONCLUSIONS OF LAW

Based on the foregoing, I make the following conclusions of law:

1. Gourmet Farms, Inc. is a California corporation engaged in agriculture and is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

2. Respondent employer engaged in unfair labor practices within the meaning of Section 1152 and 1153(a) of the Act, in so far as it dismissed Raul M. Estrada.

3. The unfair labor practice affected agriculture within the meaning of Section 1140.4(a) of the Act.

REMEDY

Having found that the Employer has discriminated against Raul M. Estrada for having engaged in protected concerted activity by dismissing him from his employment as an agricultural worker, in violation of Sections 1152 and 1153 (a) of the Labor Code, I shall recommend that the Employer shall offer to reemploy Mr. Estrada forthwith, shall make him whole for the loss of pay and other economic benefits resulting from the unfair labor practices, and shall cease and desist from further such actions of discrimination. I recommend that interest be paid at the rate determined by the Board in the recent Lu-Ette Decision, 8 ALRB No. 55.

Accordingly, upon the basis of the entire record and of the Findings of Fact and Conclusions of Law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended order and notice:

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Gourmet Farms, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee with regard to hire, tenure or any terms or conditions of employment because of that employee's involvement in concerted activities.

(b) In any like manner interfering with, restraining or coercing employees exercising their rights guaranteed under Labor Code Section 1152.

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

(a) Immediately offer Raul M. Estrada reinstatement to his former position without prejudice to his seniority or other rights and privileges.

(b) Make Raul Estrada whole for any loss of pay and other economic losses (plus interest thereon computed at a rate consistent with the Lu-Ette decision, 8 ALRB 55), he has suffered as a result of his discharge by Respondent.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records and reports, and all other records relevant and necessary to a determination by the Regional Director, of the back pay period and the amount of back pay due under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall reproduce sufficient copies of each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places at all of its offices, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice, in all appropriate languages, to all employees employed in crews in the Imperial Valley area at any time during the payroll periods from April, 1981 to May, 1981.

(g) Arrange for a Board agent or a representative of Respondent to distribute and read the attached Notice in all appropriate languages to all of its agricultural employees, assembled on company time and property, at times and places 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 employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and 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 it has taken to comply herewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: October 15, 1982



THOMAS PATRICK BURNS
Administrative Law Officer

