Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOE MAGGIO, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 81-CE-ll-EC 82-CE-47-EC 81-CE-24-EC 82-CE-107-EC 82-CE-31-EC 82-CE-193-EC 82-CE-32-EC 82-CE-194-EC 82-CE-33-EC 82-CE-216-EC 82-CE-34-EC 82-CE-217-EC 82-CE-35-EC 11 ALRB No. 15

DECISION AND ORDER

On December 29, 1983, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision in this proceeding.[1/] Thereafter, General Counsel and the Charging Party, the United Farm Workers of America, AFL-CIO (UFW) each timely filed exceptions and supporting briefs. Respondent timely filed reply briefs to the exceptions of the General Counsel and the UFW.

Pursuant to the provisions of California Labor Code section 114-6, the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.[2/]

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.

[1/] All but two charges were settled after the hearing began. Those two charges, 81-CE-ll-EC and 81-CE-24-EC, are the subject of this Decision and Order.

[2/] The signatures of Board Members in all Board Decisions appear with the signature of the chairperson first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

ORDER

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

Dated: June 26, 1985

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

CASE SUMMARY

JOE MAGGIO, INC.,

11 ALRB No. 15
Case Nos. 81-CE-11-EC
81-CE-24-EC
82-CE-31-EC
82-CE-32-EC
82-CE-33-EC
82-CE-34-EC
82-CE-35-EC
82-CE-47-EC
82-CE-107-EC
82-CE-193-EC
82-CE-194-EC
82-CE-216-EC
82-CE-217-EC

ALJ Decision

The returning economic strikers, both irrigators, were involved in separate incidents which led to their respective discharges. In the first incident, one of the alleged discriminatees, Figueroa, was waiting to begin work when another employee, a former non-striker, took a swing at him. Figueroa pulled out a gun and aimed it at his assailant before a supervisor intervened and put an end to the altercation. Shortly thereafter Figueroa was discharged; the other employee was suspended for two weeks. The ALJ found that by escalating the level of the conflict from one where fists are employed to one involving deadly weapons, Figueroa had transformed the altercation into one which could realistically result in the loss of a life. The employer thus had reasonable cause to discharge Figueroa even though he was not the initial aggressor. The ALJ further reasoned that to excuse or condone Figueroa's conduct would be to encourage similar responses in such situations, and lead to the creation and perpetuation of a condition which the Act was designed to eliminate.

In the second incident, the other alleged discriminatee, Leon, allowed a major washout to occur during his 24 hour irrigation shift, took insufficient action to mitigate the damage, and failed to report the problem to his supervisors. The washout was one of the largest in the history of the company's operations and occurred during an assignment which involved the use of a relatively small amount of water on a very small field. The ALJ found that, in discharging Leon for his conduct during this incident, the employer was not unlawfully motivated. The ALJ noted the somewhat conciliatory attitude that the employer displayed towards its employees who had been out on a strike, the four month hiatus between Leon's return to work and the discharge, and the failure of Leon to completely perform his duties regarding the washout. He concluded that the General Counsel failed to establish a prima facie case and that, even if this had been a dual motive case, the employer proved that Leon would have been discharged even in the absence of his participation in protected, concerted activities.

The ALJ recommended that the complaint be dismissed in its entirety.

Board Decision

The Board affirmed the ALJ's rulings, findings, and conclusions and adopted his recommended Order.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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Appearances:

Nicholas F. Reyes, Esq.,
for the General Counsel

Merrill Storms, Esq., Gray,
Cary, Ames & Frye
for the Respondent

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE

Beginning January 27, 1981, the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union") filed and served a series of charges on Joe Maggio, Inc. (hereafter referred to as "respondent" or the "company") alleging various violations of sections 1153(a), (c) and (e) of the Act.[1/] The dates of their filing, and when they were served, are as follows:

CHARGE	DATE FILED	DATE SERVED
81-CE-ll-EC	01/27/81	01/27/81
81-CE-24-EC	02/12/81	02/12/81
82-CE-31-EC	02/03/82	02/03/82
82-CE-33-EC	02/03/82	02/03/82
82-CE-34-EC	02/03/82	02/03/82
82-CE-35-EC	02/03/82	02/03/82
82-CE-47-EC	02/22/82	02/22/82
82-CE-107-EC	06/01/82	05/29/82
82-CE-193-EC	11/16/82	11/16/82
82-CE-194-EC	11/19/82	11/19/82
82-CE-216-EC	12/30/82	12/29/82
82-CE-217-EC	12/30/82	12/30/82

The General Counsel for the Agricultural Labor Relations Board, on August 27, 1981, caused to be issued the first of a series of complaints based on the aforementioned charges. The last of these complaints, denominated the "Third Amended Consolidated Complaint," framed all of the issues concerned in this proceeding, and was issued on January 14, 1983. Copies of all complaints and notices of hearing were duly served on respondent. In its answers to the complaints, respondent basically denied the commission of any unfair labor practices.

Commencing January 19, 1983, a hearing was held before me

1. An additional charge, 82-CE-194-EC, was filed by an individual, David Solano.

in El Centro, California. The hearing was continued while the Board ruled upon certain procedural matters[2/] and reopend on April 5,1983. As the hearing resumed, the parties had mutually resolved all of the charges involved save two, 81-CE-ll-EC and 81-CE-24-EC.[3/]

All parties[4/] appeared through their respective representatives, and were given full opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to submit oral argument and post-hearing briefs. Based on the entire record of the case, including my observations of the respective demeanors of the witnesses who testified, and having read and considered the briefs submitted to me following the close of the hearing, I make the following:

II. FINDINGS OF FACT

A. Jurisdiction

1. Respondent is and was, at all times material, an agricultural employer within the meaning of section 1140.4(c) of the Act.

2. The Union is and was, at all times material, a labor organization within the meaning of section 1140.4(f) of the Act.[5/]

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2. General Counsel sought to disqualify the Administrative law Judge for bias. Mr. Reyes, counsel for the General Counsel, was ordered excluded from the hearing. Neither position was sustained on appeal to the Board.

3. A stipulated settlement agreement was entered in to the record.

4. The Charging Party appeared on the last day of hearing through Gilberto Rodriguez. Mr. Rodriguez executed the aforementioned settlement agreement.

5. Respondent admitted the jurisdictional facts in' its answer.

B. The Unfair Labor Practices Alleged

From a factual standpoint, few matters were in controversy. Respondent was a member of the multi-employer group found by the Board in Admiral Packing, et al. (1981) 7 ALRB No. 43, to have engaged in bad-faith bargaining from February 21, 1979, forward, as a result of its conduct in collective bargaining negotiations with the Union.[6/] At some point prior to that date respondent's employees went out on strike.[7/] The two individuals with which this proceeding is concerned were both participants in the strike, and were both reinstated by respondent prior to the time the Board ordered it to do so pursuant to the above decision.

1. The Discharge of Manuel Figueroa

A. Factual Analysis

The first instance of alleged discrimination involves irrigator and former striker, Manuel Figueroa. On the first morning of his reinstatement, before the irrigators went off to their assigned fields, Figueroa was approached and struck in the

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6. Strictly speaking, the various employers who participated in the bargaining did not comprise a multi-employer bargaining unit. Rather, each grower was free to accept or reject any of the provisions tentatively agreed upon, and the "parties envisaged that separate but similar agreements would result from this form of bargaining." (Admiral Packing, supra, p. 3.)

7. The exact date of the commencement of the strike is unclear. The strike at its inception was an economic one. However, the Board found that the strike was converted as of February 21, 1979, to an unfair labor practice strike. (Id.)

face by another worker, Domingo de la Torre.[8/] In an effort to fend off any further blows, Figueroa pulled a pistol from his belt, cocked it, and levelled it at his assailant. The foreman, Enrique Nevarez, stepped in between the pair,[9/] and no further violence occurred. The men were then sent off to work that day.

Prior to his confrontation with Figueroa, de la Torre approached another returning striker, Isaac del Campo, in a similar fashion. According to de la Torre's testimony, which I credit, during the strike both del Campo and Figueroa, while on the picket line, would throw rocks at the cars driven by de la Torre and the members of his family as they drove in to the fields. Additionally, during work hours, del Campo and Figueroa would shout vulgarities to de la Torre regarding the women in his family, and would threaten

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8. De la Torre, although a rank-and-file irrigator at that time, was a foreman for a broccoli crew which had worked during the strike. He resumed that position in the broccoli season following these events.

General Counsel alleged in the complaint that de la Torre was a supervisor and agent of the company. However, no proof was presented that, at the time of the incident in question, de la Torre possessed any of the indicia of supervisorial authority. Further, General Counsel apparently abandoned the contention that de la Torre should be considered an agent of the company, as per Vista Verde Farms v. A.L.R.B. (1981) 29 Cal.3d 307, as he failed to present any argument on this point in his brief. That respondent suspended de la Torre after the incident might indicate that it disavowed and disapproved of the acts, thus relieving the company of responsibility for them. (See, e.g., Venus Ranches (1977) 3 ALRB No. 55; Frudden Enterprises (1981) 7 ALRB No. 22? E & J Gallo Winery, Inc. (1981) 7 ALRB No. 10.)

9. Figueroa was the compadre of Nevarez's son. The foreman essentially stated that he felt that his friend and son's godfather would not shoot him.

him with bodily harm.[10] When de la Torre confronted del Campo and Figueroa that morning, he challenged both men to repeat what they had shouted to him while they were on the picket line.[11] After getting no response from del Campo, de la Torre then struck the man in the mouth. Bleeding, del Campo ran to foreman Enrique Nevarez to report the incident.

It was at this point that de la Torre turned to Figueroa and the other incident detailed above transpired. The evidence demonstrated that almost immediately after Nevarez received del Campos report, he rushed to intervene in the dispute developing between Figueroa and de la Torre.

The following day, the company attorney wrote separate disciplinary action letters to de la Torre and Figueroa. Figueroa was informed that he was terminated for bringing "a weapon, namely a pistol, onto Maggio property and brandishing it at another Maggio employee." De la Torre, on the other hand, was suspended from work

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10. Figueroa basically denied verbally abusing anyone during the strike while he performed picket duty. He stated that he would simply ask people at that time to "help us, that they leave work, that they come and help us with the strike." Del Campo did not discuss any of his conduct during the strike. Even assuming de la Torre's personality to be somewhat volatile, it strains credulity that de la Torre would assault both men without any provocation whatsoever, save that some months previously del Campo and Figueroa went on strike. It is more logical to infer that de la Torre had suffered insults emanating from them and sought to retaliate. Respondent's General Manager George Stergios attested to the fact that threats and insults from the strikers were a common occurrence. Furthermore, I found, on the basis of demeanor, that de la Torre was the more credible witness. Testifying in a straight forward manner, de la Torre made no attempt to conceal any of the details about the assaults, nor the fact that he was the aggressor.

11. Neither Figueroa nor del Campo referred to this in their testimony. Del Campo stated that when de la Torre approached, he merely asked del Campo "Are you Figueroa?" before he hit him.

for two weeks, "as the result of your participation in the incident with Manuel Figueroa and Isaac del Campo .... The Company cannot, and will not tolerate fighting on its premises."

b. Legal Analysis

General Counsel's arguments basically center around the notion that the initial aggressor and non-striker in the complained-of incident was merely suspended for two weeks, while the striker, acting in "self-defense," was terminated. It is ironic that the process of the law necessitates burrowing through precedent for authority for a point which the exercise of simple common sense should make self-apparent: threatening a fellow worker with deadly force constitutes reasonable cause for discharge, regardless of the circumstances. By focussing, in essence, on who started the argument, General Counsel loses sight of the fact that by escalating the level of the conflict from one where fists are employed to one involving deadly weapons, Figueroa transformed the altercation to one which could realistically result in the loss of life. Figueroa thus himself became the aggressor.

In Patterson Farms (1982) 8 ALRB No. 57), the Board recognized that "work-related violence can justify a discharge, whether or not it occurs during a strike." There, an employee, also a striker, was accused of firing a rifle in the direction of a crew which was working during the course of a strike. After investigating the incident, the employer determined that the striker was responsible for the conduct, and terminated him. The ALO found that the employer's belief in the striker's culpability was "honest and reasonable," and sustained the discharge. He further found "the

cavalier use of firearms to be deplorable." These findings were affirmed by the Board.

Additional arguments raised by the General Counsel, some of which cite NLRA precedent, are unavailing. General Counsel avers that "the evidence clearly establishes self-defense from an attacking aggressor." He then somewhat disingenuously states that "Figueroa never posed any threat or act of aggression (sic)," citing testimony from foreman Nevarez that Nevarez did not think that Figueroa would shoot his compadre. While Figueroa may not have posed any threat to Nevarez, his cocking and pointing a pistol directly at de la Torre is the very essence of threatening behavior, and I so find.

General Counsel contends that respondent's failure to ask for Figueroa's version of the incident constitutes evidence of discrimination and unlawful motivation. However, being a percipient witness to the conduct, and knowing that de la Torre had hit del Campo, Nevarez would not need to "investigate" the incident as he was aware of most, if not all, of its particulars.

General Counsel cites several NLRA cases in support of his position that, in a physical confrontation, discrimination against the one seeking to defend him/herself may give rise to a finding of unlawful conduct. 'Nearly all of these cases are inapposite, in New England Fish Co. (1974) 212 NLRB No. 44, the discharge of an employee who struck a waiter in the company dining room was held not violative of the Act where it was shown that the employer had no knowledge that the incident arose as a result of the employee exercising section 7 (NLRA equivalent to section 1152) rights.

(Trailmobile Division, Pullman, Inc. (1967) 168 NLRB No. 31, involved an off-work incident where three anti-union employees attacked four pro-union ones. A supervisor had actually started the fight. The discharge of an employee, who was also an instigator, was upheld, as the Board noted, since there was "no evidence that respondent fostered, or even knowingly tolerated [the conduct of the anti-union employees]." The Board went on to ,note that "it requires no citation of authority to support the conclusion that such conduct is not protected by the Act."

By contrast, in Eagle Engineering (1967) 168 NLRB 352, the discriminatee was a non-aggressor who "supinely resisted" the aggression of a fellow employee. No proof of any employee misconduct was shown in Jacques Syl Knitwear (1979) 247 NLRB No. 91. The discharges in those two cases were therefore found to be unlawful.

Finesilver Manufacturing Company (1966) 159 NLRB No. 80, and J.H. Company (1975) 217 NLRB No. 175, are more nearly in point. Finesilver involved an anti-union employee who provoked a shop-floor fight with a pro-union one, and was the aggressor throughout the incident. The latter was discharged while the former was retained. Despite the fact that the pro-union employee pulled a knife to defend himself, the National Board found that a case of unlawful discrimination had been established. Significantly, however, when the Board's order was modified in particulars not pertinent to this discussion ([5th Cir. 1968] 400 F.2d 644), the appellate court felt constrained to note that the discriminatee's "case might be considered distinguishable because he threatened [his attacker] with

a deadly weapon, but there is evidence that [the attacker], as the stronger man and the aggressor, was equally to blame for the temporary breakdown of order."

Lastly, in J. H. Company, in the context of well-established union animus based upon findings of other, independent unfair labor practices, the suspension of an employee for fighting with a supervisor was found to be discriminatory. The employee had attempted to post a union notice on a bulletin board which, unbeknownst to him, was reserved for supervisors. After taking the notice down, a supervisor started to fight with the employee.

Throughout the cases cited by General Counsel there is a general level of conflict which appears not to be as serious as the one extant in the instant situation. With the exception of Finesilver, deadly weapons were not being utilized, and the imminent threat of loss of life was not present. More nearly apposite is La-Z-Boy South, Inc. (1974) 212 NLRB 295 where, despite the fact that a pro-union employee had been provoked, the employee was discharged for pulling a gun on his antagonist. In upholding the discharge, the ALJ noted that the employer was concerned about the level of tension that existed around the plant, and by discharging the perpetrator, sought to deter any possibility of a serious, violent confrontation.

Similarly, under the ALRA, it has often been recognized that the underlying purpose of the Act, as reflected in its preamble, is to "ensure peace in the agricultural fields, . . . [and] to bring certainty and a sense of fair play to a presently

unstable and volatile condition in the State." Deadly weapons have no place in this scheme. (See, e.g., Ukegawa Brothers (1982) 8 ALRB No. 90; Patterson Farms, supra; Western Tomato Growers and Shippers, et al. (1977) 3 ALRB No. 51.) While Figueroa may have been genuinely concerned about his own personal safety,[12/] to excuse or condone his conduct here would encourage similar responses in such situations, and lead to the creation and perpetuation of a condition which the Act was designed to eliminate. California's agricultural lands do not lack for martyrs.

Accordingly, it is determined that this aspect of the case be dismissed.

2. The Termination of Ricardo Leon a.

Factual Discussion

Concerning the discharge of Ricardo Leon, it is likewise determined that his discharge was not violative of the Act.

Leon had been employed as an irrigator for a total of thirty-five years, seventeen of those years spent working for respondent. Like Figueroa, Leon was reinstated in October 1980 after making an offer to return.

On February 6, 1981, Leon was assigned to irrigate six acres of a twelve acre field known as South Alamo 86. The southern edge of the field abuts the Alamo River.[13/] On the night in

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12. That Figueroa was the object of other peoples' ire was demonstrated by evidence that on the same day, while parked on company property, all the windows of his truck were smashed by a person or persons unknown.

13. Actually, there is a roadway and a "tail ditch" between the field and the river itself.

question, Leon was ordered to flood the field with two feet of water, an amount which is by no means substantial.[14/]

The irrigation process in which he was engaged consists of allowing water piped in from the irrigation canal to flow in to the "head ditch" which runs along the northern edge of the field. From the head ditch, the water is moved in to the field itself by a series of row tubes. Once it has passed through the field, the water empties in a "tail ditch" on the southern edge. A field drain, located in the tail ditch, provides the means for the removal of the water from the field.

A common problem in these fields is the presence of gophers. The gophers burrow through the fields and create subterranean channels through which the irrigation water may flow. When both the amount of the burrowing and the amount of water flowing through it become substantial enough, a washout may occur: i.e., supporting and surface soil may be carried away by the flow of water, leaving behind anything from a small hole to a major falling away of the land.

According to his testimony, Leon first noticed a washout occurring along the southern edge of South Alamo 86 about 3:00 a.m. during his shift on February 6. In an effort to stem the flow of water out from the field, Leon testified that he "changed" the water from the rows near the washout to other rows "further down," presumably by stopping the row tube flow from entering the rows

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14. Leon estimated the amount of water to be about three or four feet. In any event, he conceded that "very little water" was needed to accomplish his assigned task.

where the damage was occurring. This process, by Leon's estimate, took about two hours. Leon stated that was "all I could have done" to alleviate the situation.[15/]

As previously noted, however, washouts resulting from gopher damage are not unusual at respondent's fields. What differentiated Leon's washout from others which had occurred was the magnitude of this washout, and the manner in which Leon dealt with it. As will be seen below, it is these factors which provide ample justification for the discharge and which successfully rebut any inference of unlawful or discriminatory intent regarding the treatment of Leon's tenure.

Concerning the actual size of the washout, a portion of the field itself was carried off, leaving a chasm or gorge between the field and the river adjacent. By estimate of George Stergios, the washout was between ten to fifteen feet deep in various spots, and was approximately thirty five feet wide.[16/] Stergios provided the

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15. As will be discussed below, Leon could have resorted to other measures to slow or stop the washout. However, I do not interpret Leon's above remarks to be inconsistent with this fact, but rather that changing the water was "all" he could do in the time that he had.

16. Photographs of the washout admitted into evidence showed foreman Nevarez standing inside the washout, with the top of his head at least six feet below the level of the road through which the washout ran. Nevarez is six feet one inches tall.

following verbal description of the washout:

> The road had been eroded, washed away. Some tile lines [used to carry the salt from the field] had been washed -- the road washed away and the ground had washed away around the tile line, it had been broken and fell apart, part of the tail ditch was shut off and it had been washed away. There were larger ruts and ravenes [sic] into the carrots and the carrot field. There was a small amount of damage to the carrots and most of the dirt had washed down into the -- down towards the river.

To repair the damage, respondent employed two outside contractors at an expense of $1,165.25. Stergios noted that in addition, respondent's own workers and equipment were used to perform part of the repairs. He estimated that the time they spent at these tasks cost the company about $800.00.

Customarily, an irrigator waits at the shift change for his relief to arrive. Although Leon stated that he continued to work in the field for about ten minutes after Jose Diaz, the irrigator on the next shift, came to relieve him, Diaz himself stated that he encountered Leon as he was driving on the road leading away from South Alamo 86. Diaz was informed by Leon at that time that he had a "small gopher problem."

When he arrived at the field, Diaz noticed that water was continuing to flow from the field through the washout. His first reaction was to go to the head ditch to "stop some of the pipe that was still left open," i.e., plug the row tubes bringing water to the affected rows.[17/] He stated that although some of the tubes had already been plugged, he needed to plug an additional fifteen or twenty more. As he was engaged at this task, he saw foreman Nevarez building "counters"[18/] near the drain.

Nevarez arrived at South Alamo 86 that morning at about 6^30 a.m. Like Diaz, he testified that water was still flowing from the field when he got there. He immediately began to put in plugs

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17. Notably, this was also the focus of Leon's efforts to minimize the washout damage.

18. "Counters" are small mounds of dirt, or dams, which prevent the water from flowing into certain parts of a ditch or row. They are also referred to in the testimony as "plugs" or "checks."

to prevent the water in the ditch on both sides of the washout from running into the washout itself. Nevarez stated that there had been no plugs constructed when he got to the area of the damage: "The water was still flowing and it was still breaking." He noted that there are several measures an irrigator may take to minimize washout damage. In addition to building counters or plugs, or, as Leon did, stopping the water from flowing into the row tubes and moving it down the field, an irrigator may close the gate from the main canal and open the field drain, which in turn, presumably, would result in draining all of the water from the field.[19/]

Nevarez stated that the washout was initially caused by a gopher hole, and that gopher problems were common. It is the irrigator's responsibility to check for gopher damage, and that this should be done about every hour or hour and a half during a shift. Given this factor and the small amount of water Leon was working with, Nevarez was of the opinion, based on his experience of twenty-seven years as an irrigator and irrigator foreman, that Leon should have been able to prevent the damage on South Alamo 86 from becoming as extensive as it did. Furthermore, according to Nevarez, it was the irrigator's responsibility to report damage of this type to the foreman. Leon did not do this.

The extent of the damage, and the rate at which it takes place, are determined by the amount of water being used to irrigate, on the type of soil in the field, as well as the size of the field

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19. This would appear to be the most drastic measure as the entire field would lose the benefit of the water so drained. Contrast this method with simply draining or checking the flow of water around the washout.

itself. As one would imagine, the more sandy the soil, the more rapid the damage. Nevarez described the soil at South Alamo 86 as a "dirt field, it's sort of loose, but it's not sand; it's ground."[20/] By his estimate, the damage done to the field by water flowing through the washout, given the field's size, soil type, and the amount of water, would have taken about three to four hours to reach the extent that it did.

General Counsel attempted to show that in addition to gopher damage being a fairly common problem in respondent's fields, washouts had occurred in the past, and that the irrigators assigned to those fields where they occurred had not been discharged. More particularly, irrigator Eustacio Gomez testified[21/] that he himself had been assigned to a field some time in 1970 where a washout had occurred. He further recalled two other washouts which took place during his tenure with the company. One of these occurred in 1974, and involved an irrigator names Soliz. The other took place in a field assigned to an irrigator named Guerrero.

The testimony of Gomez bore out, however, that these incidents were distinguishable from the one involving Mr. Leon. As previously noted, the rapidity with which a washout might occur and its severity depends on the type of soil, the size of the field, and the amount of water being used to irrigate. Two of the washouts detailed by Gomez occurred at a field known as "Pitchi One," an 80-acre plot admitted by Gomez to be "one of the sandiest fields" he

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20. This testimony was uncontroverted.

21. Gomez was called as a witness for the General Counsel.

ever worked in for respondent. The other occurred at a field known as "Plum Two," which was also eighty acres in size and characterized by sandy soil. Both of the fields were being irrigated by twelve feet of water in each of the three incidents.

Insofar as the washout occurring in Gomez' field, the irrigator testified that he, unlike Leon, waited after the end of his shift to report on the damage to his foreman, Nevarez. Nevarez corroborated Gomez on this point, .and when asked to compare the Gomez washout with the one involving Leon, Nevarez stated that the Gomez incident was less serious, that less damage had occurred, that the soil was "a lot worse," and that Gomez was working "with a lot more water." Furthermore, according to Nevarez, Gomez had taken the proper action to control the damage.

General Manager Stergios recalled a washout of about the same magnitude as the one with which this case is concerned. That washout, involving an irrigator named Hermilgido, who was using fifteen feet of water to irrigate his assigned field. Hermilgido was suspended for one month without pay as a result.

b. Legal Analysis and Conclusions

Strictly speaking, I do not find the circumstances of Leon's discharge such as would create a "mixed" or "dual" motive type of a case. It is axiomatic that the General Counsel has the burden of proving, by a preponderance of the evidence, that an employer knew of an employee's protected concerted activity, and discharged or otherwise discriminated against him/her for that reason. (See, e.g., Lawrence Scarrone (1981) 7 ALRB No. 13.) While it is indisputable that respondent was aware that Leon had

participated in the Union-led strike in 1979, and that respondent may, based upon previous unfair labor practice adjudications, be possessed of a general animus towards the Union (see Admiral Packing, et al., supra), I am unable to conclude that respondent, in effectuating Leon's discharge, was unlawfully motivated.

Leon, Figueroa and Isaac del Campo, three employees who figure centrally in this case, were the only irrigators who had participated in the strike and were subsequently reinstated. All three of these workers experienced problems regarding their tenure with respondent.[22/] While this fact admittedly creates a certain suspicion regarding respondent's motivation behind the handling of their individual employment statuses, a mere suspicion is insufficient to make out a violation of the Act, and cannot substitute for actual proof. (See, e.g., Rod McLellan Co. (1977) 3 ALRB No. 71; Lu-Ette Farms (1977) 3 ALRB No. 38.)

It is highly unlikely that respondent would adopt a somewhat conciliatory attitude towards its striking employees,[23/] then wait a period of four months to discharge a worker for reasons which General Counsel failed to establish were either trivial, pretextual, or discriminatory in the sense that employees in similar situations were treated disparately. General Manager Stergios asserted that the reasons for Leon's discharge were "gross negligence" and a "complete lack of responsibility." While

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22. Del Campo's situation was resolved by settlment agreement.

23. Supportive of this inference is the fact that respondent reinstated them before it, arguably, was compelled to do so.

Stergios' characterization may appear a bit strong, it remains that Leon did not completely perform his duties regarding the washout, either in the manner he attempted to minimize its impact or in the way he failed to inform his supervisor, as was his obligation. It is therefore concluded that General Counsel has failed to establish the prima facie existence of an 1153(c) violation in regard to Ricardo Leon.

Even if one were to assume for the purposes of argument that General Counsel has presented a "dual motive" case as per Wight Line (1980) 251 NLRB 150, Nishi Greenhouse (1981) 7 ALRB No. 18, Royal Packing Co. (1982) 8 ALRB No. 74, and N.L.R.B. v. Transportation Management Corp. (1983) ___ U.S. ___, 51 USLW 4761, 76 L.Ed.2d 667, respondent has amply demonstrated that Leon would have been discharged even in the absence of his participation in protected, concerted activities.

Stated in another fashion, General Counsel has not shown that "but for" Leon's strike activities he would not have been discharged. (See Martori Brothers Distributors v. A.L.R.B. (1981) 29 Cal.3d 721.) The field which Leon was responsible for irrigating on the night in question was quite small. The amount of water which was being used for this purpose was also minimal. It was his obligation to check regularly for gopher damage around the borders to the field. Either because of inattentiveness or neglect, he did not perform his assigned duties, and the damage which occurred at South Alamo 86 might have been far less extensive than it was. Given respondent's "substantial business justification" for Leon's discharge, no finding of a violation of section 1153(c) of the Act

can be found.

IV. RECOMMENDED ORDER

It is recommended that those portions of the complaint treated in this decision be dismissed. DATED: December 29, 1983

METHEW GOLDBURG
Administrative Law Judge