Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

THE GARIN COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 83-CE-12-SAL 83-CE-70-SAL 83-CE-88-SAL 83-CE-139-SAL 11 ALRB No. 18

DECISION AND ORDER

On July 13, 1984, Administrative Law Judge (ALJ) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, Respondent The Garin Company (Respondent) timely filed exceptions to the ALJ ' s Decision (ALJD), and a supporting brief.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or 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 Respondent's exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the ALJ except as modified herein.

Respondent contends that the General Counsel failed

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

[2/] Member McCarthy did not participate in the consideration or this case.

to establish a causal connection between employee Alberto Tinajaro's union and protected concerted activities and his discharge by Respondent on June 10, 1983. We find no merit in this exception.

The ALJ's observation that Respondent perceived Tinajaro as a pipeline to the UFW is well supported by evidence of Tinajaro's participation in an ALRB hearing in 1982 wherein he testified about his union activities in the presence of Respondent's President Denny Donovan and its Employee Relations Director John Barrientos, as well as Tinajaro's distribution of union buttons and newspapers in May 1983 to employees in the presence of Respondent's foremen, just shortly before his discharge. In addition to the reasons stated by the ALJ in his Decision, we find that a prima facie case is also supported by the credited testimony establishing admissions of antiunion animus involving Tinajaro on the part of Respondent's supervisors. In September 1982, after advising Tinajaro that he had lost an ALJ decision in an earlier unfair labor practice case against the company, John Barrientos, who subsequently fired Tinajaro, told him that the company would use all of its forces to discriminate against him. He further advised Tinajaro to drop a lawsuit against supervisor Frank Vargas concerning a trailer camp where Tinajaro lived because Tinajaro would be fired soon. In August 1983, Tinajaro's immediate foreman, Paulino Guzman, admitted to employee Rogelio Godinez that Tinajaro had been fired because he always wore a union button. Thus, the evidence amply supports a prima facie case that Tinajaro was fired because of

his union and protected concerted activities.

Respondent's exception to the ALJ's drawing an adverse inference from its failure (or explanation thereof) to call employee Roberto Lopez as a witness has merit. Roberto Lopez was fired along with Tinajaro on June 10, 1983 for allegedly drinking beer at work during lunch. The ALJ credited Tinajaro's testimony as to three noontime lunch episodes during the week preceding the June 10 discharge in which Tinajaro declined Lopez' offer to drink beer. In crediting Tinajaro's testimony as to his interactions with Lopez, the ALJ relied in part upon the failure of Respondent to produce Lopez to rebut Tinajaro's testimony or to explain its failure to call Lopez. The ALJ stated that an appropriate inference would be that Lopez' testimony would not have contradicted that of Tinajaro.

In general, adverse inferences are permitted where a party fails to produce evidence or witnesses within its control, or introduces weaker or less satisfactory evidence than it is within its power to produce. (See California Evidence Code section 4-12.) (See also Auto Workers v. NLRB (D.C. Cir. 1972) 459 F.2d 1329, 1336.) The failure to explain or deny evidence or facts, or the willful supression of evidence relating thereto, permits the drawing of adverse inferences. (See Calif. Evidence Code section 413.) However, it is also clear that when a witness is available to either party, no unfavorable inference should be drawn from the failure to call that witness. (Davis v. Franson (1956) 141 Cal.App.2d 263, 270 [296 P.2d 600].) In this case, there was no evidence that Roberto Lopez was within the control

of Respondent or even available to it. Lopez was fired along with Tinajaro and thus was not an employee within Respondent's control during the hearing.

Although in crediting Tinajaro's testimony, the ALJ relied upon Respondent's failure to call employee Lopez, it is equally clear that it was unnecessary for the ALJ to have relied upon any such adverse inferences in order to support his findings. California Evidence Code section 411 provides that, except where additional evidence is required by statute, direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. Thus Tinajaro's credited testimony was sufficient to establish the facts found by the ALJ without any reliance upon adverse inferences drawn from Respondent's failure to call Lopez. Furthermore, it is clear that the adverse inference was only one of many bases the ALJ relied upon in crediting Tinajaro's testimony. The ALJ was impressed with Tinajaro's credibility and demeanor while testifying as to the events of the week preceding June 10, finding him to have a good recall of details and to have testified in a straightforward manner. (See ALJD, p. 18, fn. 24.) Also, the ALJ relied upon the corroborating testimony of one employee, Juan Lopez, as to one noontime lunch episode wherein Tinajaro refused Lopez' offer to drink beer. Thus, while we disavow the ALJ's reliance on any adverse inferences by the failure to call Roberto Lopez, we see no basis for overruling his crediting of Tinajaro's testimony in this area.

Respondent also contests the significance of the blood

alcohol test results relied upon by the ALJ for proof that Tinajaro did not drink beer on June 10. The ALJ relied upon the testimony of Dr. Simard, a pathology specialist, that Tinajaro did not drink any beer within two hours of the test administered by him. However, as pointed out by Respondent, Simard also testified that whether alcohol is detectable in the blood depends upon the amount of alcohol consumed and the amount of time between the consumption and the blood test. He testified that normally the consumption of three 12-ounce cans of beer would remain detectable in the blood for five to six hours, two 12-ounce cans of beer for approximately four hours, one 12-ounce can for approximately two hours, and one-half 12-ounce can for about one hour. Dr. Simard's opinion that Tinajaro drank no beer within two hours preceding the test is therefore qualified by his admission that half a can of beer would not produce detectable alcohol in the test after an hour following consumption. Thus, Respondent correctly points out that if Tinajaro drank a small amount of beer from 12:00 p.m. until 1:00 p.m., the blood alcohol test administered at 2:00 p.m. would not necessarily have detected it.

Nonetheless, we believe the ALJ properly attached some weight to the blood alcohol test results. The significance of the blood test is not that Respondent should have believed Tinajaro at the scene when he denied that he was drinking beer. After all, Respondent had no way of knowing what the future results of any blood test would have been. The proper probative value of the blood alcohol test result is that it tends to

discredit Respondent's assertion that Tinajaro was openly and defiantly drinking beer in the presence of Barrientos and the others. Employee Relations Director John Barrientos, foreman Paulino Guzman and employee Jose Castro[3/] each testified that he saw both Tinajaro and Lopez drink beer. Barrientos in particular testified that Tinajaro took six to seven drinks of beer in his presence. Clearly if Tinajaro was drinking such amount of beer openly in front of Barrientos and the others, an inference could be that Tinajaro had drunk the beer in the one empty can as well as the contents of the other half empty beer can found in Tinajaro's lunch bag. However, it is unlikely that if Tinajaro was drinking beer at lunch and continued to drink in the presence of Barrientos and the others, the blood alcohol test would not have detected the alcohol. The negative blood test results cast doubt that Tinajaro drank the contents of the two beer cans Barrientos found. The ALJ was entitled to reject the testimony of Barrientos and the others that they

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[3/] Respondent also objects to the failure of the ALJ to deal with the testimony of employee Jose Castro that he saw Tinajaro drinking. Respondent claims Castro had no motive to lie. While it is true that the ALJ did not specifically discredit the testimony of Castro the way he specifically discredited that of Barrientos and Guzman, the ALJ did state that with the exception of Leonard Halcon, none of the witnesses testifying as to the events of June 10 impressed him with their truthfulness. (See ALJD, p. 33.) The ALJ also stated that demeanor was not the only basis for his resolutions of the conflicts in testimony; resolutions were also made in terms of what most likely did occur. (ALJD, p. 34.) In light of the ALJ's crediting of the testimony of Halcon and his resolution of the conflicts in testimony between Tinajaro and Halcon on the one hand, and Barrientos and Guzman, on the other hand, pertaining to whether Tinajaro was drinking, there is no reason to believe that the ALJ did not similarly resolve that same conflict against Castro's version.

saw Tinajaro drinking when he considered the blood test results, the testimony of Respondent's own witness Leonard Halcon that he did not see Tinajaro drink, and Tinajaro's testimony that he had previously rejected offers to drink beer earlier in the week. The ALJ was further entitled to discredit the testimony that Tinajaro was drinking based upon Tinajaro's general demeanor, which the ALJ described as that of one who would not outrageously drink beer in the face of impending discipline, and by Tinajaro's actions in asking to be taken to a doctor immediately or asking that a nearby irrigator be called over whom he thought might verify his story. Thus, while we agree with Respondent that, in and of itself, the blood alcohol test results do not conclusively establish that Tinajaro did not drink any beer, it is evidence which does tend to discredit Respondent's version that Tinajaro was seen drinking beer.

Finally, Respondent points to the uncontroverted evidence that when Barrientos, Halcon and Castro arrived at the scene where Tinajaro and Lopez were having lunch on June 10, Tinajaro was seen with a beer can in his hand, that Tinajaro turned his back and appeared to be stuffing something in his lunch bag, and that when Barrientos searched the bag he found two cans of beer. It is certainly reasonable, as Respondent contends, that a proper inference from this evidence is that if Tinajaro had a beer can in his hand, he was drinking and that if he tried to hide the beer, 'this exhibited a consciousness of guilt. Based upon such evidence, it would appear that Respondent would have had a reasonable and legitimate basis upon

which to discipline Tinajaro.

However, the fact that Respondent may have had a legitimate ground upon which to discharge Tinajaro does not end our inquiry. For as was stated in NLRB v. Ace Comb Co. (8th Cir. 1965) 342 F.2d 841, 847 [58 LRRM 2732]:

> It has long been established that for the purpose of determining whether or not a discharge is discriminatory in an action such as this, it is necessary that the true, underlying reason for the discharge be established. That is, the fact that a lawful cause for discharge is available is no defense where the employee is actually discharged because of his Union activities. A fortiori, if the discharge is actually motivated by a lawful reason, the fact that the employee is engaged in Union activities at the time will not tie the employer's hands and prevent him from the exercise of his business judgment to discharge an employee for cause. (Emphasis in original.)

In essence, looking at all the circumstances, the Board must determine what the actual motive was behind the discharge in this case. Respondent contends that it fired Tinajaro because he was drinking beer. The ALJ discredited this defense, relying both on credibility resolutions between the testimony of witnesses as to whether they saw Tinajaro drink, and circumstantial evidence which corroborated Tinajaro's testimony that he was not drinking.[4/] Thus the ALJ found that Respondent's asserted reason for the discharge was in fact pretextual, despite the existence of some evidence which might otherwise have served as a legitimate

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[4/] The corroborating evidence includes the ALJ's assessment of Tinajaro's demeanor, Tinajaro's testimony concerning the events during the week preceding the June 10 discharge as well as the corroborating testimony of Juan Lopez, the testimony of Leonard Halcon that he did not see Tinajaro drink, Tinajaro's attempts on June 10 to get Barrientos to take him to see a doctor or to call over a nearby irrigator, and the blood alcohol test results.

defense. In Shattuck Mining Corp. v. NLRB (9th Cir. 1966) 362 F.2d 466, 470 [62 LRRM 2401], the Court discussed the situation where an employer's asserted reason for a discharge is found to be pretextual.

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact -- here the trial examiner — required to be any more naif than is a judge. [Footnote omitted.] If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal -- an unlawful motive — at least where, as in this case, the surrounding facts tend to reinforce that inference.

Such is the case here. Having found that Respondent's stated-reason for the discharge, i.e., that Tinajaro was seen drinking, was false, the Board is entitled to infer that in fact the motive the employer desires to conceal -- an unlawful motive -- was the true motive. The evidence in this case demonstrates that such an unlawful motive existed; indeed, the credited statements of Barrientos and Guzman of animus involving Tinajaro (in one case Barrientos[1] warning to Tinajaro that he would be fired for his union and protected concerted activities, and in the other case, foreman Guzman's actual admission of unlawful motive for the discharge) reinforce the conclusion that Tinajaro's discharge was unlawful and that the assigned reason for his firing was in reality a pretext.

An independent basis upon which we conclude that

Respondent's asserted reason for Tinajaro's discharge is pretextual is the disparate treatment accorded Tinajaro for his alleged violation of Respondent's drinking policy. The policy, which applies equally to foremen as well as workers, prohibits the "reporting for work under the influence of drugs, liquor, or having such items in the work area." Violation of this policy subjects employees to "discipline, up to and including termination." As detailed by the ALJ in his Decision, Respondent's handling of other violations of the drinking policy, including some far more egregious violations by foremen, demonstrates that Respondent did not immediately discharge employees for first time offenses. Thus, in April 1982, foreman Paulino Guzman received only an oral warning when, while driving a company vehicle, he was cited by the California Highway Patrol (CHP) for driving under the influence of alcohol. A second citation received just weeks before the hearing by Guzman for driving a company pickup while drinking resulted in no immediate action until months later, when Respondent laid out three conditions for continued employment.[5/] In August 1983, foreman Jesus Uribe destroyed a company vehicle while driving under the influence of alcohol. Uribe was not discharged; instead, he was required to use his own vehicle at work and purchase his own gasoline until the company replaced the vehicle. Once

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[5/] The three conditions were that he would park his company vehicle in Garin's yard during nonworking hours (foremen normally have 24 hours use of company vehicles), he would not consume alcohol for a year; and he would attend an alcohol rehabilitation program.

replaced, Uribe would have to park the vehicle at Garin's shop during off-duty hours for a period of a year. Another example of Respondent's handling of drinking violations, is that of foreman Jose Alvarez, who in 1983 was caught drinking or driving under the influence of alcohol at least three times. His discipline consisted of an oral warning, being sent home early for one day, and a two-week suspension. It was not until June 1983 when Alvarez was involved in an accident while driving a company vehicle under the influence that Alvarez was discharged. Finally one other employee, Dennis Strong, who had work attendance problems on Mondays and Fridays because of drinking, was warned before he was eventually discharged. Thus, we are persuaded that Respondent's own past conduct in handling other violations of its drinking policy indicates that Tinajaro's immediate discharge was disparate treatment based upon Tinajaro's union activities and support. (See George A. Lucas and Sons (1984) 10 ALRB No. 33.)

Under the U.S. Supreme Court's analysis in NLRB v. Transportation Management Corp. (1983) 104 S.Ct. 2469 [113 LRRM 2857], once the General Counsel establishes a prima facie case, the burden shifts to an employer to show that despite the employee's union activities, the employee would nonetheless have been fired. However, if the employer's reason is found to be pretextual, Respondent fails to carry its burden and is guilty of an unfair labor practice. As the Supreme Court stated in Sure-Tan, Inc. v. NLRB (1984) 104 S.Ct. 2803, 2811 [116 LRRM 2857]:

> It is by now well established, however, that if the reason asserted by an employer for a discharge is pretextual, the fact that the action taken is otherwise legal or even praiseworthy is not controlling. See NLRB v. Transportation Management, Inc. 462 U.S. ___ (1983). If the Board finds, as it did here, that the otherwise legitimate reason asserted by the employer for a discharge is a pretext, then the nature of the pretext is immaterial, even where the pretext involves a reliance on state or local laws. (Cite omitted.)

Therefore except as modified above, we fully adopt the ALJ's rulings, findings and conclusion that Respondent's discharge of Alberto Tinajaro violated Labor Code section 1153(a) and (c).[6/] We will order our appropriate remedies, including reinstatement and backpay.[7/]

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (ALRA or Act), the Agricultural Labor Relations Board (Board) orders that Respondent, The Garin Company,

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[6/] Chairperson James-Massengale agrees with the result but only on the basis of evidence which demonstrates that when the discriminatee's situation is compared to that of other similarly situated employees, it is clear that he was adversely subjected to disparate treatment because he had recently engaged in protected activities. She does not attach any significance to events subsequent to the discharge, namely the results of the blood alcohol test, as that test had no probative value as to whether Tinajaro openly and defiantly drank beer in the presence of Barrientos. Accordingly, she rejects the majority's contention that the most logical inference is that Tinajaro drank the contents of the empty beer can. Even if such inference was the "most logical," Tinajaro could have drank the beer at sometime prior to lunch, thereby leading to a blood test which indicated an absence of any alcohol consumption.

[7/] Respondent's offer of reinstatement to Tinajaro as a new employee and subject to his participation in an alcohol rehabilitation program will not satisfy our order for reinstatement or otherwise affect Tinajaro's entitlement to backpay.

its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the UFW or any other labor organization by discharging any of its agricultural employees for participating in union or other protected concerted activities.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them by section 1152.

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

(a) Offer to Alberto Tinajaro immediate and full reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights and privileges.

(b) Make whole Alberto Tinajaro for any losses of pay and other economic losses he suffered as a result of his discharge, such backpay award to be computed in accordance with established Board precedent, together with interest thereon at a rate consistent with the Board's Order in Lu-Ette Farms, Inc. (1982) Q ALRB No. 55.

(c) Preserve, and upon request, make available to the Board or its agents, for examination, photocopying and otherwise copying, all records relevant and necessary to a determination of the amount of backpay and interest due to the aforementioned employee under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into all appropriate

languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice in conspicuous places on its property for a sixty-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of this decision.

(g) Mail copies of the attached Notice in all appropriate languages within 30 days of the date of issuance of the Order to all employees employed by Respondent in the payroll period encompassing June 10, 1983, or for any payroll period thereafter for the remainder of the year 1983 in the Salinas area.

(h) Arrange for a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer

period.

(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

Dated: July 29, 1985

JYRL JAMES-MASSENGALE, Chairperson[8/]

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

[8/] 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.

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by discharging Alberto Tinajaro on June 10, 1983. The Board has ordered us to post and publish this Notice. We will do what the Board has ordered us to do and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize yourselves;
2. To form, join, or help any union;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect each other; and
6. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT discharge or otherwise, discriminate against any employee because he or she has exercised any of these rights.

WE WILL offer Alberto Tinajaro his old job back, if he wants it, and we will pay him any money he lost because we discharged him unlawfully.

Dated: THE GARIN COMPANY

By: _____
(Representative)

(Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

THE GARIN COMPANY

11 ALRB No. 18
Case Nos. 83-CE-12-SAL
83-CE-70-SAL
83-CE-88-SAL
83-CE-139-SAL

ALJ Decision

Administrative Law Judge (ALJ) Robert LeProhn found that Respondent discriminatorily discharged employee Alberto Tinajaro because of his union activities. In crediting part of Tinajaro's testimony that he refused employee Roberto Lopez' offer to drink beer at lunch during the week preceding the discharge, the ALJ drew adverse inferences against Respondent for its failure to call Roberto Lopez to testify to the events in question. The ALJ rejected as pretextual Respondent's defense that Tinajaro was seen drinking beer at work, in violation of company rules. The ALJ relied upon the testimony of one of Respondent's own witnesses that he did not see Tinajaro drinking and upon the expert testimony of a pathologist that based upon negative results of a blood alcohol test administered shortly after the discharge, Tinajaro did not drink beer within the time period claimed by Respondent.

Board Decision

The Board upheld the ALJ's conclusion that 'Tinajaro was discharged for his union support. However, the Board disavowed the ALJ's drawing of adverse inferences against Respondent for its failure to call as a witness employee Roberto Lopez since there was no evidence that Lopez was within Respondent's control. The Board nevertheless upheld the ALJ's crediting of Tinajaro's testimony in this area based upon the ALJ's credibility resolutions and corroborative testimony of another employee. The Board also affirmed the ALJ's conclusion that Respondent's reason for the discharge was pretextual, as it was based upon discredited testimony of Respondent's witnesses that Tinajaro was seen drinking. The Board clarified however that the negative blood alcohol test results did not prove that Tinajaro was not in fact drinking but that the results tended to discredit Respondent's version that Tinajaro was openly and defiantly drinking beer in front of Respondent's supervisors. In addition, the Board concluded that Respondent's defense was pretextual based upon evidence of disparate treatment accorded Tinajaro for his alleged violation of Respondent's drinking policy.

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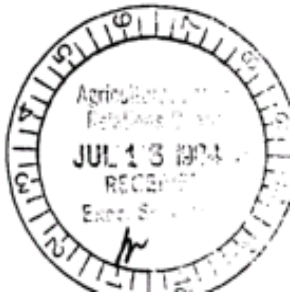
STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:,	)	Case No: 83-CE-12-SAL
	)	83-CE-70-SAL
THE GARIN COMPANY,	)	83-CE-88-SAL
	)	83-CE-138-SAL
Respondent,	)	
	)	
and	)	
	)	
JOSE ANGEL FIGUEROA, FRANK JIMENEZ, UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Parties.	)	



Appearances:

Jose B. Martinez
112 Boronda Road
Salinas, CA 93906
For General Counsel

Jose Angel Figueroa
408 Midway Avenue
Salinas, CA 93905
For Charging Party

Frank Jimenez
160 East Street
Soledad, CA 93960
For Charging Party

Howard D. Silver
Dressier, Quesenbery, Laws & Barsamian
911-B Blanco Circle
Salinas, CA 93901
For Respondent

Before: Robert LeProhn
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Robert LeProhn, Administrative Law Judge: This case was heard before me in Salinas, California, on November 21, 22, 23, 28, 29 and 30, and on December 1, 2, 5, 6 and 7, 1983, and on March 2 and 16, 1984.

The charge in case number 83-CE-12-SAL was filed and duly served on February 14, 1983; the charge in case number 83-CE-70-SAL was filed and duly served on May 13, 1983; the charge in case number 83-CE-88-SAL was filed and duly served on June 14, 1983; the charge in case number 33-CE-139-SAL was filed and duly served on October 10, 1983. A First Amended Consolidated Complaint consolidating the foregoing charges for hearing, issued October 21, 1983; Respondent filed and duly served its Answer on October 27, 1983.[1/]

During the course of the hearing the parties settled charges number 83-CE-12-SAL and 83-CE-139-SAL; thus resolving the allegations contained in paragraphs 6(b) and (d) of the complaint.[2/]

Also during the course of the hearing, General Counsel moved to amend the complaint by adding two substantive allegations.

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1. The First Amended Consolidated Complaint is referred to hearafter as complaint.

2. Paragraph 6(b) alleged that Respondent threatened certain named and unnamed agricultural employees because of their support for the United Farm Workers. Paragraph 6(d) alleged that Respondent discriminatorily discharged Jose Angel Figueroa.

The motion was granted and the following paragraphs were added:

> 5(e) Beginning from on or about June 13, 1982, and continuing until or or about June 10, 1983, Respondent by its agents John Barrientos and/or Paulino Guzman has discriminatorily given less work to Alberto Tinajero because of his participation in union and protected concerted activities.

5(f) On or about May 13, 1983, Respondent by its agents John Barrientos and/or Paulino Guzman has discriminatorily given less work to and/or placed on layoff status Frank Jimenez because of his filing an unfair labor practice charge against Respondent on May 13, 1983.

The remedial paragraphs of the complaint were amended to seek back pay for Tinajero and Jimenez because of the commission of the alleged unfair labor practices.

The United Farm Workers of America (UFW) filed a Notice of Intervention on September 16, 1983, which was duly served by mail.[3/] Jose Angel Figueroa and Frank Jimenez, charging parties in cases number 83-CE-39-SAL and 83-CE-70-SAL respectively moved to intervene in the proceedings. Their motions were granted.

The parties were given full opportunity to participate in the hearing. General Counsel and Respondent filed post-hearing briefs on April 13, 1984. Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Garin Company (Respondent) is an agricultural employer within the meaning of Labor Code section 1140.4(c) and is engaged in agriculture within the meaning of section 1140.4(a).[4/] The

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3. The UFW did not appear at the hearing.

4. Unless otherwise indicated code section citations refer to the Labor Code.

Agricultural Labor Relations Board (ALRB) has previously asserted jurisdiction over Respondent's operations.[5/]

The United Farm Workers of America (UFW) is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours and other conditions of employment on behalf of agricultural employees. The UFW is a labor organization within the meaning of section 1140.4(f).

II. THE EMPLOYER'S OPERATIONS

Respondent is a California corporation having its headquarters in Salinas, California. It farms approximately 6,000 acres, 3,000 of which are located in the Salinas valley. Its main crops are lettuce, celery, broccoli, sugar beets and carrots. It employs irrigators, tractor drivers, thinning crews, lettuce wrap machine crews and other seasonal harvest and ground crews. Its peak period work force is approximately 400. The alleged discriminatees in the instant case were employed as tractor drivers.

During the period with which we are concerned, Respondent utilized two classes of tractor drivers: class one and class two. (I:73.)[6/] The class one driver is used primarily for planting,

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5. The Garin Company (1979) 5 ALRB No. 4.

6. Transcript references will be noted by Roman and Arabic numbers. The Roman numerals refer to the volume number, and the Arabic numbers are page references. General Counsel's Exhibits will be noted as G.C. Ex. __; Respondent's Exhibits will be noted as Res. Ex._____.

cultivating, fertilizing, listing and leveling. (IV:26.) The class two drivers are used for discing, breaking bottoms, grading and mixing plants. (IV:27; III:55.) During the relevant period, there was a ten to fifteen cent per hour wage differential between Class 1 and Class 2 drivers. (I:76.)

III. SUPERVISORY PERSONNEL

John Barrientos

Barrientos is Respondent's employee relations director, having held the position since August 1981. He handles employee grievances and is involved together with the general manager and department heads in investigating employee misconduct, discussing the findings and the recommended course of action for such misconduct. Barrientos maintains Respondent's personnel files and administers its safety and health insurance program. His immediate supervisors are Denny Donovan, Respondent's president, and its personnel director, Frank Vargas. Respondent admits Barrientos is a supervisor or agent acting on its behalf within the meaning of section 1140.4(j).

Paulino Guzman

Paulino Guzman is the tractor foreman. Respondent admits Guzman is a statutory supervisor, and the evidence supports a finding to that effect.

Foremen are paid a salary; tractor drivers are hourly rated employees; foremen are paid semi-monthly, hourly rated employees are paid weekly; foremen are furnished company pickup trucks, rank and file employees are not. Foremen received paid vacations and participate in a profit sharing program.

Guzman assigns work to the tractor drivers and determines the number of hours a driver will work. He is responsible for disciplining employees working under him. He does no hiring; this function is performed by the personnel office. He is directly responsible to Tom Tarpe, the department head of the tractor/irrigation department. Guzman also makes recommendations to Tarpe regarding employee promotions.

Jose Alvarez

Prior to his termination in June 1983 for drinking and being involved in an accident in a company vehicle, Jose Alvarez was an irrigator foreman enjoying the same working conditions as Guzman and having the same responsibilities vis-a-vis irrigators as Guzman had regarding tractor drivers. Respondent admits and I find that at all times material prior to June 1983, Alvarez was a supervisor within the meaning of the Act. Following his discharge, Alvarez was rehired as an irrigator; he no longer performs any supervisorial functions.

Frank Vargas

Vargas is Respondent's Personnel Director and the owner of Chualar Labor Contractors (Chualar). Respondent utilizes Chualar to fill some of its employee needs in the cauliflower harvest. Chualar is presently managed by Pete Baclig. As Personnel Director, Vargas reports directly to Respondent's president. As noted above, Barrientos is directly responsible to him as well as Donovan. These facts support a finding that as Personnel Director Vargas is a .person who formulates and effectuates Respondent's labor and personnel policies and is a supervisor or agent acting on

Respondent's behalf within the meaning of section 1140.4(j).

IV. RESPONDENT'S POLICY RE DRINKING ON THE JOB

Respondent issues its employees a company handbook which sets out its policies with respect to fringe benefits, working conditions and disciplinary standards. The most recent edition of the handbook was prepared for the 1980-81 season.[7/] The policies set forth therein have remained unchanged. (I:44.)

> So that the Garin Company can provide a safe, productive place to work, it is necessary that all our employees follow the few common sense rules listed below. The Company appreciates your efforts to abide by them, if, however, an employee is unable to do so, he/she is subject to discipline, up to and including termination.
>
> * * *
>
> 5. Reporting for work under influence of drugs, liquor, or having such items in the work area. (Resp. Ex. A.)

On November 30, 1982, Respondent issued a memorandum directed to all Garin employees operating company vehicles which stated:

> Drinking and driving a Garin Company vehicle will not be tolerated. Any violation of this company policy will result in immediate termination. (G.C. Ex. 5.)[8/]

Respondent's policy against drinking extends only to the fields and to use of its vehicles. It is purportedly applicable to supervisors as well as workers. (I:88.) There is no prohibition against off hours drinking in the labor camps which Respondent maintains on its properties. (I:87; X:79; XI:47.)

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7. A previous edition was issued in 1979. (III:101.)

8. Both the Company Handbook and the November 30, 1982, memorandum were issued in 'Spanish and English. It is apparent the no drinking policy is known to the workers. See Moreno testimony (III:8); Lopez testimony (III:47).

Respondent provides bus transportation between the Salinas area and fields in the- Gonzales area for field workers. The workers have a practice of buying beer in Gonzales and consuming it on the bus during the ride to Salinas. (II:63.)[9/] It is not customary for foremen to ride the bus. No witness testified to beer consumption on the bus in the presence of a supervisor.

A. Drinking Incidents

Alleged discriminatee Francisco Jimenez testified to an occasion on which he and another worker drank four beers on Saturday as he was getting off work. No foreman was present. (III:79.)

Jimenez also testified that Jose Alvarez, a foreman, gave him a ride in his company pickup to two occasions. Once Jimenez had to move some beer in the cab in order to get into the truck. (III:80.) The second time Alvarez's speech was slurred and his hat was on backwards. (III:83.)[10/] There is no evidence Alvarez was observed on either occasion by his supervisor.

In 1978, Pete Maturino, assistant to the director of personnel between 1977-80, caught Alvarez drinking on the job. Maturino was alerted to Alvarez' condition by Hinio Guzman, a foreman. As Maturino was traveling to the site where Alvarez was

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9. Respondent views the after work bus from Gonzales and Salinas as outside the scope of its no-drinking policy because employees are on free time. (X:79; XI:47.)

10. Alvarez denied even giving Jimenez a ride in his truck. (IX:97.) His denial is not credited in view of credible testimony of other witnesses regarding his conduct.

working, he encountered him on the road and directed him to stop.

working, he encountered him on the road and directed him to stop. When Alvarez got out of his vehicle, Maturino could see that he had been drinking; he took the pickup keys from Alvarez, locked the pickup and took Alvarez home. No immediate discipline was imposed as the result of this incident. (V:75.) A second drinking on the job incident in 1978 led to Alvarez being suspended for two weeks. He was not demoted, nor did he suffer loss of use of a company vehicle. (V:76-77.) During the period when Maturino was employed by Respondent, it was the policy that both foremen and workers could be fired for drinking on the job.[11/]

Alvarez admitted there was one occasion in 1978 on which he was observed by Norman Amaral, a general foreman, drinking beer as he walked from one field to another. He was warned. (IX:98.) There was also an occasion in 1978 when he came to work with a hangover and was driven home by his son in a company vehicle. (IX:100.)

Alvarez denied that he ever drank in the fields during working hours in 1979 or that he carried beer in his pickup. Similar denials were elicited with respect to 1980, 1981 and 1982. (IX:100-101.)

Marcos Alba testified that he frequently drank beer with Jose Alvarez in 1982 during work hours and on company property.

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11. Maturino resigned his employment with Garin in the face of an accusation by Denny Donovan, Garin's Persident, that he was stealing payroll checks as well as benefit payments from Pan American Insurance. He has made and is continuing to make restitution. He appeared to be a straight forward witness, and I credit his testimony.

(V:51.)[12] Alvarez would buy the beer; Alba would keep it at his house on the Williams Ranch overnight; and the next, day Alvarez would drive him to his trailer to retrieve it. (V:53.) According to Alba, Alvarez would consume as much as 24 bottles of beer a day-He never saw Alvarez drink in the presence of supervisors. (V:57.) Alvarez would hide his drinking from other people and told Alba to do likewise. (V:57.)[13]

As a result of a June 5, 1983, accident, Alvarez was fired. Thereafter he was offered an opportunity to return to work as an irrigator, at the bottom of the seniority roster, provided he agreed to go to an alcoholic center. (IX:103; V:63.)

Jose Jesus Gutierrez testified he had been caught drinking on the job in Salinas during his last day of work in September 1982. The incident occurred in a field near Respondent's Salinas shop sometime between two or three o'clock.

He and three other workers has been drinking all day. Felipe Gomez, a foreman, discovered them and ran them off the job-They had already received their layoff notices and were discussing where they would go to work next as Gomez arrived. (III:120-121.) Gomez gave Gutierrez an oral warning and sent him home for the

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12. Alvarez denied he ever drank beer with Alba during work hours. (X:97, 106.)

13. There is no evidence of Respondent's knowledge of this conduct. Without such knowledge the conduct is not appropriately considered in determining whether Respondent's application of its drinking policy in Tinajaro's case evidences illicit disparate treatment.

balance of the day -- an hour or an hour and a half of the day remained. He suffered no loss of pay. Gutierrez did not subsequently see the other-three workers and had no knowledge of whether they were disciplined.[14/]

In April 1982, tractor foreman Paulino Guzman was stopped by the California Highway Patrol (CHP) for drinking; he was driving a Garin vehicle. (IV:55.) Guzman reported the incident to his boss, advising he had been cited for driving under the influence. (IV:58.) Guzman received an oral warning; his use of a company vehicle was not suspended. (IV:60.) Guzman received a second citation while driving a company vehicle during non-work hours approximately two weeks before he testified in the present proceedings. Once again Guzman was cited for being under the influence. He reported the incident to his supervisor; at the time of hearing no disciplinary action had been taken. Guzman was still permitted use of a pickup.[15/] On December 6, 1983, Denny Donovan with Guzman and laid out three conditions for continued employment: his pickup would remain locked in Garin's yard during non-work hours; he would not consume alcohol for one year; and he would voluntarily admit himself to a self-held program. (XI:52.)[16/]

There was an occasion during the last half of February 1983

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14. Marcos Alba testified to a conversation which he had with Gomez which appears to relate to the same incident. Gomez told Alba he had fired the four workers because he caught them drinking -- in later testimony Alba modified "fired" to suspended. (V:56.)

15. Rito Campos, a Garin Company tractor driver, sees Guzman every day and has never seen him drinking on the job.(X:28.)

16. Donovan is Respondent's president.

on the Williams Ranch at the eating area in the back of the barn when Paulino Guzman, Jose Alvarez, Manual Gomez and Juan Lopez drank tequila at about 7:30 in the morning.[17/]

Jesus Uribe, a foreman currently stationed in Yuma, Arizona, was involved in an accident in a Garin vehicle on August 5, 1983. He was cited for driving under the influence. He is no longer driving a company vehicle because of his involvement in the accident. The pickup was "totaled." Until the vehicle is replaced, Uribe has been required to use his own car and provide his own gasoline in the performance of his duties. When the pickup is replaced, Uribe will be required to park it at Garin's shop or its harvesting area during off-duty hours for a period of a year. (X:171.) Normal Garin practice is that foremen have 24-hour utilization of their company vehicle.

Respondent has an alcohol rehabilitation program which it administers on a case-by-case basis. (X:61.) The program was initiated by Donovan because of empathy for people with alcohol problems. Donovan has been an active member of Alcoholics Anonymous for 13 years. (XI:49.)

On June 10, 1983, Barrientos directed a letter to Alvarez notifying him of his termination because of the vehicle accident on

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17. Testimony of Antonio Heredia Azevedo who was present but who is a non-drinker. (VI:33.) They sat around for approximately half an hour. Each had three or four drinks. (VI:66.) Guzman testified to an after-work occasion on which he, Manuel Gomez, Rito Campos, Armando Flores and Luis Ramirez were drinking tequila in the vicinity of the trailers on the Williams Ranch. This occurred about 5:30 in the afternoon. (IX:72.) Campos corroborates Guzman[1]s testimony. (X:32.) Guzman drove his company pickup home after the group broke up. (IX:85.)

June 5, 1983. The letter further offers Alvarez, because of his long-term employment with Garin, re-employment subject to the following conditions: successful completion of a 90-day alcohol rehabilitation program; thereupon employment as an irrigator at the bottom of the seniority list. (Resp. Ex. K.) The decision to make Alvarez this offer of re-employment was made by Barrientos in conjunction with Donovan. Another factor considered in offering Alvarez the opportunity to return to work was the seven relatives he has working for Garin.

Jose G. Ramirez is another person to whom Garin extended the opportunity to rehabilitate himself. Ramirez had a continuing problem with attendance on Fridays and Mondays. Barrientos had discovered him drunk in the labor camp on several occasions. Ramirez was offered but refused the opportunity to attend the alcohol rehabilitation program. He was terminated.

Dennis Strong was employed as a handyman by Respondent from late November 1982 until April 1983. Strong also had a Monday-Friday attendance problem. On at least two occasions Strong called in that he would be unable to come to work because he was hung over. Barrientos and Strong's foreman met with Strong to discuss the problem. Strong admitted having not come to work on several occasions because of a hangover. Barrientos offered him the opportunity to participate in a rehabilitation program. Strong declined to do so; he was put on notice that any future unexcused absence could result in termination. He lasted about a week after being put on notice. (X:69.) He quit.

As noted below, Tinajero was offered reinstatement

following his discharge conditioned upon his participation in an alcohol rehabilitation program. He rejected the offer.

V. THE UNFAIR LABOR PRACTICE

Following settlement of two of the original charges giving rise to the complaint, four allegations remain to be decided: the discharge of Alberto Tinajero, the layoff of Frank Jimenez, the reduction in Tinajero's hours during the year preceding his discharge and the reduction in Jimenez's hours as a result of discriminatory application of Respondent's policy regarding employees apprehended by the Immigration and Naturalization Service (INS) and his filing an unfair labor practice regarding application of the INS policy.

(A) The Tinajero Discharge

(1) Introduction

Respondent contends it discharged Tinajaro pursuant to an established company policy against drinking on the job, i.e., that the discharge was for just cause. The General Counsel argues that Tinajero's discharge was the last act in a scenario of discrimination against him dating back to 1978. Alternative theories are urged in support of the allegation of wrongful discharge: (1) Respondent attempted entrapment of Tinajero to drink beer on Company time so as to justify his discharge for violating a Company policy against on-the-job drinking; and when Tinajero proved uncooperative in that he refused to have a beer, Respondent fabricated testimony to the effect he had done so. General Counsel's alternate theory is that if it be found that Tinajero took a drink, Respondent's action was discriminatory

disparate treatment violative of the Act.

(2) The Facts

At the time of his discharge on June 10, 1983, Tinajaro was employed as a Class 1 tractor driver. He was initially hired in 1974 as a Class 2 driver and was promoted to Class 1 in either 1975 or 1976.

The assigned cause for Tinajaro's discharge was the following:

> . . . drinking alcoholic beverages (beer) during hours of work and on company property on the tenth of June 1983 at 12:30 in the afternoon. This happened on Moore Ranch between Lot 4 and 5.[18/] (I:90.)

Roberto Lopez, a fellow tractor driver, was also discharged on June 10 for drinking beer. Tinajaro and Lopez had their lunch together at the fertilizer truck on that date.

Tinajaro met Lopez the previous Friday, the day Lopez began working for Respondent. Following the lunch break that day, Paulino Guzman (the tractor foreman) moved Tinajaro into the same field with

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18. This is an agreed upon Spanish to English translation of the termination notice. (See G.C. Ex. 6.)

Lopez.[19/] After watching Lopez work, Tinajaro told him that he was not doing a good job. Lopez told Tinajaro that he didn't know how to drive a tractor, that he used to work in an office. (VI:134.) Tinajaro testified he also told Guzman that Lopez wasn't doing good work and asked why he had been hired. Guzman responded that Tarpe had hired Lopez and told Guzman to place him in front of Tinajero, i.e., to have him break bottom ahead of Tinajero's fertilization work. Guzman testified to a conversation with Tinajero regarding Lopez during which Tinajero told him that Lopez's work was all right (IX:80.) Since Guzman was not pinned down with respect to date, time and place of the conversation about which he was testifying, it is impossible to determine whether he was giving his version of the Friday conversation about which Tinajaro testified. Neither asserts there was anyone present during the conversation. It does appear that each was testifying to a single conversation. Since Lopez's ineptness is a cog in General Counsel's "set up" theory, i.e. Lopez was hired not to drive tractors but to persuade Tinajero to drink on duty, Tinajero has a motive for stating he made management aware of Lopez' deficiencies. On the other hand, Guzman can also be said to have motive for his version of the conversation. His testimony on this point is at least as plausible as Tinajero's; therefore,

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19. Tinajaro testified that for the two years preceeding his discharge he had not been assigned to work the same field together with another tractor driver and that it was not company practice to assign two drivers doing cultivation and fertilization to the same field. (VII:19.) However, Lopez was breaking bottoms not cultivating. There is credible testimony that a driver breaking bottom works ahead of a driver who is cultivating; since Tinajero's main job is cultivating, it seems unlikely that his testimony in this regard is accurate. It is not credited.

General Counsel has failed to establish by a preponderance of the evidence that Guzman was alerted to Lopez's ineptness.[20/]

Prior to the start of work on Saturday, Lopez sought to question Tinajaro regarding the UFW; Tinajaro did not respond because he did not know Lopez. As Tinajero began his lunch, he was joined by Lopez and offered a Coors beer. Tinajaro declined. Lopez drank two or three beers with his lunch.[21/]

The following Monday, Roberto Lopez joined Tinajaro and Juan Lopez for lunch. Roberto invited them to have a beer. Tinajaro declined; Juan accepted. Roberto had the same small ice chest and suitcase-like lunch pail he had used the previous Saturday. Roberto drank two or three beers during lunch and then returned to work.[22/]

On Tuesday the scenario was repeated; however, Juan Lopez was not present. Tuesday afternoon about 3:00 p.m., Tinajaro again spoke with Guzman regarding Lopez. He told Guzman that Lopez did not know how to do the work and he also told Guzman that Lopez was drinking beer on the job. Guzman departed and spoke with Lopez for

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20. S. Kuramura (1977) 3 ALRB No. 49 at p. 16; Desert Harvest Company (1979) 5 ALRB No. 25, at p. 2.

21. Lopez had a small ice chest which contained the beer-He also had a small black suitcase-like lunch pail.

22. Juan Lopez corroborated Tinajaro's testimony regarding the events of the Monday lunch. Juan admitted drinking a beer. He testified, corroborating Tinajaro, that Tinajaro did not have a beer that day, explaining that he was taking some pills. Tinajaro testified that he declined because he was taking some pills for a thyroid condition and for athlete's foot. (VI:59.)

about 10 minutes.[23/]

Roberto Lopez did not join Tinajaro for lunch on Wednesday.

On Thursday, as they were moving to a new field, Lopez offered Tinajaro a beer and again Tinajaro declined, saying he didn't drink while he was working. Lopez inquired whether his refusal was because he didn't like Coors; Tinajaro responded that he drank Budweiser.[24/]

The Events of June 10

As one would expect, there is substantial conflict regarding what occurred on June 10, particularly with respect to whether Tinajaro was drinking beer or even took a drink of beer. Of the witnesses who testified, only Lester Halcon, a field representative for Pan American Underwriters, can be considered as

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23. Guzman denied that Tinajaro told him Roberto Lopez was drinking on the job. His denial is not credited. His recall of specific events was less than impressive. A Tuesday afternoon conversation with Tinajaro is not denied; nor did Guzman deny having a conversation with Lopez that afternoon. A remark regarding Lopez' beer drinking would explain why Guzman went to speak to Lopez following his conversation with Tinajaro. Moreover in view of Tinajaro's suspicions of Lopez, as manifested by his refusal to discuss the UFW with Lopez, it is likely that Tinajaro would have mentioned Lopez's drinking during the Tuesday afternoon conversation with Guzman.

24. The findings regarding Tinajaro's interaction with Roberto Lopez as set out above are based upon the uncontroverted testimony of Tinajaro. Roberto Lopez did not testify. Although Tinajaro's testimony in these areas is for the most part uncorroborated, I find the testimony credible. Tinajaro's demeanor generally impressed me favorably; he exhibited a good recall of details in this area and testified in a straightforward manner. Respondent offered no explanation regarding the failure to call Roberto Lopez to rebut Tinajaro's testimony. An appropriate inference is that Lopez[1] testimony would not have contradicted that of Tinajaro.

disinterested.[25/] He was a candid and straightforward witness, and while his recall of some details of the day was poor, it did not appear to be deliberate. Thus, this testimony regarding what happened is credited except when the testimony of others present makes it unlikely his recollection is accurate. Even if one were to accept the proposition that Respondent staged the events of June 10th for Halcon's benefit, there is no reason to conclude his testimony is colored.

On June 9, Halcon, received a phone call from Barrientos asking him to come to the Garin fields the next day to talk to some of the ground and wrap machine crews and to enroll a new tractor driver under the health and welfare plan.

Halcon met Barrientos at Respondent's asparagus shed between 10:45-11:00 on the 10th. Using Halcon's pickup, the two men drove to a field where a wrap machine crew was working. They stopped the crew, and Halcon talked to a Mr. Cantar about an unpaid claim; he also talked to several of the other workers. He and Barrientos spent about an hour with the wrap machine crew.[26/] Halcon and Barrientos then moved on to visit Ground Crew 3. They arrived about 12:30 as the crew was finishing work; they remained

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25. As of June 1993, Pan American was the carrier providing medical insurance coverage for Garin's employees. During 1983 Halcon visited the Garin fields 3 or 4 times. On some occasions he and Barrientos visited the fields in Halcon's pickup and on others in Barriento's car.

26. Halcon does not wear a watch and was not wearing one that day. Barrientos, who was wearing a watch, also testified that they spent about an hour talking to the wrap machine crew. (X:81.) I so find.

for 10-15 minutes but were not approached by any of the crew members; they then proceeded to where Tinajaro and Lopez were located. Barrientos intended to have Lopez complete an enrollment card for insurance coverage. (X:82.) As they were leaving the site of the ground crew, Barrientos commented that it was strange that the tractor drivers weren't working. (X:82.) Before leaving the ground crew, Barrientos asked the crew foremen to get Jose Castro, the stitcher driver, to join them. When Castro arrived, Barrientos said he'd heard there was drinking on the job, and said "we are going to go check [it] out." (IX:42.) Barrientos did not mention the source of his information. No explanation was offered during Barrientos' testimony for singling out Castro as a person he wanted present.

Tinajaro began his lunch break about noon. Lopez arrived about 3 or 4 minutes thereafter and opened a can of Budweiser and placed it on the bed of the truck near Tinajaro. Tinajaro told Lopez he did not drink on the job and denies that he did so despite Lopez's continued urging. Prior to the arrival of Halcon, Barrientos and Castro, Lopez consumed three bottles of Coors.[27/]

Although Lopez insisted that he have a beer, Tinajaro still declined. Lopez took a second can of Budweiser and placed it beside the first on the bed of the truck. Tinajaro could not testify with certainty whether the second Budweiser was opened. As the pickup approached, Lopez took a drink from the opened can of Budweiser.

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27. This finding is based upon uncorroborated testimony of Tinajaro. It is found credible for the reasons cited above.

Halcon, Barrientos and Castro reached the field where Lopez and Tinajaro were parked sometime after 12:30 p.m. (I:91.) Tinajaro's testimony that they arrived at 12:18 or 12:20 p.m. is not credited. It is inconsistent with the general chronicle of their movements prior to arrival. Halcon parked about 20 feet from the fertilizer truck. He testified that Tinajaro was standing at the side of the truck and that Lopez was sitting on the truck bed. (IX:34.) This testimony is inconsistent with that of Tinajaro who places himself on the truck, but it is consistent with Barrientos' testimony and is credited. (XI:19.) Halcon's testimony that he knew and recognized Tinajaro was uncontradicted.

Halcon testified that he saw a can of Budweiser in Tinajaro's hand but did not see him take a drink from the can. (IX:48.) Both Barrientos and Guzman testified to seeing Tinajaro take a drink of beer. Barrientos testified that the can from which he saw Tinajaro drinking was empty when he took it from Tinajaro and that there were a total of three cans of Budweiser — one full, one empty and one half-empty. (I:92.)

As Barientos and Castro got out of his pickup, it appeared to Halcon that Tinajaro was putting something into his lunch bag. When Barrientos got to the fertilizer truck, he inspected Tinajaro's lunch bag and removed one or two beer cans.

When Barrientos reached the fertilizer truck, he said to Tinajaro, your're drinking beer; Tinajaro denied the charge and said it was Lopez who had been drinking. Barrientos did not speak to Lopez. Tinajaro asked Barrientos to call a nearby irrigator (Ventura) to come over, he refused to do so. Sarrientos then

returned to the pickup and asked Halcon if he would come and be a witness. Barrientos took the camera he customarily carries with him "back to the fertilizer truck. When Halcon got to the truck, Barrientos asked him to verify the presence of beer bottles and cans. Halcon did so, and Barrientos then took pictures of the scene.[28/] (X:86.) Halcon heard Barrientos ask why the workers were drinking on the job when they knew they could be fired; but he returned to his pickup without hearing either Tinajaro or Lopez respond. (IX:35.)

As Barrientos photographed the beer cans, Lopez was drinking from a bottle of Coors. (IX:36.) Halcon observed two bottles of Coors on the truck and two by the side of a ditch. After he took the pictures, Barrientos asked Halcon if he would return Castro to his stitcher truck so he could radio Paulino Guzman, the foreman, to report to the scene. . (X:88.) Halcon did so and by the time he returned, Guzman had arrived. Barrientos testified he had Guzman come to the scene to verify whether he had told Tinajaro it was all right to have a beer with lunch. Guzman denied having done so. (IX:55.) Barrientos then announced that Lopez and Tinajaro were discharged for drinking on company property, and he told Guzman to take them home. Tinajaro asked to go to a doctor. Barrientos refused this request; he told Tinajaro he was going to send him home. When Barrientos told Guzman to take Tinajaro home, Tinajaro

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28. Halcon testified that Barrientos photographed the cans before he and Castro departed to summon Guzman. Guzman testified the photographs were taken after he arrived. This seems unlikely. One would expect, as Halcon testified, that Barrientos would have photographed the cans immediately upon arrival.

again asked to be taken to the doctor's, but Barrientos still refused to permit this. (VII:15.) Halcon testified that he and Barrientos left the field before Guzman and the workers. He testified credibly that he and Barrientos left the field sometime between 1:15 and 1:30 and that Guzman and the two workers were still there.

Halcon's estimate of when he and Barrientos left the field is a credible construct based upon his arrival at Salinas for an appointment. He was approximately 45 minutes late for a 1:15 p.m. appointment, guessing his arrival at between 2:00 and 2:15 p.m. (IX:45.) This would mean that Tinajero arrived at the doctor's office in Gonzales sometime around 1:30 p.m. and in Salinas at Simard's establishment from 2:00 or a few minutes thereafter. This timetable is not significantly at odds with Simard's testimony that the blood alcohol test was administered about two o'clock. Nor does it impeach Tinajaro's denial he drank any beer. Simard's opinion was that Tinajaro had consumed no beer for at least the two hours prior to the test. Since it is contended that Tinajaro consumed beer as late as 12:35, the consumption would have been well within a two-hour time frame.

Following his discharge, Tinajaro was offered reinstatement conditioned upon his participation in an alcohol rehabilitation program. He declined the offer. According to Barrientos, the offer was made because of Tinajaro's long service with Respondent. In making the offer, Barrientos purports to have considered reports received from Paulino Guzman to the effect that Tinajero had reported to work on several occasions with a hangover; as well as

records from the Department of Motor Vehicles in his possession, which indicated that Tinajaro had been cited for driving while under the influence in August 1982; and the fact that the farming manager, Mr. Tom Tarpe, told him sometime during the week preceding Tinajaro's discharge that he had seen empty beer cans and bottles in fields where Tinajaro and Lopez had been working. (X: 77-78.)

(B) Tinajaro's Union Activities

During May 1983, Tinajaro met with a UFW representative on two occasions at the UFW office in Salinas. Juan Lopez and Antonio Heredia were with him. In the first part of June 1983, he had an evening meeting at his home with Lopez, Heredia and a representative of the UFW. (VI: 112.) Both employees testified on Tinajaro's behalf. Heredia is his cousin. There were no supervisors present at any meeting held outside of work time-(VII: 36.)

Tinajaro distributed UFW buttons in May 1983 at Williams Ranch before the start of work. Jose Alvarez and Guzman were present. (VI: 113.) The last time he distributed the UFW newpaper was also during late May 1983; again Alvarez and Guzman were present. (VI:114.) There was no UFW organizing campaign at Garin during 1983; no access was attempted. (VII: 34.) There was a UF»7 campaign during the period from June to August or September 1982.
(VII:34)

Tinajaro visited the UFW hall on several occasions in 1982. He spoke with Lupe Bautista. Alberto Gonzales was also present.

During the course of an ALRB hearing in 1982 in the presence of Barrietos and Denny Donovan, Tinajaro testified

regarding his union activities. (VI:118.)

(C) Evidence of Animus

In July 1982 at the barn at the Williams Ranch prior to the start of work, Juan Lopez, Tony Heredia and others were talking about the union. Jose Alvarez was listening. He took out a gun and showed it to them, saying it was to kill the Chavistas. (VI:120.) Alvarez said for a thousand dollars he'd kill all the Chavistas and Cesar Chavez.[29/] (VI:120.) Tinajaro testified that later that morning Alvarez told him that the gun was for Lopez, Heredia and himself. (VI:120.)

In the latter part of April 1983, Tinajaro called the Garin office to ascertain why he had not been paid for two hours work some two or three weeks previously. He spoke with Barrientos who asked whether he had worked; Tinajaro said that he had not worked; that Guzman had stopped him because it was raining that day and a part on the equipment Tinajaro was using had broken. He told Barrientos that he had gone to the barn to wait for the foreman. Lopez, Heredia, Alba and five or six other workers were also in the barn at the time. Tinajaro told Barrientos that when Guzman arrived, he accused Tinajaro of holding a union meeting. Tinajaro said he had denied the accusation and explained why the workers were present. (VI:123.) He said Guzman told him to go home because he was organizing people. (VI:124.) Tinajaro told Barrientos to pay him

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29. Juan Lopez testified to a similar statement by Alvarez; however, Lopez places the date as the latter part of February 1983 on the occasion of the tequila drinking incident. (VI:35.) Lopez also saw Alvarez' gun. Irrespective of whether the incident occurred in February 1983 or July 1982, it would have occurred at a time when Alvarez was admittedly a supervisor.

for those two hours because they'd paid the rest of the workers Who had stopped that day. According to Tinajaro, Barrientos told him to ". . . go to hell with Lupe Martinez from the ALRB, and with the farm workers union." He told Tinajaro he was not going to get paid and to go file a complaint against him or Denny Donovan. (VII:125.) Tinajaro apparently did not do so.[30/]

Also in late April 1983 at the Williams Ranch, Tinajaro together with Mario Garcia, Armando Flores and Rito Campos, were sent home by Guzman because it was raining. When Tinajaro asked why he was being sent home while Guzman was permitting another employee (Mario Garcia) to work, Guzman responded that, ". . .he was not taking me to work because I wore the button, and Mario did not wear it." (VI:127.) This testimony is not credited because it provides no explanation for sending Flores and Campos home.[31/]

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30. Predictably, Barrientos' testimony regarding this subject matter differs from Tinajaro's. Barrientos places the time as October or November, presumably 1982. This seems unlikely and the April 1983 date is credited. Tinajaro called and said he was shorted two hours and wanted to know why he wasn't paid. Barrientos checked the circumstances with Guzman and concluded Tinajaro shouldn't be paid. He called Tinajaro and so advised him. Tinajaro said he would file a charge with the ALRB. (X:121-124.)

31. Campos, a current employee, was called as Respondent's witness. He was not asked specifically about this incident; however, he testified he sees Guzman once or twice a day during the course of work and has never heard Guzman say anything about the UFW. Campos also testified that Mario Garcia told him that he was in favor of the UFW. (X:28-29.) Flores did not testify. Tinajaro's testimony was not corroborated. In what appears to be testimony regarding the same incident, Guzman testified he encountered Tinajaro at the barn about 11:00 a.m., and asked why he was there. Tinajaro's response was that it was raining, and he didn't want to get wet. Guzman said the rest of the drivers were

(Footnote continued------)

supporter.

Tinajaro testified that at the time he was given the employees' handbook in 1979 by Paulino Guzman, he was told by Guzman that the company would not recognize seniority for him because he organized for the UFW and wore "the Button." (VI:109.)

Juan Lopez, a current employee, testified to an occasion in September 1982 when he and Antonio Heredia were admonished by Jose Alvarez to keep away from union activities, or he would place them doing heavier work. (VI:34.) Alvarez also told them that he would do the irrigating himself, thus taking work from them. (VI:35.)[32/] On an occasion when Lopez, Alvarez and others were drinking tequila, Alvarez exhibited a pistol and announced that if the company paid him $1,000 he would kill the Chavistas, including Cesar Chavez. (VI:35.) Tinajaro corroborated Lopez with respect to the gun incident. (VI:120.)

Antonio Heredia, a current Garin employee, testified to an

(Footnote 31 continued------)

working. Tinajaro returned to work. Around 1:00 p.m. he again encountered Tinajaro in the barn. When asked, Tinajaro said he wasn in the barn because it was raining. Guzman said everbody else is working; work or go home. Mario Garcia was present also; Guzman was taking him to another field to move a tractor. (IX:76-78.) Garcia corroborated Guzman regarding his reason for being with Guzman (VIII:72) but Garcia was not questioned regarding the substance of the Guzman-Tinajaro conversation.

32. Alvarez testified but was not questioned on direct examination regarding the conversations to which Lopez and Heredia testified. Their testimony stands uncontroverted and is credtied.

occasion near the end of September 1982 on which Alvarez told him to stop getting involved with the union or he would be punished by receiving less work. (V:21.) Heredia also testified to unspecified occasions when Alvarez stated he didn't like Chavista supporters, and if he were well paid he would kill them, even Chavez. (V:22.)

Heredia also testified to a conversation between Barrientos and Tinajaro during the course of which he heard Barrientos tell Tinajaro that he was going to give him a ticket because he was always talking to the union when he went home for lunch. Tinajaro said he wanted it in writing; Barrientos responded that he wasn't that dumb. (V:24.)

Juan Lopez testified that he was not given a cap by the company this year.[33/] Higinio Guzman, a foreman, told him that Barrientos said hw was not going to give caps to the Chavistas-(VI: 37.) Lopez testified that Barrientos, following his reading of a letter Lopez received from Chavez, told him that Respondent was going to fire him and Heredia in the same way they fired Tinajaro.(VI:41)

Regilio Godinez, a current employee, testified to a conversation with Alvarez during December 1982 in the course of which Alvarez, while engaged in irrigating, told Godinez that he was doing the work so that the people in contact with the union wouldn't

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33. Barrientos testified regarding issuance of a cap to Lopez in June or July 1982. The record does not indicate whether one is supposed to receive a new cap annually.

get it. (IV:72.)[34/]

Godinez also testified to a conversation with Paulino Guzman in August 1983 in which he asked Guzman what happened to Tinajaro. Guzman responded that he had been discharged for drinking. He told Godinez to remove his union button, because if he didn't, the same thing would happen to him as happened to Tinajaro. When Godinez asked what he meant, he was told that Tinajaro had been fired because he always wore a union button. (IV:77-79.) Guzman recalled the conversation with Godinez about Tinajaro's discharge; but his testimony contains nothing which a reasonable person would construe as a threat of reprisal. (IX:79.)

As a current employee testifying adversely to the interests of his employer, Godinez' testimony is entitled to added weight.[35/] I credit Godinez' version of the August 1983 conversation with Guzman, and find Guzman's statements to Godinez to manifest animus toward the UFW.

Tinajaro testified that in September 1982, Barrientos approached him and asked whether he had heard the outcome of ULP charges which Tinajaro had filed against Garin. Barrientos went on to state that the ALJ's decision was in favor of Garin. He then stated: "From now on we're going to use all the force of discrimination to discriminate against you." (VI:93.) Barrientos

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34. Alvarez was not questioned regarding the Godinez conversation. Godinez' testimony stands uncontroverted and is credited.

35. Southern Paint & Waterproofing Co., Inc. (1977) 230 NLRB No. 61; Georgia Rug (1961) 131 NLRB 1304, fn. 2.

also asked how the complaint against Vargas was going. When Tinajaro told Barrientos he had nothing to do with the case, Barrientos told him to stop the case because he would be fired soon.

Barrientos admits to a conversation with Tinajaro in which he asked whether Tinajaro had received a decision in the ULP case he had filed against Garin. Tinajaro responded he had heard nothing and that he would let Barrientos know when he heard something. Barrientos testified he inquired because some of the workers purported to have been told by Tinajaro that he had won the case. Barrientos did not specifically deny the threatening remarks attributed to him by Tinajaro; nor was he asked whether he had made such remarks. (X:119-121.) Nor was he specifically asked whether he spoke to Tinajaro regarding his action against Vargas. General Counsel has the burden of proving that the Tinajaro version of the conversation with Barrientos is correct, the failure of Respondent to elicit a specific contradiction from Barrientos supports the inference that Tinajaro's testimony is accurate. I so find and find Barrientos inquired about the status of Tinajaro's action against Vargas as well as the status of the ULP case and that his other remarks during that conversation are evidence of animus-

Tinajaro testified that in June 1983, Barrientos confronted him in the field where he was changing a piece of equipment and told him he was going to get a ticket for taking the truck home to eat

the day before. (VI:96.)[36/] According to Tinajaro, Barrientos said that Tinajaro was not going home to eat but rather to call the UFW to advise them how the organizing campaign was proceeding. (VI:96.) He did receive a warning notice later that day.

(3) Analysis and Conclusions

The framework for analyzing whether Respondent's discharge of Tinajaro violates sections 1153(a) and 1153(c) is spelled out by the California Supreme Court in Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 and by the Ninth Circuit in Zurn Industries, Inc. v. N.L.R.B. (9th Cir. 1982) 680 F.2d 683.

The General Counsel has the burden of making a prima facie case, the elements of which are the following: the alleged discriminatees participation in union or protected concerted activity; employer knowledge of such activity and a causal connection between the action taken against the alleged discriminatee and his union or protected concerted activity, i.e. proof that Respondent's action was illicitly motivated. Once General Counsel makes a prima facie case, the burden of going forward and the burden of proof shifts to Respondent who must establish as an affirmative defense that its action toward the alleged discriminatee was unaffected by his union or protected

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36. Barrientos denied that such a conversation occurred. (X:107.) Barrientos testified that Tinajaro received a warning ticket for driving the fertilizer truck home for lunch, but that he was not involved in its issuance. (X:107.) I credit Barrientos; the warning ticket was issued by Guzman.

concerted activity.

> When it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained 'but for[1] his union membership or his performance of other protected activities." [37/]

In short, once General Counsel has made a prima facie case the burden shifts to Respondent to establish the discharge was for cause.

Respondent does not deny knowledge of Tinajaro's union activity. The record does not show him to be a highly visible activist or even as having more involvement than fellow employees. However, the degree or extent of such activity, as well as its relationship in time to alleged discriminatory act, is significant only in terms of persuading that the discharge was illicitly motivated. All things being equal, discriminatory motive is harder to prove when the discriminatee's union activity was of a kind commonly engaged in by fellow unpunished employees; was no more visible than that of coworkers and was engaged in at a point in time removed from Respondent's commission of the alleged discriminatory act.

General Counsel's theory of the Tinajaro case is that his discharge was the culmination of a campaign against him by Respondent which began in 1978 and which was manifested along the way by taking planting work away from him and by reducing his work hours. With respect to the discharge, General Counsel argues that

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37. Martori Brothers Distributors v. Agricultural Labor Relations Bd., Id., p. 730; Zurn Industries, Inc. v. N.L.R.B., Id.

the conduct for which Tinajaro was purportedly discharged, i.e., drinking on the job, did not occur; thus, the ground for discharge was pretextual. As a secondary position, General Counsel argues that if Tinajaro be found to have drunk beer at work, the discharge must be viewed as a mixed motive discharge, and Respondent's handling of Tinajaro's case evidences disparate treatment thereby overcoming efforts of Respondent to meet its burden of proof under Martori and Zurn, i.e., that the discharge was for cause and that the same action would have been taken against Tinajaro absent any union or protected concerted activity. We turn to an analysis of the respective contentions.

Respondent having admitted knowledge of Tinajaro's union and protected activities, the threshhold question is whether Tinajaro did in fact consume any beer on the day of his discharge. The answer presents difficult problems of credibility resolution. Predictably, Tinajaro denies he did so; Dr. Ernest Simard supports Tinajaro's testimony. To the contrary is the testimony of Barrientos and Guzman. Halcon, an unimpeached percipient witness, did not see Tinajaro take a drink, but did see him with a can of beer in his hand. With the exception of Halcon, none of those testifying regarding the events of June 10 uniformly impressed me with their truthfulness. While some of the adverse impressions regarding the candor of Tinajaro, Barrientos and Guzman stems from their testimony in other areas, their demeanor during that testimony has created doubts regarding the accurateness of their testimony about the events of June 10. It would be convenient to assert that demeanor was the primary basis for making the credibility

resolutions recited below; but it would be less than candid to do so. Conflicts in uncorroborated testimony have been resolved primarily by determinations of what is most likely to have occurred, bearing in mind the self-interest of the persons testifying.

A major gap in Respondent's position that Tinajaro was discharged for cause is the failure, and absence of explanation for the failure, to produce Roberto Lopez. Tinajaro's testimony regarding Lopez' noon time beer drinking and his solicitation by Lopez to join him stands uncontroverted and is corroborated by Juan Lopez with respect to one lunch period. Standing unexplained, Respondent's failure to call Roberto warrants the inference his testimony would not have contradicted that of Tinajaro regarding events which occurred during the lunch breaks the week which Roberto worked, particularly the events of the 10th. Whether Roberto was a competent tractor driver isn't crucial to General Counsel's case. The uncontroverted, again because of Lopez' absence, revelation to Tinajaro that he was an office employee rather than a tractor driver does, however, support the conclusion that he was inexperienced and tends to impeach Guzman's testimony regarding the adequacy of Lopez's performance. Furthermore, Respondent offered no explanation regarding its employment of a tractor driver from Sommerton, Arizona. The credited and uncontroverted testimony of Tinajaro that Lopez cozied up to him immediately after being hired and the fact he persistently sought Tinajaro's company at lunch time and persistently offered him beer are circumstances which lend support to General Counsel's theory of the discharge.

There remains the question in terms of establishing illicit

motivation: why would Respondent go to such lengths to rid itself of Tinajaro. General Counsel argues his termination was the culmination of a five-year plan. This argument is not persuasive. A more reasonable inference is that Respondent began shortly before his discharge to perceive Tinajaro as a pipeline to the UFW. This perception, coupled with Tinajaro's increasing visibility as an activist in the months immediately preceding his discharge is sufficient to establish prima facie proof of illicit motivation.

The evidence produces, albeit barely, more than a suspicion of illicit motivation; but it does do so, and I find General Counsel made a prima facie case. See National Labor Relations Board v. Federal Pacific Electric Company (5th Cir. 1971) 441 F.2d 765; Royal Packing Co. v. Agricultural Labor Relations Bd. (1980) 101 Cal.App.3d 826, 835-837.

Other than agreement regarding who was present, there are few undisputed facts regarding what transpired on June 10. One such fact is that Tinajaro and Lopez had not returned to work prior to the arrival of Barrientos, Halcon and Castro. With respect to their time of arrival, Tinajaro's testimony timing the arrival at 12:18 p.m. is not credited, not because of a prior inconsistent statement placing the arrival at 12:22 p.m., but because of his preciseness in stating the time and because antecedent events make it more likely that Barrientos et al. did not arrive until after 12:30 p.m.

Barrientos and Halcon each testified they were with a ground crew at approximately 12:30, testimony supported by the fact the ground crew which they visited was completing its work and leaving the field as they arrived.

Yet another uncontested fact is the presence of empty Coors and Budweiser containers at the site. The reasonable inference is that the beer had recently been consumed by Lopez and/or Tinajaro. Barrientos testified he saw Tinajaro take a drink from a can of Budweiser; Halcon testified he saw Tinajaro with a can of beer in his hand but did not testify he saw him take a drink. Halcon, as noted above, was a credible witness.

General Counsel produced an expert witness, Dr. Ernest Simard, a certified specialist in pathology. Simard's office performed a blood-alcohol test on Tinajaro the afternoon of June 10. Based upon that test it was Simard's opinion that Tinajaro had ingested no alcohol for two hours prior to the test being administered. It is not Simard's practice to log the times when tests are given. On the basis of the location of Tinajaro's name of the office's sign in sheet, he was of the opinion the test had been administered around two o'clock. Thus, Tinajaro could not have consumed any beer during his lunch hour.

Tinajaro's testimony that he did not drink beer on the day of his discharge is credible. It is consistent with his refusal to accept Lopez's offers of lunchtime beers made earlier that week; it is consistent with the blood alcohol tests administered by Dr. Simard's office the afternoon of his discharge; it is consistent with the testimony of percipient witness Halcon; it is consistent with his request to be taken forthwith to the doctor for a blood alcohol test; and it is consistent with his request to Barrientos that he be permitted to call over a nearby irrigator whom he had reason to believe would substantiate his story.

Having refused Lopez' offer of a beer on three previous noon hours, it is unlikely Tinajaro would have reversed his position on the day of discharge, particularly in view of his suspicions about Lopez. The fact that Friday was the first day Lopez offered Budweiser, as opposed to Coors, is not sufficient to cast doubt on Tinajaro's credibility. If the appearance of Budweiser had any impact on Tinajaro's behavior, it is likely to have reinforced his suspicions of Lopez.

It is unlikely that Tinajaro would have sought to have Guzman take him to the doctor had he consumed beer. The promptness of his submission to a blood alcohol test coupled with the negative results of the test is persuasive evidence that he did drink beer at lunch on June 10. Moreover, Respondent's witness Halcon was present at the time Barrientos purportedly saw Tinajaro take a drink and did not corroborate Barrientos' testimony on this point.

Respondent's witness Guzman's testimony regarding the events of June 10 is not credible. It is inconsistent with Halcon's testimony regarding whether Halcon was at the scene at the time Guzman arrived. Halcon says no; Guzman says yes. There is no reason for discrediting Halcon. Nothing suggests he had reason to be other than truthful, and his demeanor impressed me as a candid effort to relate events as he recalled them.

Moreover, Guzman's testimony was inconsistent with that of Halcon and Barrientos on points where one would anticipate consistency, e.g., Guzman testified that Tinajaro, in the immediate presence of Barrientos, continued to drink beer. While Barrientos testified that Tinajaro took a drink of beer after his arrival, this

purportedly occurred prior to the time Guzman arrived, and as noted Halcon testified that Tinajaro drank no beer while he was present-Additionally, were Guzman's testimony accurate, evidence of Tinajaro’s consumption would be likely to have appeared in the blood alcohol test since Guzman did not arrive on the scene until hear the end of the confrontation. Guzman's credibility is further impeached by his testimony regarding the pictures Barrientos took of the incident. He testified that Barrientos photographed the beer cans after his arrival. Both Barrientos and Halcon testified the pictures were taken before Halcon left the scene with Castro to summon Guzman. There are other discrepancies between the testimony of Guzman and others present at the scene which need not be detailed. They further support the conclusion that Guzman's testimony regarding the June 10 incident is not credible.

In crediting Tinajaro's testimony regarding the events of June 10, it follows that Barrientos has not been credited. Barrientos testified on several occasions during the course of the hearing and left varying impressions of his credibility. V7ith respect to the events of June 10, Barrientos testified that he removed two beer cans from Tinajaro's lunch bag and placed them on the truck together with some Coor's bottles, and that as he was talking to them, both Lopez and Tinajaro grabbed a beer container and took a drink. This testimony is not credible. Tinajaro did not impress me as one who would behave so outrageously in the face of impending discipline. Moreover, had Tinajaro acted as Barrientos testified, it is unlikely that Halcon would have failed to see him drinking. Additionally, inconsistencies in Barrientos' testimony

regarding the can from which he purports to have seen Tinajaro drinking casts doubt on the veracity of his testimony regarding Tinajaro's drinking.

Having concluded that Tinajaro drank no beer on June 10, 1983, it follows that Respondent's assignment of beer drinking as the cause for discharge was pretextual and that Tinajaro was discharged because of his Union and protected concerted activities in violation of sections 1153(a) and (c). Stated otherwise, Respondent failed to rebut General Counsel's prima facie case by failing to prove that Tinajaro would have been discharged irrespective of his union and protected concerted activities.[38/]

B. Tinajaro's Reduction in Hours

Facts

General Counsel's allegation that Tinajaro was given less work during the period from June 1982 until his discharge in June 1983 is apparently based upon a charge filed in December 1982. The record contains no such charge. The charge involving Tinajaro appears to be 83-CE-88-SAL which was filed June 14, 1983. If this is the underlying charge, Labor Code section 1160.2, had it been raised as a defense by Respondent, would move the relevant time frame from June 1982 to December 14, 1982. Absent reliance upon the

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38. The conclusion reached above obviates the need to consider General Counsel's argument that Tinajaro was accorded disparate treatment in the manner in which Respondent administered its policy regarding on the job drinking. Were such consideration necessary, it is my view the evidence does not support the General Counsel's position. The record supports the conclusion that Respondent's post-discharge treatment of Tinajaro was consistent with its treatment of others terminated for on job drinking known to the individual's supervisor, i.e., reinstatement conditioned upon participation in an alcohol rehabilitation program.

affirmative defense afforded by 1160.2, the allegations of paragraph 5(e) will be considered on their merits.

As noted above, General Counsel contends that Respondent had been engaged in a course of discriminatory conduct against Tinajaro since 1978 which has been manifested (1) by the failure to provide Tinajaro with the number of hours due him pursuant to Respondent's practice of working tractor drivers on the basis of seniority; and (2) by denying him the opportunity to do planting work after removing him from such work in 1978.

Respondent defends by asserting that following his removal from planting work in 1978, Tinajaro was offered and refused the work in 1979 and 1980; that he again sought planting work in September 1982 but was denied the work because of the experience achieved by the current driver doing planting work and by arguing that Tinajaro has generally received more hours per pay period than one or more of the four drivers senior to him.

Respondent has an announced seniority policy set forth in its employee handbook which provides:

> The Company tries to avoid lay-offs, but because of the seasonal nature of agriculture, this is not always possible. The employee wil be protected under the seniority system whereby the employee with the longest time in service to the company will be the last to be laid off or first to be rehired. Rules for seniority are as mentioned below.
>
> In the event an employee works for the Company at least 20 days within the preceding ninety (90) calendar days he shall acquire seniority on the 20th day of work with the Company retroactive to the original date of hire. Seniority shall prevail in layoffs, recall, and filling of job vacancies; provided however, the employee is able to do the work. The Company shall have the right to determine any employee's ability to do the work, regardless of seniority, but such determination shall not be exercised arbitrarily. In all cases the senior employee shall have

> reasonable time to demonstrate his ability to do the work satisfactorily. In the event such employee is unable to satisfactorily do the work, the employee shall return to his prior job classification. While there is not job classification seniority, the Company agrees not to change an employee's job classification arbitrarily.
>
> * * *
>
> Seniority, as described in this section, is defined as Company seniority, which means length of service with the Company. However, where a dispute arises, the senior employee within a geographical area of operation shall have preference. It is understood and agreed that work is performed in certain commodity groups and/or in the makeup of the work force, it is customary for families and/or certain employees to work together.
>
> Seniority shall not be applied so as to displace (bump) any employee of the Company within an established crew, commodity or geographical area.

Tinajaro was positioned number 5 on the seniority roster dated January 10, 1983. (G.C. Ex. 4.) Mendoza, Gomez, Genero Garcia and Sanchez were the tractor drivers having more seniority than Tinajaro. Cirilo Martinez whom Tinajaro sought to bump from doing planting work was number 7 on the list.

During 1982, there were forty-two weeks in which Tinajaro worked fewer hours than one or more drivers below him on the seniority roster. In many of those weeks, eight to twelve less seniority drivers logged more hours than Tinajaro. In most cases the differential was in the range of a half hour to an hour, e.g. during the week ending October 23, nine of the ten drivers logging more hours than Tinajaro worked in additional half hour. Also during 1982 there were twenty-three weeks in which Tinajaro logged more hours than one or more of the drivers above him on the seniority list. (Res. Ex. H.)

A comparison of Tinajaro's hours during weeks he worked

with those of Zuniga, next below him on the seniority roster and a driver also primarily engaged in cultivation and fertilization work, shows that during 1982, there were 27 weeks in which Tinajaro worked fewer hours than Zuniga, 4 weeks in which he worked more hours and 17 weeks in which he and Zunigo worked the same number of hours.[39/] The significance of these figures is questionable in light of the fact that the work time differential during 11 of these weeks was an hour and one half or less and was five hours or less during 18 of the 27 weeks Zuniga logged more time than Tinajaro. (Res. Ex. H.)

Tinajaro did not work during the weeks ending January 1, 9 and 16, 1982; nor did he work in 1983 until the week ending February 5. The failure to work during these two periods provides corroboration for the testimony of Guzman that Tinajaro was not available for work during the month of January. Tinajaro conceded that on occasions he takes a leave of absence to visit relatives in Mexico during the holiday season in December and January.[40/] (VII:27.)

During 1983 Tinajaro worked sixteen weeks prior to his discharge. In each of those weeks, one or more drivers with less seniority worked more hours. Cirilio Martinez, who was two below Tinajaro on the seniority list, worked more hours in each of the

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39. The record does not establish whether Zuniga was a UFW activist.

40. See also testimony of Genero Garcia. (VII:70.)

sixteen weeks;[41/] Zuniga who was next below Tinajaro worked more hours in ten of the sixteen weeks. The number of additional hours per week worked varied from one half hour to eight hours. (Res. Ex. I.) During ten of sixteen of the weeks he worked in 1983, Tinajaro logged more hours than one or more of the drivers above him on the seniority roster. (Res. Ex. I.)

Guzman testified that there were weeks in 1983, particularly during the rainy season, when he attempted to locate Tinajaro for work but was unable to find him. As a result, it was necessary to call in persons with less seniority. This testimony was unrebutted and is credited. (X:10.)

The work attendance records tend to support the testimony of the tractor foreman that ability to perform a specific task is considered as well as seniority in making work assignments. Specifically, in response to questions by General Counsel, Guzman testified that planting work is assigned to the driver who can do it better as opposed to the one with the most seniority. (IV:25.)Charging Party Jimenez also testified that planting and seeding work is assigned on the basis of ability.[42/] (III:87.)

In terms of desireability, Pete Maturino, former assistant personnel director for Respondent testified the Class I tractor work was more desirable, with planting being the most desirable of all Class I work. (V:70.) His opinion was based upon the fact that

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41. Martinez does the planting, a job which customarily provides more hours.

42. See also testimony of Maturino (V:73).

planting did not require the use or application of pesticides; also the person doing the planting will tend to get a few more hours-(V:71.) Maturino's opinion was seconded by Tinajaro. (VI:104.)

Tinajaro performed planting work during 1976, 1977 and for some period in 1978. He performed none thereafter. (VI:90.) Tinajaro testified that he spoke to Barrientos about being returned to planting work in 1981; that Barrientos said he would investigate the matter and get back to Tinajaro; and that he did not do so.[43/] (VI:92.)

Tinajaro testified that he asked Guzman about planting work in 1979, but he could recall no details of the conversation. In 1980, Tinajaro contends he "told them (Guzman) about the planter, and he (Guzman) said to stay away from organizing and using the button." (VI:101.) He testified he had similar conversations with Guzman in July 1981 and July 1982.[44/] Guzman purportedly told him to ". . . keep from doing that, and talking to the people, and to remove the button." (VI:102.) In August 1982, Tinajaro asked Guzman about a planting job. He testified that Guzman's response was "Me to stop wearing the button, and he would give it to me."

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43. Tinajaro's testimony regarding this incident is inconsistent. He initially testified that all Barrientos said during the conversation was that he wanted Tinajaro to sign a paper so there would be no more overtime. (VI:91.) Thereafter, in response to a leading question, Tinajaro testified as recited in the text.

44. Guzman denied that Tinajaro spoke to him about planting prior to 1982.

(VI: 103.)[45/]

Guzman testified that Tinajaro first asked him about the planting job sometime during August or September 1982. Guzman responded that Tinajaro had been offered to job before but didn't want it. He asked why Tinajaro had waited to request the work. Tinajaro's response that he and Martinez were not getting along too well any more; so he wanted to get the planting away from him. Guzman declined to give him the work because Martinez had been working with the planter for a long time and was doing a good job. (IX:60)[46/]

Two or three years earlier, Norman Amaral told Tinajaro there was a possibility of an opening to work on the planter and asked Tinajaro whether he wanted it. Tinajaro declined, saying he

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45. Tinajaro knew of the ALRA and its purposes as early as 1978. He testified he felt Garin's failure to give him planting work in 1979 and thereafter was because of his union activities, but he filed no unfair labor practices alleging such discrimination. When asked on cross-examination whether he had ever filed such charges, his response was "I don't remember." It is highly unlikely he would have forgotten had such charges been filed. Ilis response was evasive and not credible. No charges based on Respondents failure to give him planting work were filed, a fact which leads me to conclude that Tinajaro saw nothing improper in the assignment of planting work to Martinez and further leads me to discredit the testimony set out above regarding his requests to be assigned such work. Thus, that testimony does not tend to establish a background of discriminatory conduct toward Tinajaro or of any general animus toward the UFW. Finally, it is noted that Tinajaro unsuccessfully filed a charge relating to a three-day discriminatory layoff in 1981; thus, making it even more unlikely he sought and was refused planting work as he testified.

46. For the reasons set forth in fn. 20, I credit Guzman's testimony on this point and find that 1982 was the first year, following his removal from planting work, in which Tinajaro sought the work.

didn't want to travel to Huron or Bakersfield to work. (IX:61.) Amaral's testimony on this point was uncontradicted and is credited.

Cirilio Martinez is assigned to planting work.[47/] If he is not available, the work is assigned to Genero Garcia who is number 3 on the seniority list. If he isn't available, the work is assigned to any other driver who is capable of handling it.[48/] (VII:68.) The company is interested in assigning the work to experienced people.

Planting is considered a Class 1 job, it will be done occasionally by Class 2 drivers when all the Number 1 drivers are busy. (IX:58.) Prior to Tinajaro's termination, there were three Class 1 drivers.

Guzman testified that there was less tractor work in 1983 than in 1982. He attributes this to two things: there was more rain in 1983 and Respodnent was farming fewer acres in the greater Salinas area, having let go of one ranch in King City. (IX:62.) Two tractor drivers were transferred from King City to the Gonzales area, Rito Campos and Armando Flores.

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47. Cirilo Martinez was very active on behalf of the UFW during the 1978 election campaign; but Tinajaro denied knowledge of an election in 1978 in which Martinez was elected by the tractor drivers as their representative. (VI:33.) Tinajaro also denied that Martinez was the spokesman for drivers and irrigators at meetings regarding work related problems. (VII:34-35.) He contends that he and Antonio Heredia, his cousin, were the spokesmen.

48. On cross-examination Garcia's testimony differed, he testified that when additional dirvers were needed for planting work, it was given to Zuniga, Mario Garcia, Campos or himself. (VII:122.) Mario Garcia, Campos and Genero Garcia are Class 2 drivers.

Guzman's testimony regarding decreased acreage and increased rainfall in 1983 was not controverted and is credited.

In 1981 Tinajaro averaged more hours per week during weeks he worked than did M. Gomez, Flores, Ramirez and Campos, the four year-round drivers having the least seniority. In 1982, two of the four, Gomez and Flores averaged more hours per week than Tinajaro. The same two drivers also averaged more hours per week than M. Garcia and Lares both of whom were higher on the seniority list than they; and a third, Campos, the bottom year-round driver, had the same average hours worked per week as Lares, three places above him on the seniority list, and a higher average than Ramirez who is next above him in seniority.

In 1983 prior to Tinajaro's discharge, during the eleven weeks in which the four bottom year-round drivers worked, they worked more hours per week on the average than did any of the drivers above them in seniority.[49/]

With regard to layoffs lasting a week or longer, Respondent, with one or two exceptions, appears to have followed the policy enunciated in the employer handbook.

(2) Analysis and Conclusions

The General Counsel's argument that the failure of Tinajaro to have been assigned more hours per week each week than drivers below him on the seniority roster manifests Respondent's

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49. These factual conclusions rest upon Res. Exs. H and I, payroll records introduced into evidence. Average hours worked per week were obtained by dividing total hours worked for the period being considered by the number of weeks worked during the-period, e.g., in 1982 Tinajaro worked a total 2347.5 hours during 48 weeks; 2347.5/48 = 48.90 average hours worked per week worked.

discriminatory conduct toward him is not persuasive. It rests upon a misconception of the relevance of the seniority policy set forth in the employee handbook.

The Handbook promises that Respondent, subject to the ability to do the work, will layoff drivers in reverse order of seniority and will recall after layoff in order of seniority. With respect to Tinajaro there is no contention that he was laid off out of seniority or that Respondent failed to recall him in order of seniority. The seniority policy set forth in the Employee Handbook is not germane to the allegations of paragraph 5(e).

An assertion that seniority shall control layoffs or recalls after layoffs is manifestly different from the process of determining or assigning the hours to be worked during the course of a week by those drivers currently on the payroll. Distribution of work during the week is dependent upon the tasks to be performed; and the type of work customarily performed by a driver. Respondent's commitment to application of seniority rights as set forth in the handbook, does not provide for bumping on a day to day basis, nor assignment of work on a day to day basis to insure that he who has the most seniority shall receive the most hours per day or even per week. In the context of the allegations of Paragraph 5(e), Respondent's seniority policy is not relevant. To the extent that General Counsel is contending Respondent discriminated against Tinajaro by failing to lay him off or recall him in order of seniority, the evidence does not support the allegation.

Examination of hours worked per week by tractor drivers evidences no significant positive correlation between place on the

seniority roster and hours per week worked. The absence of such a correlation cuts against General Counsel's contention that Tinajaro's failure during certain weeks to receive as many hours work as some drivers below him on the roster was because of his union or protected concerted activities.

Since both perform the same type work, the difference in hours worked by Zuniga and Tinajaro during 1982 and 1983 is more significant; however, the record raises no more than a suspicion that generally small differences in work time per week in favor of Zuniga might have had a discriminatory motivation.[50/] There is nothing in the record to indicate the relative competence of the two; nor is there anything which indicates whether Zuniga was also a low profile UFW activist. But most significant in reaching the conclusion that the General Counsel has failed to prove discriminatory motivation with respect to the hours of work assigned Tinajaro is the minimal differentials during most weeks. An hour and a half a week is an average of fifteen minutes a day for a six-day work week, an amount easily attributable to differences in work assignments. Moreover, the fact that Tinajaro's work hours frequently exceeded those of persons above him on the seniority roster again cuts against General Counsel's argument.

In view of the evidence set forth above, General Counsel

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50. "It is incumbent on the General Counsel of the Board to prove unlawful conduct and unlawful is not lightly to be inferred." National Labor Relations Board v. Federal Pacific Electric Company (5th Cir.1971) 441 F.2d 765; mere suspicions of unlawful motivation are not sufficient to constitute substantial evidence. Lozano Enterprises v. National Labor Relations Board (9th Cir. 1966) 357 F.2d 500.

has not proved by a preponderance of the evidence that Respondent assigned Tinajaro fewer hours per week because of his union or protected concerted activities.

We turn now to General Counsel's contention that Respondent's refusal to assign Tinajaro the planting work during the 1982-83 planting season was illicitly motivated.

Tinajaro's testimony that he requested planting work from Guzman or Barrientos repeatedly during the period between 1979 and 1983 is not credited. Guzman denied any conversations prior to August or September 1982 regarding planting work. He admits to such a conversation at that time and to having refused to give Tinajaro the planting job. The basic and credible reasons for his refusal were the fact that Tinajaro had previously been offered the work and had rejected it because he did not want to travel to Bakers field or Huron as is requested of one who does this work; secondly there was the problem of Tinajaro's unavailability during December and January when planting work is performed; and finally the fact that Hartinez had been performing the work satisfactorily since being assigned to the work some years ago.

Tinajaro's testimony regarding conversations with Barrientos or Guzman in which he purportedly sought planting work is not credible. The similarity of his testimony with respect to each of the conversations gives them the ring of recent contrivance rather than candid recollections of events which occurred three or four years ago. Tinajaro's cousin Heredia testified that Tinajaro is a person who pursues his rights when he feels he has been wronged as is witnessed by his previous charge upon which complaint issued

and the present charge, as well as his suit against Chualar labor camp. Had he requested planting work and been refused such work in the manner he testified, it. is difficult to believe he would not have filed charges against Respondent; had such charges been filed, it is unlikely General Counsel would have failed to bring them to my attention.[51/]

To summarize: General Counsel has failed to establish by a preponderance of the evidence that Respondent discriminatorily gave Tinajaro fewer work hours during the period from June 1982 until his termination and has failed to establish by a preponderance of the evidence that Respondent discriminated against Tinajaro during the period between June 1982 and June 1983 by declining to assign him to planting work. Therefore, I recommend that the allegations of paragraph 5(e) of the complaint be dismissed.

C. Jimenez' Reduction in Hours

(1) Introduction

Paragraph 5(c) of the complaint alleges that commencing on or about March or April 1983, Respondent discriminatorily applied its policy with regard to the seniority of employees picked up and detained by the Immigration and Naturalization Service (INS) with the object of discrimination against Jimenez and others because of their activities on behalf of the UFW. The effect of Respondent's action being a reduction in work hours available to Jimenez and

51. Tinajaro's failure to respond directly on cross-examination to questions seeking to ascertain whether he had filed unfair labor practices regarding Respondent's purported refusal to return him to planting work contributed to the failure to credit his testimony regarding conversations in which he purportedly sought the planting work. See: VII:27-30.

others. The complaint also alleges that because Jimenez filed the charge underlying the allegations of paragraph 5(c), his work hours were further reduced and he was placed on layoff status.

Respondent concedes that Jimenez was laid off earlier in 1983 than in prior years, attributing the earlier layoff to the transfer into the Salinas operation of tractor drivers having more seniority than Jimenez from a Garin operation which had been closed and to the fact that 1983 weather conditions prohibited double cropping.

Jimenez conceded there was a lot of rain in 1983 and that when there is a lot of rain, there is less work for tractor drivers-He also conceded that he was not laid off out of seniority.

The events giving rise to the charge relate to Mario Garcia and his detention by INS. On April 8, 1983, while at work, Garcia was picked up by INS. He returned to work on April 13, 1983, with no loss of seniority.[52/] Respondent denied that the application of its INS policy to Mario Garcia was discriminatory.

(2) The Facts

Francisco Salada Jimenez (Jimenez) has worked for Respondent as a Class II tractor driver since 1977 and has been a steady employee since 1979.

Jimenez testified he attended a meeting sometime in 1980 or 1981 between all irrigators and tractor drivers and company representative Vargas, Matarino and Donovan. (III:61.) The main subject of discussion was the reason for Garin workers receiving

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52. The parties stipulated to the date of pick up and date of return to work. (VI:78-79.)

lower wages than workers at other companies. (III:61.) Cirilio Martinez acted as the workers' spokesman. Donovan explained that Garin had not received wage reports from other companies and that raises would be granted when they learned what others were paying-Vargas also spoke of Garin's policy re workers apprehended by the INS. He stated that any worker picked up by the INS would be terminated. The workers agreed with him. (III:62.) Denny Donovan, Garin's president testified it was Garin's policy not to rehire any worker picked up by INS, unless the worker can prove he's legally in the United States. Donovan did not state any policy regarding the seniority placement of the rehired workers. This was the only meeting attended by Jimenez at which Respodnent's INS policy was discussed. (III:62.) There were other occasions, the most recent of which was 1981, on which Jimenez heard Pete Matarino reiterate his position to various workers.[53/] Jimenez was unaware of whether any of his fellow workers had been apprehended or whether any worker had lost his job because he had been returned to Mexico.[54/]

Testimony was presented regarding Respondent's treatment of two employees apprehended by INS.

(a) Francisco Luis Bustamonte

Bustamonte, a current employee, was initially

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53. Matarino is Barrientos predecessor. He was called as a witness by General Counsel but was not interrogated about how Garin return to Garin. (XI:57.)

54. On cross-examination, Jimenez was unclear regarding when the meeting occurred at which Respondent's INS policy was discussed. He was sure that the discussion occurred at the same meeting as one which wages and fringe benefits were also discussed.

employed by Garin in 1973 as an irrigator in the Gonzales area. In February 1980 he was arrested by the INS and deported to Mexico. During his absence he had no contact with Respondent. In May 1980, Bustamonte returned to the area and sought employment from

Respondent. He was rehired but was not credited with his 1973 seniority date. He now has a May 1980 seniority date.[55/] Donovan testified that Bustamonte returned after deportation with a green card and was rehired because of his previous good service. He was not given his former seniority date because of the period of time for which he had been absent and the lack of certainty that he would return to Garin. (XI:57.)

Bustamonte's only union activity occurred during 1978 and consisted of wearing a UFW button for a period of 9 months (III:16, 17.)[56/] He testified that many other workers wore UFW buttons during 1978, and he conceded he received no adverse comment from any of his supervisors for wearing the button. (III:17.)

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55. Bustamonte testified he had legal status when he returned to the U.S. althrough he was here illegally prior to his deportation. However, he also testified he took no steps to obtain legal status during the period he was in Mexico. The circumstances under which he obtained legal status are unexplainted.

56. Mario Garcia testified that Bustamonte "never wears a button." This was in response to a question as to whether Bustamonte wore a button in 1978. General Counsel's interest is in showing Bustamonte was a Union supporter and Respondent's was in showing he wasn't. Even if he wore a button in 1978, I find it unlikely that Respondent predicated any action in response to his deportation upon that fact. Therefore, I find it unnecessary to resolve this conflict in the testimony.

(b) Mario Garcia

Mario Garcia was first employed by Respondent in April 1975 as a tractor driver. He is the son of Genero Castro Garcia who is also a tractor driver for Garin. Mario's seniority date is April 10, 1975.

Garica was apprehended by INS on April 8, 1983.[57/] He was not deported and after a hearing established that he was legally in the United States, he returned to work for Garin on April 13 with no loss of seniority. (VI:78-79.)

Following Mario's return to work, Jimenez spoke to Barrientos about Garcia's retention of seniority and requested a meeting to discuss Respondent's INS policy. (III:102.) Jimenez contended Garcia should go to the bottom of the seniority list.

Garcia testified that he attended most of the UFW meetings since 1978. (VIII:74.) General Counsel produced witnesses who testified Garcia was not present at meetings which they attended. He also produced a witness, Juan Lopez, who testified that Garcia had on many occasions in head to head conversations with him stated he did not like the UFW. (VI:57.)[58/] Respondent's president testified he was aware that both Mario and his father were engaged in union business.

Following Mario's return to work, the tractor drivers met

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57. Mario's father, notified Respondent Mario had been picked up by INS.

58. Mario Garcia testified but was not questioned regarding any conversation with Lopez regarding this attitude toward the UFW. Lopez' testimony is uncontroverted and is credited.

with Barrientos, Donovan and Vargas to discuss the manner in which Respondent had handled his seniority.(VII;98) The meeting was in response to Jimenez's complaint to Barrientos that Mario should go the bottom of the list.

Frank Vargas told the employees he was not favoring any worker; he said he was merely accepting or respecting the letter Marrio had presented from immigration. (VII:99) Vargas said that although Mario had been picked up, he had papers to establish he was legally in the United States; therefore, he would lose neither his seniority nor his job. (X:22) Barrientos added that the situation was analogous to a worker being picked up by the Highway Patrol and be absent for two or three days; he would be treated the same way. (VII:99) When the meeting was over, Vargas asked if there were any other complaints. No one responded. Cirilio Martinez testified he polled the drivers and the only one who was dissatisfied was Jimenez. (X:22)

(c) Respondent's Policy Re Workers Apprehended by INS

Denny Donovan testified that it's Garin's policy to terminate any worker apprehended by the IMS. Juan Lopez testified that during the course of a 1981 meeting in response to a question, a management representative stated that a worker taken by the INS who returns on the third day would be rehired with a loss of seniority. (III:49) Lopez recalled no discussion regarding the fate of a worker who failed to return within three days.

Genero Castro Garcia testified to a different understanding

of Garin's policy. At a meeting in 1980 in response to a question about rehiring person picked up by INS, Frank Vargas said that a person picked up and sent to Mexico would lose his job if he returned without a paper or permit. (VII:81) Vargas went on to say the company could be fined if it hired persons without a permit.

(d) Jimenez' Union and Protected Concerted Activities

Jimenez' union or protected concerted activities appear to be minimal. He testified that he together with many others wore UFW buttons during a nine month period in 1978. He conceded that he received no adverse comment from any supervisor because of his button wearing.

He testified to an incident in 1983 in which Norman Amaral, a supervisor, approached him and "flipped" the union buttons Jimenez was wearing on his jacket. (III:69) Amaral denied that the incident occurred; he denied speaking to Jimenez about the UFW or touching his person.

Jimenez' testimony regarding a meeting with Donovan relating to being assigned to laser work was offered as further evidence of Jimenez' protected concerted activity. This encounter was said to occur in 1982. Jimenez asked Donovan why the least seniority persons had the laser. (III:73) Donovan called Barrientos into the meeting. Barrientos said nothing; Donovan said they thought Romulo, the person operating the laser at the time was

a good worker and deserved it. (III:74)[59/] Romulo was above Jimenez on the seniority list. Jimenez testified he was wearing a UFW button at the time. (III:76) Although Jimenez purportedly he inquired about Respondent's basis for assigning the laser work, he testified he personally was not interested in the work. (III:101)

Contrary to the testimony of Jimenez, Respondent's witness Garcia testified that Hermenegildo Gomez has been assigned to laser work for the past two years. (VII:96) Gomez is number two on the seniority list.

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59. Donovan was not questioned about this meeting.

(e) Weekly Hours Worked by Tractor Drivers [60/]

	TOTAL HOURS WORKED		AVERAGE HOURS PER WEEK		DIFFERENCE
	4/16/83-7/24/82	4/17/83-7/23/83	1982	1983	
(1) F. Mendoza	819	843	54.6	56.2	+1.6
(2) H. Gomez	948	871	63.2	58.1	-5.1
(3) G. Garcia	915	838	61.	55.8	-5.2
(4) J. Sanchez	*				
(5) A. Tinajero	**				
(6) J. Zuniga	943	876	62.9	58.4	–4.5
(7) C. Martinez	957	947	63.8	63.1	-7
(8) Mario Garcia	910	731	60.7	48.7	-12
(9) R. Lara	931	824	62.1	54.9	-7.2
(10) M. Gomez	936	845	62.4	56.3	–6.1
(11) A. Flores	922	817	61.4	54.4	–7.0
(12) E. Ramerez	790	829	52.7	55.2	+2.5
(13) R. Campos	852	834	56.8	55.6	–1.2
(14) J. Arriaga	851	798	56.7	53.2	–3.5
(15) Rodriguez	932	817	62.1	54.4	–7.7
(16) Cabrera	922	808	61.5	53.8	–7.7
(17) Villegas	936	839	62.4	55.9	–6.5
(18) Jimenez	826	718	55.	47.9	–7.1

* Comparison not appropriate since off work 10 consecutive weeks for undisclosed reason.

** Comparison not appropriate since discharged June 10, 1983. s. Ex. H & I

Jimenez filed his ULP charge during the week ending May 14, 1983. Commencing with that week, Jimenez worked a total of 11 weeks before he was laid off. He worked a total of 549 hours for an average of 49.9 hours per week. For a comparable period in 1982, Jimenez worked 626 hours for an average of 56.9 hours per week.

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60. The average hours worked per week in 1982 and 1983 was obtained by dividing total hours worked during the period beginning the week ending April 16,17 and ending with the week of July 23, 24

Thus, during this period he averaged 7 hours per week less in 1983. Jimenez worked 626 hours for an average of 56.9 hours per week. Thus, during this period he averaged 7 hours per week less in 1983. He average 7.1 hours per week less during the period for April 16 through July 23.[61/]

Testimony by Respondent witnesses that the decline in work hours of tractor drivers in 1983 was attributable to acreage reduction, heavier rain in 1983 and transfer of drivers from King City was unrebutted.

(f) Analysis & Conclusion

General Counsel argues that Respondent, on the basis of union activity, discriminatorily appled its so called INS policy with the object of discriminating against Jimenez by providing him with fewer hours work.

There is no question but that Jimenez worked fewer hours during the 1983 weeks following Garcia's return to work than he worked during the same period in 1982. However, it is difficult to attribute the cause of his fewer hours to Garcia's return or to the fact that Jimenez purports to be a UFW activist. With the exception of two drivers, one whom was number one on the seniroity list, all drivers averaged fewer hours per week during the crucial period in 1983 than they averaged in 1982. Jimenez' average weekly hour loss (7.1) was commensurate with the average work hour loss of Respondent's other drivers. Garcia averaged 12 hours per week less following his return to work in 1983 that he averaged during 1932.

Although some effort was made by Respondent to establish it

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61. The references are to week ending dates,

had a policy with regard to persons apprehended by INS and General Counsel made an effort to convince that the policy was disparately applied, neither position is persuasive. According to management representatives, Garin's policy was to fire anyone picked up by INS and to treat such persons as new hires if they were rehired. This really doesn't amount to a company policy. One would expect that person who has been terminated and rehired to have his seniority date from his date of rehire.

General Counsel asserts the policy to be that persons rehired, having returned within three days, would retain their seniority. Garcia was not such a person; therefore his rehire with no seniority loss was aimed at depriving union activist Jimenez of work hours. Assuming arguendo the existence of such a policy, General Counsel's proof does not establish its disparate application for reasons violative of the Act. In the first place, there are only two instances of employer response to having an apprehended worker return to work for the Company, i.e., Bustamonte and Garcia.

Bustamonte was depicted as a Union activist and Garcia as anti-union. With regard to Garcia, there is a conflict regarding the extent, if any, of his union support. Irrespective of one's conclusions on this point, it is unclear what, if any, knowledge Respondent had of Garcia's Union support or union animus. But any difference between Bustamonte and Garcia in this regard is minimal given consideration of other differences in their cases.

Bustamonte was deported to Mexico; he did not return to seek work for approximately three months. Respondent had no idea

whether he would ever return to work for Garin.[62/] On the other hand, Garcia was not deported. His father, a longtime Garin employer, apprised Respondent of his pick-up. Following his apprehension, Garcia remained in Salinas, had a speedy hearing and returned to work in four days. In Garcia's case, his return to work was shortly after apprehension and a reasonable inference is that Respondent knew such would be the case, i.e., that Respondent knew he was legally in the country.

General Counsel perceives Respondent's action as a "let's get Chavista Jimenez" move; but it would be speculative to conclude that had Garcia been place at the bottom of the seniority list, Jimenez would have received additional hours. The eight drivers between Garcia and Jimenez on the seniority list could have absorbed Garcia's hours without difficulty.

With regard to General Counsel' s contention that Respondent-further reduced Jimenez' work hours because he filed a charge in May 1983, the evidence does not support the contention. From mid-April until his layoff in late July, Jimenez averaged 7.1 hours per week less in 1983 than for the same period in 1982. During the interval between filing the charge and layoff, Jimenez averaged 7 hours per week less work than in 1982. It is true that Jimenez was laid off earlier in 1983 than in 1982, but Respondent has presented unrebutted evidence that his layoff would have occurred irrespective of his purported union or protested concerted activities.

For the reasons set forth above, General Counsel has failed

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62. Credible testimony from a Respondent witness to this was not controverted.

to prove the allegation of paragraphs 5(c) and 5(f), and I recommend dismissal of said paragraphs.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of sections 1153(a) and (c) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Alberto Tinajaro, I recommend that Respondent be ordered to offer him immediate and full reinstatement to his former job if it has not already done so, without prejudice to seniority, or other rights and privileges. I further recommend that Respondent make Alberto Tinajaro whole for any losses suffered as a result of its unlawful discriminatory action by payment to him of a sum of money equal to the wages and other benefits which would have been earned by him from June 10, 1983, to the date on which he is reinstated, or offered reinstatement. Such amount to be computed in accordance with established Board precedents, plus interest thereon, he computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

In order to further effectuate the purposes of the Act and to insure to the employees the enjoyment of rights guaranteed to them in section 1152 of the Act, I shall also recommend that Respondent publish and make known to its tractor drivers that it has violated the Act, and it has been ordered not to engage in future violations of the Act.

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

ORDER

Respondent, The Garin Company, its officers, agents and representatives shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the UFW or any other labor organization by discharging any of its agricultural employees for participating in protected concerted or union activities.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them by section 1152.

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

(a) Make whole Alberto Tinajaro for any losses he suffered as a result of his discharge by payment to him of a sum of money equal to the wages lost, less his respective net interim earnings, together with interest thereon at a rate consistent with the Board's Order in Lu-Ette Farms, Inc. (1982) 8 ALRB Mo. 55.

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amount due to the aforementioned employee under the terms of this Order.

(c) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages,

Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Post copies of the attached Notice in conspicuous places on its property for a 90-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(e) Provide a copy of the attached Notice to each tractor driver hired during the 12-month period following the date of this decision.

(f) Mail copies of the attached Notice in all appropriate languages within 30 days of the date of issuance of the Order to all tractor drivers employed by Respondent in the Salinas area in 1983.

(g) Arrange for a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board agent shall be given the opportunity outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps whih have been taken to comply with it. Upon request of the Regional

Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

(i) Offer to Alberto Tinajaro immediate and full reinstatement to his former job at Respondent's Salinas operation without prejudice to his seniority or other rights and privileges.

It is further recommended that the remaining allegations in the complaint as amended be dismissed.

DATED: July 13, 1984

ROBERT LEPROHN
Administrative Law Judge

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join, or help any union;
3. To bargain as a group and to choose anyone they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect each other; and
5. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT discharge or otherwise discriminate against any employee because he or she has exercised any of these rights.

WE WILL offer Alberto Tinajaro his old job back, if he wants it. His old job back if they want him, and will pay him any money he lost because we discharged him unlawfully.

DATED: THE GARIN COMPANY.

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.