

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

WEST COAST DAIRY,)	
)	
Respondent,)	Case No. 34-CE-92-EC
)	
and)	
)	
DAIRY EMPLOYEES UNION, LOCAL 11)	No. 30
No. 17, CHRISTIAN LABOR)	
ASSOCIATION,)	
)	
Charging Party.)	

DECISION AND ORDER

On June 24, 1985, Administrative Law Judge (ALJ) Stuart A. Wein issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions to the ALJ's Decision along with a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,^{1/} the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions^{2/} and briefs of the parties

^{1/}All section references herein are to the California Labor Code unless otherwise specified.

^{2/}Some of the ALJ's findings are based in part on the testimony of employees Alfonso Gomez and Juan Cornejo. The ALJ credited their testimony and discredited Respondent's general manager George Vander Dussen. To the extent that an ALJ's credibility resolutions are based upon demeanor of the witnesses, they will not be

and has decided to affirm the ALJ's rulings, findings, and conclusions^{3/} and to adopt his proposed Order as modified herein.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent West Coast Dairy and its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Promising benefits to discourage Union activities or sympathies and/or threatening any agricultural employee because she/he has engaged in any concerted or union activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Discouraging membership of employees in the Dairy Employees Union, Local No. 17, Christian Labor Association,

(Fn. 2 cont.)

disturbed unless a clear preponderance of the relevant evidence demonstrates that such resolutions are incorrect. (Adam Dairy dba Rancho dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1521]TlWe have reviewed the evidence and find the ALJ's resolutions of witness credibility to be well supported by the record viewed as a whole.

^{3/}We do not rely on the ALJ's finding that Respondent gave shifting reasons in explaining why it discharged employee John Cornejo. As all the reasons given by Vander Dussen (i.e., high bacteria counts, number of sick or three-teat cows, and improper priming, washing, and "teat dipping") are related, we find that they constitute one reason rather than various different reasons. However, even without this one indicia of a causal connection, we find that that element is established by Respondent's anti-union animus and by the timing of the discharge. In addition, the record establishes that other milkers responsible for violations more serious than those attributable to Cornejo were not discharged. We therefore affirm the ALJ's conclusion that Respondent unlawfully discharged Juan Cornejo.

or in any other labor organization, by unlawfully discharging any of its agricultural employees or in any other manner discriminating against individuals in regard to their hire or tenure of employment or any term of condition of employment, except as authorized by section 1153(c) of the Act.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of his/her rights guaranteed by section 1152 of the Act.

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

(a) Offer to Juan Cornejo reinstatement to his former or substantially equivalent position and make him whole for all losses of pay and other economic losses he has suffered as a result of the discrimination against him, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay and interest due under the terms of this Order.

(c) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each

language for the purposes set forth hereinafter.

(d) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order, to all agricultural employees employed by Respondent from April 1, 1984 to April 1, 1985.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for sixty days, the times and places of posting to be determined by the Regional Director, and exercise due care to replace any notice which has been altered, defaced, covered or removed.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the notice and/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 in order to compensate them for time lost at the reading and during the question-and-answer period.

(g) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps

Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: December 10, 1985

JOHN P. MCCARTHY, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the-El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, West Coast Dairy, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by promising benefits to discourage union activities and by threatening employees Juan Cornejo and Alfonso Gomez and by discharging employee Juan Cornejo because of his protected union activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farmworkers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about 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 and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

SPECIFICALLY:

WE WILL NOT promise benefits to discourage union activities or threaten any agricultural employee because he or she has engaged in any protected union activities.

WE WILL NOT discharge or lay off any employee for engaging in any protected union activities.

WE WILL reimburse Juan Cornejo for all losses of pay and other economic losses he has suffered as a result of our discriminating against him, plus interest, and in addition offer him immediate and full reinstatement to his same or substantially equivalent position.

DATED:

WEST COAST DAIRY

By:

Representative

Title

If you have any questions about your rights as farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California. The telephone number is (519) 353-2130.

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

West Coast Dairy
Dairy Employees Union, Local No. 17
Christian Labor Association

Case No. 84-CE-92-EC
11 ALRB No. 30

ALJ DECISION

The ALJ concluded that Respondent unlawfully promised employees Alfonso Gomez and Juan Cornejo a less expensive medical insurance plan than the one provided by the employees' union. In addition, the ALJ found that Respondent threatened to replace the employees with non-union workers if they did not sever their union ties. Finally, the ALJ concluded that Respondent discriminatorily discharged employee Juan Cornejo because of his union support and affiliation, in violation of section 1153(c) and (a) of the Act.

BOARD DECISION

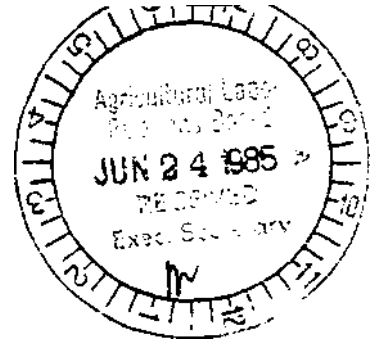
The Board adopted the findings and conclusions of the ALJ, as well as his Proposed Order. However, the Board did not rely on the ALJ's finding that Respondent gave shifting reasons in explaining why it discharged employee Juan Cornejo. The Board found that the various explanations given by Respondent are closely related and constitute one single reason.

* * *

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

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)
WEST COAST DAIRY,)
Respondent,)
and)
DAIRY EMPLOYEES UNION LOCAL)
NO. 17, CHRISTIAN LABOR)
ASSOCIATION,)
Charging Party.)

Case No. 84-CE-92-EC

Appearances:

Eugene E. Cardenas, Esq.
319 Waterman Avenue
El Centro, California
for the General Counsel

Peter F. Samuel, Esq.
Samuel & Samuel
5777 Madison Avenue, Suite 1100
Sacramento, California
for the Respondent

Bernie Vander Weide
Ben Sybesma
14397 Euclid Avenue
Chino, California
for the Charging Party

William C. Adams, Esq.
200 East Sandpointe
Santa Ana, California
for the Charging Party

Before: Stuart A. Wein
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Judge:

This case was heard by me on April 22, 23, 24, 1985, in Riverside, California.

The complaint, dated 8 March 1985, was based on one charge filed by the Dairy Employees Union, Local No. 17, Christian Labor Association (hereafter the "Union" or "CLA") on or about 4 September 1984, and duly served on Respondent.

The complaint alleges that Respondent violated sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter referred to as the "Act") by first threatening and then discharging employees Alfonso M. Gomez and Juan Cornejo because of their participation in and support for protected union activities.

The General Counsel, Respondent, and Charging Party were represented at the hearing and were given a full opportunity to participate in the proceedings. General Counsel and Respondent filed briefs after the close of the hearing pursuant to 8 Cal Admin. Code section 20278.

Based on the entire record,^{1/} including my observation of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following:

1. I hereby correct certain typographical errata and other clerical mistakes in the transcription of the official record. Although I note that the preferred methodology is to submit these modifications to the parties (see *Airlines Parking, Inc.* (1972) 197 NLRB 762, fn. 3), these changes are not material to the outcome of the case, and I believe the process can be better expedited in this manner. The corrections are contained in Appendix I attached hereto.

FINDINGS

I. Jurisdiction;

Respondent, WEST COAST DAIRY, is an employer engaged in agricultural operations -- specifically the production of milk in Chino, California, as was admitted in its answer. Accordingly, I find that the Respondent is an agricultural employer within the meaning of section 1140.4(c) of the Act.

As was also admitted by Respondent in its answer, I find that Dairy Employees Union, Local No. 17, Christian Labor Association, is a labor organization within the meaning of section 1140.4(f) of the Act, and that Alfonso M. Gomez and Juan Cornejo were at all relevant times agricultural employees within the meaning of section 1140.4(b) of the Act.

II. The Alleged Unfair Labor Practices:

The complaint charges that Respondent violated section 1153(a) of the Act by threatening and coercing employees Alfonso M. Gomez and Juan Cornejo in April 1984 because of their support for the Union. Respondent is further charged with violation of section 1153(a) and (c) of the Act by the 25 July 1984 discharge of the two employees because of their participation in protected union activities.

Respondent denies that it violated the Act in any respect. Although admitting that employee Cornejo was questioned regarding his joining the Union in April 1984, Respondent suggests that the discussion involved no threat or coercion. The discharges were allegedly not for any union support or participation, but because

the employees' work performance was unsatisfactory: They did not properly prime,^{2/} dry, or teat dip^{3/} the cows causing Respondent to receive (two) high bacteria count reports, and resulting in illness to numerous cows.

III. Background;

West Coast Dairy was purchased in October 1981 by Broer Vander Dussen. The latter's son, George Vander Dussen, was the general manager^{4/} in charge of the day-to-day operations during the relevant time frame and was responsible for the hiring and firing of employees.

The company has one item for purchase -- milk -- and typically employs four workers (two milkers and two ranch hands) as well as one relief person to care for 400-500 dairy cows. The cows are fed in the early morning and then locked up to be bred. The milkers arrive at approximately 11:00 a.m to bring the cows into the milkhouse for milking which is completed by 4:00-4:30 p.m. Typically, a "string" of ten cows is brought in from the corral after having been washed (by the ranch hands) and dried (by the milkers) with paper towels. The cows are then primed, and the milkers thereafter arrange the machinery for the automatic milking.

2. "Priming" is hand milking a cow to obtain a sample so that infection or mastitis in the milk can be detected before the cows are milked by machine.

3. "Teat dipping" involves the application of spray to the udder of the cow to close the orifices and coat the teats thus reducing the possibility of infection.

4. George Vander Dussen became joint owner with his father in January 1935.

After the milking is finished, and the machinery is automatically displaced, the milkers teat dip the cows, wash the barn, clean the grain bowls, and take out any sick or injured cows to the hospital corral for treatment.

When Broer Vander Dussen purchased the dairy in 1981, it was a "union" dairy -- employing (union) milkers and (non-union) ranch hands. There was no replacement of employees by virtue of the purchase, and the Vander Dussens described their relationship with the CLA as "good". Generally, upon hire, employees were advised that they were free to join or not to join the union as they saw fit.^{5/} However, Respondent never formally executed the extant CLA -- dairy industry contract, and during the negotiations of April 1984, Broer Vander Dussen^{6/} accused Union business agent Ben Sybesma of threatening employee retaliation if economic increases were not agreed to by the employer bargaining committee.^{7/}

5. No contract was introduced at the hearing, although Ben Sybesma testified that all full-time employees were eligible for pension and insurance benefits. No grievance had ever been filed by the CLA for the failure to provide these benefits (R.T. II, pp. 59-63). It is thus unclear what union security provisions, if any, were applicable to the instant proceeding.

6. Broer Vander Dussen was a member of the (management) executive bargaining committee which negotiated the 1984 contract with the CLA.

7. Mr. Sybesma specifically denied such threatening remarks, which denial was confirmed by General Counsel witnesses (Union business agent) Bernie Vander Weide and (Union president) Al Fernandez. As Mr. Vander Dussen's testimony was uncorroborated and conceded the possibility that Sybesma was suggesting only that it would be in the companies' best interests to offer some economic incentive to keep their workers content, I find that no such threat of agricultural sabotage was uttered by Sybesma at the April 26, 1984, session or at any other time. As Broer Vander Dussen did not

(Footnote continued----)

George Vander Dussen explained the duties and responsibilities of the new employees as they were hired. An observation window in the milk house enabled him to observe the daily performance of the milkers. The Company's oral disciplinary policy included the immediately dischargable offenses of whipping/beating of a cow, showing up drunk, stealing, or cussing out the employer. Verbal warnings would be issued prior to discharge (as determined by George Vander Dussen) for high bacteria counts,^{8/} failure to prime the cows properly or forgetting to teat

(Footnote 7 continued----

relate this perceived threat to his son George in any event, and as the latter was solely responsible for the decision to terminate the alleged discriminatees, the incident sheds no light on the Respondent's motivation in the instant context. While the scenario might have potentially explained the deteriorating work performance of Gomez and Cornejo (see discussion, *infra*), the record is devoid of any evidence linking the Union, its personnel, or the alleged discriminatees to any such nefarious scheme.

8. For quality control, the California Milk Producers -- a voluntary association -- takes samples of Respondent's milk once weekly, but on random days. The results are received by the company approximately three days later, and would normally reflect the milk for the day preceding the sample (depending upon the time of pickup of the milk which was usually in the early morning). Violations occur when the SPC levels (bacteria) exceed 25,000, when coli exceed 500 and LPC (pasteurization) was greater than 500. More than two violations in any one reporting period (one month) can result in a fine to the dairy; and all "high" counts are serious as they reflect the presence of bacteria which causes infection and ultimately may cause injury to the cows. A sick dairy cow which would ultimately have to be "beefed" declines in value from approximately \$1,000 to \$500.

The reasons for high counts can vary as articulated by George Vander Dussen: A standard plate count (SPC) in excess of 25,000 may be due to mastitis in one cow, dirty or wet cows, wet weather, or mud. (Higher counts would thus be expected for the wet winter months.) High coli counts would be attributable to cows that were not dried properly. High LPC counts (which have never been a problem at the company) would normally reflect bacteria in the milking pipelines). (R.T., Vol. II, pp. 97-99.)

dip the cows after milking. The number of warnings prior to discharge would depend upon the seriousness of the offense, the individual's attitude, weather conditions, etc. Trial periods for milkers could last anywhere from two hours to two weeks depending upon the employee's performance. A number of employees failed such trial periods during Respondent's tenure at the dairy, and all told, some 16 (union and non-union alike) workers were discharged between October, 1981, and the date of the hearing.

Alfonso M. Gomez was hired as a milker in April 1982 with some three years experience. He originally worked two daily shifts (11:00-11:30 - 4:00-4:30) which was subsequently changed to one straight seven-hour shift for each of three milkers. He did not join the Union until June 1982. Gomez testified that some three months after becoming a union member and on various occasions thereafter, George Vander Dussen asked him to "remove the Union" or get rid of his (Gomez') union membership because the insurance cost a lot, which conversations Gomez did not relate to anyone as he perceived no threat to his job security. Prior to the hiring of Juan Cornejo in January 1984, Gomez recalled a conversation with George Vander Dussen in the presence of milker Francisco Diaz wherein the general manager allegedly indicated that he wanted to hire another worker outside of the Union, and that he only wanted two workers (Gomez and Diaz) from the Union. George Vander Dussen denied all such conversations.^{9/}

9. I credit Vander Dussen's specific denials in this regard, as Gomez' recollection was uncorroborated, and apparently of insufficient moment to cause the employee to relate the conversations to anyone at the time. (See S. Kuramura, Inc. (1977) 3 ALRB No. 49.)

Juan Cornejo was hired as a milker in January 1984 -- having had about 10 years previous experience. He 'had never before been discharged for poor performance and signed up for the Union some 4 months after he started working with Respondent (in early April 1984).

IV. Facts:

As is perhaps not untypical in these situations -- where the participants feel strongly about their respective positions -- much of the critical testimony concerning the alleged unfair labor practices is best characterized as litigation hyperbole. The employees would have the Respondent uttering continuous threatening remarks over the entirety of their employment and be unconcerned about anything other than ridding itself of the Union.^{10/} On the other hand, the Respondent suggests a scheme to sabotage the dairy orchestrated by the Union's frustrations at the bargaining table.^{11/}

Viewing the evidence in its entirety, I make the following findings regarding each of the alleged unfair labor practices. I have attempted to indicate where and why contested factual issues have been so determined.

10. Thus, while insinuating that the employer suggested the clandestine instigation of a decertification campaign, both Gomez and Cornejo denied having ever received instructions regarding the nature of their duties and responsibilities as milkers. Given the Respondent's articulated interest in the economic viability of its enterprise, I find this denial wholly implausible even if the two were experienced milkers.

11. I have already rejected this account for the reasons aforesaid. See discussion supra.

A. The Alleged Threats

Juan Cornejo recalled a conversation with George Vander Dussen after he had signed with the Union sometime in April 1984. Upon the employee's arrival at work, Vander Dussen inquired why Cornejo had signed with the Union and not told him about it, stating that he wanted a less expensive insurance policy. Vander Dussen's face became red, and he spoke in a "slightly angry, fast" manner. (RT. Vol. I, p. 48, 11. 1-7.) Approximately one hour later, Vander Dussen went to the milking stables and spoke jointly with Cornejo and Alfonso Gomez telling them to "get rid of the Union". Cornejo replied that "he would think about it". (R.T. Vol. I, p. 48, 11-15-23.) Later that same day (approximately 5:00 p.m.) Vander Dussen called both workers up to his office. Pointing to "a piece of paper with numbers on it", Vander Dussen explained that the Union insurance cost a lot, that he could get cheaper insurance, and that the company would pay \$1.00/day more if the workers left the Union. He asked why Cornejo and Gomez would want to pay (\$17.00 dues) "to those pigs" and stated that if the two employees did not leave the union he would get people from outside the union. (R.T. Vol. I, pp. 49-50.)

Gomez' testimony closely tracked that of Cornejo with regard to the latter two conversations with Vander Dussen -- suggesting first that Vander Dussen wanted the two employees to instigate a decertification campaign without revealing the true source (R.T. Vol. I, p. 138, 11. 26-28), and then later, threatened to get new workers who were not union if Gomez and Cornejo did not sever their Union ties. (R.T. Vol. I, p. 141, 11. 18-26.) Gomez'

recollection differed only in the timing -- he placed the first conversation at approximately 11:00 a.m. and the second (office) confrontation some 5 minutes later.

The employer presented a greatly different version of events. George Vander Dussen denied threatening either employee, conceding only that he was surprised to learn that Cornejo had joined the Union after having reviewed the insurance statement in his father's office on 11 April 1984. He was upset because he thought that he had a good relationship with his employees and therefore asked Cornejo at the workplace why he had not been so informed. Vander Dussen testified that he then returned to his office (and the telephone), denying any denigrative remarks concerning the Union. Later that day, Gomez and Cornejo asked Vander Dussen whether they were supposed to pay their Union dues or if the company could pay the amount directly, Vander Dussen stated that the company would pay the money and further denied telling the workers to get rid of the Union, or offering a raise/insurance benefits. He also denied any conversations in his office, pointing out that the milking cows would never be left unattended. (R.T., Vol. II, pp. 115-117.)

In considering the entire record, including the demeanor of the percipient witnesses, I find that the employees' version of the events of April 11, 1984, to be the more accurate. Gomez' narration closely paralleled that of Cornejo, although neither was present while the other testified following Respondent's Unga^{12/}

12. Pursuant to Unga Painting Corp. (1978) 237 NLR3 1306 [99 LRRM 114], I granted Respondent's motion to sequester witnesses at the commencement of the hearing.

motion. Although the two did not agree as to the approximate time of day of the alleged conversations,^{13/} both appeared to testify in a sincere, straightforward manner, giving little embellishment to the events of that day.

I find Gomez' explanation that he did not immediately relate these conversations to his Union representatives because the employer was content at that time with his work performance to be plausible under the circumstances. Nor am I persuaded that the conversations could not have occurred in Vander Dussen's office because the barn would never be left unattended. As the conversation was extremely brief, it is not clear from the record whether or not the workers were between "strings" during this discussion. Additionally, George Vander Dussen could view the milk barn through the observation window for this short period.

The account of George Vander Dussen seems to have glossed over certain critical portions of the parties' exchanges. I do not find it credible that Vander Dussen's perturbation at Cornejo's joining the Union related solely to the fact that the employee failed to discuss the matter with him beforehand. If the West Coast Dairy employees were free to join the Union as they saw fit -- as Vander Dussen indicated in his testimony -- no legitimate purpose would be served by this employer-employee tete-a-tete. Cornejo had not at that time been a long-time employee for whom Vander Dussen might possibly have felt some paternalistic betrayal. Nor does Vander Dussen's assertion that Cornejo asked (through Gomez) whether

13. Cornejo was involved in all three conversations; Gomez only participated in the latter two.

he was to pay the dues directly make any sense in light of Gomez' prior history of Union membership and, by inference, familiarity with the company's accounting practices.

Further, George Vander Dussen's denial of concern for the increased insurance/pension benefits (the amount owing would double or increase some \$270.00 per month)^{14/} is belied by the dairy's paramount interest in holding costs down as conceded by Broer Vander Dussen in reference, to the April 1984 negotiations. (R.T. Vol. II, pp. 8-9.) I credit Broer Vander Dussen's original assertion that George Vander Dussen had authority to offer an alternative (non-union) insurance plan because of the conviction with which Broer Vander Dussen asserted this fact on cross-examination. (R.T.Vol. II, p. 23, ll. 14-28.) I do not credit Broer Vander Dussen's later recantation as a "mistake"^{15/} -- since the owner was easily able to distinguish his son's authority to offer insurance from that of offering raises.^{16/}

14. I have assumed that the \$17.00/member union dues is directly deductible from the employee's pay -- although no evidence was presented on this issue.

15. R.T., Vol. II, p. 52, ll. 13-20.

16. In the latter regard, I do not credit that portion of the employees' version which would have George Vander Dussen offering a "bonus" for getting rid of the Union. Said offer of benefits was not referred to in the underlying charge (GCX 1.1), was beyond the authority of George Vander Dussen, as both he and his father agreed, and would be at odds with the Respondent's avowed concern for keeping costs down. I do not believe an employer alleged to demonstrate anti-union animus by virtue of its reluctance to incur an additional \$270 per month in benefits would at the same time offer an additional daily bonus to encourage its employees to forego union benefits.

I thus credit the employees' very precise and apparently sincere recollection that (1) George Vander Dussen became angry when learning that Cornejo joined the Union; (2) urged the employees to get rid of the Union and enroll in a less expensive company insurance; and (3) thereafter denigrated the Union and threatened termination if the employees did not reconsider their choices.

B. The Discharge's

Respondent concedes that both employees' job performance was initially satisfactory. Gomez had been working without incident since April 1982. Cornejo commenced a single shift in January 1984. By early March,^{17/} the company had returned to split shifts for greater profitability. One milker was laid off (union member Francisco Diaz), and Gomez and Cornejo were assigned to work two daily 11-4:30 shifts. The two worked uneventfully through April. In early May, the company received a very high bacteria report (150,000 SPC, 3,000 coli). Vander Dussen told the employees to be more careful. On 23 July, the company received a second "bad" report (66,000 SPC, 3,000 coli). When Vander Dussen asked Cornejo and Gomez what had happened, Gomez responded that the

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17. George Vander Dussen placed the change in mid-March Cornejo recalled that the date was earlier. Respondent's own records (RX 1) indicate that Diaz was laid off at the end of February. I, thus, credit the employee's recollection in this regard.

new ranch hand/relief person was not working properly,^{18/} and that the "bad report was for milk sampled on Cornejo's day off.

Two days later,^{19/} both Gomez and Cornejo were told that they were no longer needed because they were not properly checking and priming the cows. Gomez asked why he had not been warned at the time that he had not been properly performing his duties. Vander Dussen allegedly indicated that in any event he had hired (non-union) replacements and since the employees had not gotten rid of the union, they were no longer needed. (R.T., Vol. I, p. 124, 11. 2-4.)

Both employees denied that their performance had deteriorated post-April 1984 and denied that they had been given any

18. The direct examination on this issue proceeded as follows:

"Gomez: 'I told him [George Vander Dussen] that the worker was doing a bad job, and he told me that I should take care of it.'" . . .

"Cardenas: 'What if anything did you say?'"

"Gomez: 'That I was doing my job, and that I could not take care of both of us.'" RT. I, p. 121, 11. 14-22.

On cross-examination, Gomez reaffirmed this version of the conversation:

"Gomez: 'I said that I was sure because I told the employer that I had seen Antonio and the three-tit cows that he was putting on the machine as though they were four-tit cows.'" RT. I, P. 136, 11. 17-19.

19. It is unclear from the record precisely how much time elapsed between George Vander Dussen's receipt of the second "bad" report, and the notification of the discharges. It appears that the intervening period was less than 48 hours. (23 July 1984 was a Monday; all agree that the discharges occurred on Wednesday morning, 25 July 1984. Compare Vol. I, pp. 121-122, 145, with Vol. II, p. 105.)

prior warnings for poor performance other than the aforescribed conversations regarding the two violations.

Vander Dussen, in turn, denied stating that the employees had been replaced by non-union workers, or that they had been terminated for their union affiliations. He testified that he had told Gomez on some 4-5 occasions between May and July 1984 to "get his act together or seek employment elsewhere". (R.T. Vol. II, p. 90, 11. 19-28; p. 91, 1. 1.) Both Gomez and Cornejo were warned to prime the cows better, to dry the cows better, and to properly teat dip. He stated that the two were fired on 25 July 1984 because (1) they did not want to comply with his pleas (and improve their performance); and (2) the number of cows in the hospital and the number of "three teaters"^{20/} had increased dramatically from January 1984 (from 3-5 to 17-20). He denied that the reason for the discharge was the employees' union membership.^{21/}

When interviewed by the Board agent who investigated the underlying charge, Vander Dussen stated that the two employees were fired for having received three violations. (R.T., Vol. II, p. 127, 11. 2-5.) At hearing, Vander Dussen conceded that he was in error with respect to the 4 August 1984 violation (which occurred subsequent to the discharge of Gomez and Cornejo), attributing the

20. "Three teaters" are cows that are producing milk from only three teats.

21. The conversations occurred separately between the general manager and each employee. It is unclear whether any other worker -- e.g., Isidro Gonzalez or Antonio Campos -- was able to overhear and/or participated in these discussions. (R.T. Vol. II, pp. 113, 114.) I therefore decline to draw any adverse inference from the failure of either to testify as requested by General Counsel. (See General Counsel Post-hearing Brief, p. 18.)

mistake to his perception that there had been at least one other "bad" (albeit non-violative) report during the dry May-July period.

Current employee (ranch hand) Isidro Gonzalez testified on behalf of Respondent that Cornejo and Gomez started doing a "bad job" in April 1984 and did not prime, dry or check the cows properly. Gonzalez reported this to Vander Dussen on some three occasions prior to the terminations. He discussed the matter once with his coworkers, but was told to "mind his own business". (Vol. II, p. 76, 11.16-17.)

In rebuttal, former employees Juan Mendonca and Luis De Sousa testified that it was Respondent's anti-union policy -- George Vander Dussen's desire to be rid of the union -- which prompted each to resign following short-term employment.^{22/}

In resolving the factual conflicts concerning the discharges, I do not credit the employees' version of the incriminating statements attributed to George Vander Dussen on the day of the terminations. Cornejo's testimony upon direct examination and cross-examination referred only to George Vander Dussen's statement that he (Cornejo) was not priming or checking the cows properly and was not needed anymore. (R.T., Vol. I, p. 54, 11. 9-17; Vol. 1, p. 92, 11. 14-16.) Only upon examination by myself did Cornejo quote Vander Dussen as saying "I don't need you any more, anyway. I have people outside the Union." (R.T. Vol. I, p.

22. Mendonca worked from October 10, 1983 to December 6, 1983. De Sousa worked for a very limited period of time, either one day (October 20, 1983) by Respondent's account or less than one week by De Sousa's own admission. See Respondent Exhibit 1; R.T. Vol. III, pp. 34, 53.)

101, 11. 11-13.) I thought at the time that the latter testimony appeared more of an attempt to influence my decision than a precise recollection of the events in question.

Gomez, on the other hand, did recall George Vander Dussen stating that "he had hired people that were not from the union and additionally that "I (Gomez) had not wanted to get rid of the union and he (Vander Dussen) did not need me." (R.T. Vol. 1, p. 124, 11. 2-5.) No reference to Vander Dussen's alleged statements concerning the securing of non-union replacements appears in the Charging Party's declaration, however, as Vander Dussen is quoted only as saying that "We don't need you guys because you went to the Union and I do not want the Union." (GCX 1.1.)

Although the remarks may be considered to parallel those that Vander Dussen conceded he made to his father on the morning of the discharges (to the effect that he had already hired the replacements),^{23/} and although it is factually correct that no union employees have been hired since the terminations of Gomez and Cornejo, I find it unlikely that Respondent's General Manager would so expose his "true" rationale. If, as General Counsel has suggested, Respondent engaged in a surreptitious three-month effort to find a justifiable "excuse" to discharge its pro-union milkers, I do not believe Vander Dussen would have uttered the admissions alleged. I therefore credit Vander Dussen's specific denial of any reference to the hiring of non-union people or to preferring

23. Indeed, one employee -- Antonio Campos -- had been hired on 11 July 1984, some twelve days prior to the second violation. (See RX 1.)

non-union people or to the employees' failure to get rid of the Union in either discharge conversation. (RT. II, p. 114, 11. 21-24; p. 115, 11. 1-16.)^{24/}

I find, however, that Respondent has exaggerated the number and nature of warnings given the employees during the April-July 1984 period. I credit Cornejo's and Gomez' recollection of the discussions concerning the two violations -- and particularly Gomez' testimony that he believed co-worker (Antonio Campos) was responsible for the second violation. Vander Dussen did not deny this statement by Gomez, and, indeed, suggested that the employees responded to his criticism of their performance by blaming a co-worker. (R.T. Vol. II, p. 104.) Nor do I believe that Vander Dussen gave as many (4-5) warnings as those to which he alluded in testimony, or observed the substandard performance to which he alluded. By his own accounting, Vander Dussen spoke with Isidro Gonzalez about the milker's performance because he was unable to ascertain by himself whether or not the latter were properly performing their duties. Vander Dussen struck me as the type of employer who, if having observed poor performance by his employees, would not be reticent to so inform them. (Compare R.T., Vol. II, p. 95, 11. 3-7, with Vol. II, p. 110, 11. 1-13.) Further, Vander Dussen greatly overstated the number of "three-teaters" at the time

24. I thus distinguish the impulsiveness with which George Vander Dussen reacted to the news of Cornejo's union membership (and consequent increased benefit payments) from the deliberation which characterized the decision to discharge the two employees. Additionally, each employee's recollection of the April conversations was much more precise and consistent with one another than their versions of the termination conversations.

of the discharge -- recalling some seventeen to twenty with ten to twelve cows in the hospital corral. These figures were disputed not only by the employees but by Respondent's own witness (ranch hand) Isidro Gonzalez) who recalled only eleven or twelve three-teaters in July 1984.

I credit employee Gonzalez testimony only insofar as I find that he informed Vander Dussen on more than one occasion that he felt Gomez and Cornejo were responsible for the two violations in May and July 1984.^{25/} As Mr. Gonzalez was less than forthright in explaining how he came to testify in the case,^{26/} was unable to recall when the milkers' performance allegedly deteriorated (he thought that it had been in April 1984), and worked as a ranch hand with only limited opportunity to observe the performance of the two milkers, his testimony regarding his own discussions with Gomez and Cornejo struck me as particularly dubious. I therefore credit Cornejo's denial of same. (R.T., Vol. I, p. 96.)

Finally, I do not rely upon the testimony of employees Mendonca and De Sousa -- who also were less than forthright in explaining how they came to testify in the case. Both were combative during examination by counsel and seemingly hostile in their regard for the Vander Dussens. De Sousa felt that he was underpaid for his work, and did not wish to remain as a ranch hand in any event. Mendonca explained why he had not previously reported

25. This portion of his testimony was corroborated by George Vander Dussen. (R.T. Vol. II, p. 110.)

26. I thought his reference to "his duty to testify" was a particularly evasive response to examination by counsel in this regard. (See R.T. Vol. II, p. 69, 11. 5-7; p. 73, 11. 25-27.)

his problems with the Vander Dussens by reference to the "common knowledge" that the latter definitely wanted out of the Union because their other dairy did not have the union. (R.T. Vol. III, p. 19, 11. 20-26.) These views of the Respondent -- which I find to have tainted both De Sousa's and Mendonca's testimony -- lead me to reject their explanations for the motivations of Respondent's conduct for the events in question.

V. Analysis and Conclusions

A. The Alleged Threats

While Respondent's right to free speech is protected under Labor Code section 1155, threats of reprisal and/or promises of benefits can constitute the bases of an unfair labor practice. Threats are proscribed as they clearly chill the exercise of section 1152 rights; promises of benefits suggest "the fist inside the velvet glove" -- as employees draw the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up. N.L.R.B. v. Exchange Parts Company (1964) 375 U.S. 405 [55 LRRM 2098]. In either situation the test is not the employee's reaction, but the objective standard of whether or not the statements would reasonably tend to affect the workers in the exercise of their rights guaranteed by the Act. (Jack Brothers and McBurney, Inc. (1978) 4 ALRB Mo. 18; Lawrence Vineyards Farming Corporation (1977) 3 ALRB No. 9.)

In the instant case, I have credited testimony to the effect that Respondent, through General Manager George Vander Dussen, became perturbed about employee Juan Cornejo's joining the

union in April 1984, offered to provide company insurance if Cornejo reconsidered, threatened discharge to employees Cornejo and Gomez if they did not "get rid of the union", and denigrated the union by reference to the employees' "throwing their money away to those pigs". As the statements were made in direct reaction to Cornejo's exercise of his protected rights (to join the union and thus receive union pension and insurance benefits), the potential adverse consequences of Cornejo's action were not subtly communicated to both employees, and were conveyed in a somewhat hostile manner by the person responsible for all hiring and firing decisions at the dairy, I conclude that the exchanges reasonably tended to threaten and interfere with agricultural employees in the exercise of their protected rights, and were therefore violative of the Act. See Abatti Farms., Inc. v. Agricultural Labor Relations Board (1980) 107 Cal.App.3d 317. I shall recommend an appropriate remedy therefor.

B. The Discharges

Evaluation of the termination decisions is much more problematical. Labor Code section 1153(c) makes it an unfair labor practice for an agricultural employer "to discriminate in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." General Counsel's prima facie case is established by showing that the employee(s) were engaged in protected activity, the Respondent had knowledge of such activity, and there was some causal relationship or connection between the protected activity and the adverse action taken against the employee(s). (Jackson & Perkins Rose Co. (1979) 5 ALRB Mo. 20.)

Often, in these types of cases, the parties offer competing explanations of why the employees were fired. General Counsel points to evidence of anti-union motivation and Respondent cites employee misconduct, denying any other motivation. In such situations the task of the trier of fact is to determine whether the ascertained misconduct occurred and whether or not it effectively produced the discharge. (See N.L.R.B. v. Wright Line (1st Cir. 1981) 108 LRRM ,2513.)

In this case, Gomez' and Cornejo's union membership was "known to Respondent who was responsible for paying the monthly insurance/pension benefits on the employees' behalf. A causal relationship between this protected activity and Respondent's adverse action is suggested by Respondent's unlawful promise of company insurance and threats to terminate the employees if they do not rid themselves of the union, as well as the proximity of the discharge (three months) to the articulated anti-union statements. Indeed, the timing is critical, because the employer concedes that the alleged deteriorating performance coincided precisely with the union membership of Cornejo. Nor does Respondent's suggested reason for the discharges -- poor performance -- patently negate the inference that such unlawful motivation was at play. Unlike the situation where, for example, repeated acts of sabotage are alleged and proven,^{27/} the employees' "misconduct" in the instant case is much more of the subjective variety, supported objectively only by the references to the (two) violation reports in May and July

27. Of. George Arakelian Farms, Inc. v. Agricultural Labor Relations Board (1980) 111 Cal.App.3d 253; hg. den. Jan. 14, 1981.

1984.^{28/}

Under the most recent standard articulated by the Board, once General Counsel has persuaded the trier of fact that anti-union animus contributed to Respondent's termination decision, Respondent can only avoid a finding that it violated the Act by demonstrating by a preponderance of the evidence that it would have discharged the employee(s) even if they had not participated in protected activities (i.e., joined the union). Mike Yurosek & Son, Inc. (1983) 9 ALRB No. 69; Block Mechanical Service, Inc. (1984) 271 NLRB No. 201 [119 LRRM 1183]; N.L.R.B. v. Transportation Management Corp. (1933) 459 U.S. 1014 [103 S.Ct. 2469, 113 LRRM 2857.]

As suggested by the First Circuit, the prima facie case may be overcome by evidence that the employer would have fired similarly situated employees (whether or not union activists) -- e.g., by proof that the Respondent was a consistently strict employer who commonly fired employees for similar rule violations or poor performance or by proof that the employees' conduct was in fact so detrimental to the business that the discharge was warranted. It is the employer's judgment in this regard which is controlling. The employer may make and enforce its own rules and/or standards (however foolish they may appear to the Board) so long as personnel decisions are not based on union status.

28. I am aware that the prima facie case with respect to Mr. Gomez is much less compelling -- particularly because of the latter's previous union activities. But as the employer conceded that the termination decision was a "joint" one, and I have credited both employees' version of the threats of April 1984, I find that General Counsel has met its burden in this regard with respect to each. This is not to say that the ultimate analysis will compel a similar conclusion for the two milkers. See discussion, infra.

Nevertheless, where the issue is what motivated a decision to discharge, the apparent insignificance of a particular rule, along with the employer's history of treating it as unimportant, support an inference that something more was involved than just a breach of that rule." (N.L.R.B. v. Wright Line, supra, p. 2520, fn. 16, citing Liberty Mutual Insurance Co. v. N.L.R.B., 592 F.2d at 603.)

Respondent's proof in this regard is not insubstantial. The company received an extremely high bacteria count in May 1984. Another high count was received in July 1984. All parties concur that the presence of bacteria in the milk is an extremely serious matter -- one which can lead to illness to the cows and severely reduce the profitability of the dairy. At least one other employee attributed the responsibility for this problem to the alleged discriminatees' deteriorating performance. Respondent typically dealt severely with employees for a variety of perceived misdeeds -- and the brunt of George Vander Dussen's wrath had been felt by union and non-union members alike. Indeed, employee Gomez' union affiliation had long been tolerated by the Respondent -- at least while his work remained satisfactory. Nor does this Respondent have any history of statutory unfair labor practices before the Board. There is thus a certain persuasiveness to Respondent's contention that George Vander Dussen's patience with the two employees had worn thin; the failure to improve their performance during the last three months of employment determined their discharges irrespective of union affiliation.

Closer examination of the proof of Respondent's non-discriminatory rationale, however, suggests certain deficiencies:

Gomez had worked satisfactorily for Respondent for some 2½ years. Cornejo had a good 10 years of experience as a milker

without ever having been fired for poor performance. There is no particularly persuasive explanation for the incredibly coincidental deterioration of both Gomez' and Cornejo's performance simultaneously with Cornejo's joining the Union. Coupled with George Vander Dussen's announced displeasure with Cornejo's conduct (in joining the Union) and the additional financial burden which Respondent contended at the negotiation table it could not bear, one is inclined to believe that something more than the Respondent's perception of substandard work is involved in the termination decisions. While the Respondent's employment pattern reveals discharges/terminations of union/non-union employees alike, poor performance had never before been cited as a reason for discharge of any of the eight milkers terminated at West Coast Dairy during the relevant period. Only one person of the sixteen total discharges -- ranch hand Bruce Idzinga -- was terminated for the reasons given Gomez and Cornejo (see RX 1; Appendices A and B attached hereto).

Further, Respondent historically maintained one or two (even three on one occasion) union employees (milkers) on its payroll at a given time,^{29/} but by early 1984, as Respondent conceded at the negotiation table, it was greatly concerned about monthly costs. (Union) employee Francisco Diaz was laid off in February 1984, and the much less senior (and then non-union) milker

29. I disagree with Respondent's contention that the failure to make payment in March 1982 demonstrates an absence of anti-union animus (see Respondent Brief, pp. 18-19). Although there is no explanation for this omission on the record, the documentation is clear that at least one union member (milker Lupe Franco) was employed at the time (see RX 1, Appendix C).

Juan Cornejo was retained.^{30/} Immediately following the terminations of Gomez and Cornejo, Respondent was left with a totally non-union workforce (albeit ostensibly a "union dairy" which participated in contract negotiations with the CLA and which apparently agreed to the latest contract in June 1984).^{31/} No union member has been hired since.

I also find it significant that there is serious dispute concerning the employees responsible for the high count of 20 July 1984. While all agree that Cornejo was typically off on Fridays, and that July 19 was a Thursday, General Counsel contends (and Cornejo testified) that he did not work on the day in question. Respondent offered only the uncorroborated testimony of George Vander Dussen that Cornejo did indeed have Fridays off, and that he worked on the 19th. No payroll records were introduced to confirm same. Nor was there documentation to reveal whether the milk picked up for the sampling was the milk for the preceding day as was usual, or whether a late pick up meant that it was Friday's milk that was in violation.^{32/} I thus do not find preponderant evidence

30. The company changed the schedules of the milkers from three straight-time shifts to two split shifts.

31. There is no evidence as to what, if any, union security provisions were included in this or any previous contract. See discussion, supra. Respondent's suggestion that the union could at any time sign up these non-union employees is thus not supported on the record. (Resp. Post Hearing Brief, pp. 23-24.) In any event, there may well be valid reasons why the union would prefer voluntary participation by its membership regardless of the existing contract language.

32. Apparently under subpoena, Respondent produced only its summary of the employees' work history (RX 1) and no actual payroll records.

supportive of Respondent's contention that Cornejo committed the misconduct alleged.

Lack of evidence regarding who was responsible for the July 19/July 20 high bacteria count is particularly perplexing in light of another aspect of Respondent's defense -- to wit, that Jose Perez was responsible for the high count in August. George Vander Dussen testified^{33/} that since Mr. Perez was new on the job, he (George Vander Dussen) was more tolerant of the high bacteria count. However, Respondent's own summary^{34/} reflects that Perez was not hired until August 16 -- a good 12 days following the August violation.^{35/} This confusion not only undermines one's confidence in Respondent's ability to ascertain responsibility for a given violation, but casts serious doubt upon Respondent's efforts to distinguish its treatment of the post-discharge employees from the fate accorded the discriminatees.

The testimony concerning the seriousness of the high bacteria reports tended to obfuscate the issue of whether Gomez and/or Cornejo received disparate treatment^{36/} for their alleged

33. Vander Dussen recalled that the violative report was for milk picked up on Saturday, August 4, and that the employees responsible were milker Antonio Campos and relief person Jose Perez. (R.T., Vol. II, pp. 105-106.)

34. RX 1.

35. These records indicate that Mr. Campos was hired on 11 July 1984 -- which fact is consistent with the employees' claim that the "new relief person" was responsible for the 20 July violation.

36. In comparison to the non-Union employees hired after 25 July 1984, as well as to those (Union and non-Union alike) employees working prior to Respondent's articulated concern about keeping insurance/pension costs down.

poor performance. During the relevant time period, the only deductions (a "fine" of \$278.29 for two violations in one monthly period) occurred in September 1983 (see GCX 3). There is no evidence of any such sanction during the critical April-July 1984 period of Gomez' and Cornejo's employment. Nor is there indication that any milkers were discharged for these apparently more serious reports of the previous year.^{37/}

Although Respondent attempted to explain the differential treatment accorded violations in August, September and December 1984,^{38/} comparative samplings of the pre- and post-discharge test reports do not suggest notable differences. The yearly bacteria report submitted into evidence by Respondent (RX 2) shows that the company's rating declined significantly during the May-July 1984 period. However, the comparison is skewed by the selection of relative base periods (5/2/83 - 4/22/84 as compared to 5/3/84 -7/25/84). While the latter comprises the two violations, the former encompasses very good counts (i.e., the February-April 1984 and September-January 1983-84 periods) which also involved work by one or two of the discriminatees.

The total SPC and coli counts for the period May 1983 through July 1983 as compared to May 1984 through July 1984 differ essentially because of the extremely high May 3 bacteria count.

37. The one coterminous firing (milker Alfred Laurence) was attributed to insubordination rather than poor work performance. See RX 1.

38. The August report was attributed to the newness of relief person Perez; the September violation was due to troughs overflowing in the barn; the December count was typical of the wet winter season. Thus, nobody was discharged for these "bad" reports.

Indeed, the overall record for May-July 1984 is superior to that of May-July 1983 excluding the two violation dates (May 3 and July 20). (Appendix D.) The March-April 1984 reports (when Gomez and Cornejo commenced working together) compare favorably to the March-April 1983 reports -- revealing roughly one-half SPC and coli counts. (Appendix E.)

Dividing the year in half to compare periods of union and non-union milker performance, the January-July 1983 periods demonstrated nearly twice the coli levels for the same time in 1984, but only 2/3 of the SPC count. For January-July 1983 there were three violations as compared to five for January-July 1984. For August-December 1983, coli and SPC counts exceeded those for the same period in 1984 (with newly hired [non-union] employees), but there were seven violations for the 1984 period with only four violations in 1983. (Appendix F.) Looking at the first half of 1984 (where the milker were union personnel) in comparison to the second half (where the milkers were non-union), the SPC level was slightly higher for the first part of the year; coli and LPC levels were higher for the second part of the year. (Appendix G.)

Viewing the "tabulations" for the entire year, the 1983 tally shows seven violations of SPC or coli on five different dates. In 1984, there were 12 violations on 7 different days, but 7 of these 12 violations and 4 of the dates occurred in the period August-December 1984 -- after the discharge of the discriminatees. (Appendix H.)

The statistical data supportive of Respondent's case, then, is less than overwhelming. While not denigrating the significance

to the employer of favorable quality reports, and the right of the employer to legitimately deal with conduct which contributes to such violations, it is unclear to me that these reports effectively determined the fate of both alleged discriminatees.

This lack of differentiation between the pre- and post April-July 1984 bacteria reports takes on added significance when viewed in light of the reasons Respondent expressed for the terminations during the unfair labor practice investigation. In his discussion with Board agent Miguel Castro, George Vander Dussen attributed the firings to the three violations which Respondent candidly conceded at hearing had been in error. While I find it somewhat odd that Respondent would make an error of such magnitude when discussing its legal position and the facts underlying its conduct with the agent formally assigned to investigate the case, I am less concerned with Respondent's "error" than I am about the shifting bases for its conduct. Thus, at hearing, George Vander Dussen referred to the increase in sick and "three-teater" cows, and the failure of the milkers to comply with his pleas as reasons for the discharges. (R.T. Vol. II, pp. 110-111.)^{39/}

Where Respondent's reasons for termination shift from basis to basis, this Board has rejected the Respondent's proffered business justification as insufficient to rebut the General Counsel's case.

(See Sunnyside Nurseries, Inc. (1977) 3 ALRB No.

39. In the same vein, Vander Dussen recalled on direct examination an incident where the milkers were allegedly "rushing" the cows. (R.T. II, p. 92.) This type of gratuitous attribution of poor performance is another factor which leads me to believe that more was involved in the instant case.

42, enf. den. in part; Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Board (1979) 93 Cal.App.3d 922; petition for hearing denied (August 22, 1979). The Board has thus found the adequacy of the employer's defense wanting even under the pre-National Transportation Management, supra, standard which placed the ultimate burden of proof upon General Counsel. A fortiori, Respondent would not be able to prove its affirmative defense by a preponderance of the evidence in such cases.

In a similar factual situation, this Board has found that the timing of the discharges and other unlawful conduct (interrogation and threatening statements as well as benefits granted shortly before an election) established General Counsel's prima facie case that the employees' union activity was a motivating factor in the Respondent's decision to discharge. See Harry Boersma Dairy (1982) 8 ALRB No. 34.^{40/} Decided under the pre-National Transportation Management, supra, standard, the Board therein weighed the timing of the discharges, the fact that all who expressed support for the union were subsequently discharged, the Respondent's unlawful interrogation, surveillance, and other anti-union conduct against Respondent's legitimate concern for the mastitis problem at its dairy, and concluded that Respondent would not have discharged the employees but for their union support. There, Respondent's concern over the mastitis problem was discredited by the lack of evidence that the workers were actually

40. I note that all of the instances of misconduct in the Boersma decision occurred within one month from the date of the employer's knowledge of Union activities and that there was an intervening election.

responsible for the higher incidence of mastitis, by expert testimony which revealed that mastitis was more common during the wet winter months, and by the fact that virtually every dairy had some instance of mastitis which was spread by a number of factors.

In weighing these conflicting tensions in the instant case, I reach a different conclusion with respect to each discriminatee. In the case of Mr. Gomez, I find that he would have been discharged for cause (poor performance) in July of 1984 regardless of his Union affiliations. His long-time Union membership was known to the Respondent, his certain involvement in the milking^{41/} which gave rise to the July 20 violation report, and the diminishing concern for his work which he expressed to George Vander Dussen when queried about the July 1984 violation compel this finding. By the employee's own account, there were no changes in his Union status or in the constant threats that Respondent allegedly communicated to him during his tenure which would explain the July discharges. Gomez' version that the new relief person was improperly milking the cow provided little explanation for why he (Gomez), as the more experienced milker, did not take some action to rectify the situation prior to Respondent's reprimand. Gomez' statement that he had his own work to do, I believe, typified the employee's unwillingness to heed the Respondent's pleas, resulted in his deteriorating performance, and was the effective reason for his termination. I thus conclude that Respondent's (preponderant) proof

41. There is no evidence on this record which would attribute responsibility for the May and July 1984 violations to any source other than the milkers.

in this regard is sufficient to rebut General Counsel's prima facie case and I recommend that that portion of the complaint be dismissed.

On the other hand, I have serious doubts about Mr. Cornejo's responsibility for the second violation.^{42/} Respondent was aware of the employees' contentions in that regard and did not persuasively rebut them either in conversation with the two prior to the discharges or at hearing. Additionally, it was Cornejo's union affiliation which triggered the unlawful threats of April 1984. Of the two employees, Mr. Cornejo appeared to be much more concerned about the quality of his work, and took great pride in his impeccable employment record.

While it may seem peculiar to so distinguish this "joint" termination decision, I am of the opinion that applicable precedent which requires the weighing of competing interests suggests this individualized analysis. This is not a "pretext" case, wherein I totally disbelieve Respondent's explanations for the terminations. Nor is it alleged anywhere that Gomez discharge was somehow a "coverup" to camouflage the unlawful termination of Cornejo, or that Gomez was a spokesperson of the two.^{43/} Rather, I am of the opinion

42. George Vander Dussen conceded that one high count would not be grounds for a discharge under Respondent's (oral) disciplinary policy. (R.T., Vol. I, pp. 11-12.)

43. Respondent did concede that it communicated essentially with Gomez because the latter spoke better English. Additionally, the employees stated that Cornejo joined the union after speaking with Gomez. However, there is no evidence on the record which would support the inference that Respondent had any knowledge of Gomez' role in this regard.

that the facts surrounding Cornejo's termination strike a different balance.^{44/} I am not convinced that the preponderant evidence suggests that Cornejo would have been discharged for alleged "poor" performance in the absence of his having joined the CLA in April 1984 (and thus having caused Respondent to incur an additional monthly financial burden). As the ultimate burden of proof on this issue is Respondent's, I conclude that the termination of Mr. Cornejo is violative of section 1153(a) and (c) of the Act and recommend an appropriate remedy therefor.

SUMMARY

I find that Respondent violated section 1153(a) of the Act by General Manager George Vander Dussen's 11 April 1984 promise of benefits and threats to employees Juan Cornejo and Alfonso Gomez which were expressly conditioned upon the employees' rejection of the union. I further find that Respondent violated section 1153(a) and (c) of the Act by terminating Juan Cornejo on 25 July 1984. I recommend dismissal of all other fully litigated allegations raised during the hearing. Because of the importance of preserving stability in California agriculture, and the significance of protecting employee rights, I recommend the following proposed:

44. I would distinguish the cases cited by Respondent in its post-hearing brief (p. 35), citing International Harvester Co. (1976) 222 NLRB 377 [91 LRRM 1231; W. J. Dillner Transfer, Co. (1975) 221 NLRB 1022 [91 LRRM 1158]; Green Giant Company (1976) 223 NLRB 377 [91 LRRM 1468]) on the basis that all were decided prior to Wright Line, supra. Additionally, they are factually distinguishable -- anti-union animus did not enter into the decision to terminate (International Harvester Co., supra); Respondent had the opportunity to discharge the employee with impunity months prior to the actual discharge (W.J. Dillner Transfer, Co., supra); the employee was discharged after provoking a serious altercation with another worker (Green Giant Company, supra).

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent West Coast Dairy and its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Promising benefits to discourage Union activities or sympathies and/or threatening any agricultural employee because s/he has engaged in any concerted or union activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

b. Discouraging membership of employees in the Dairy Employee Union, Local Mo. 17, CLA, or in any other labor organization, by unlawfully discharging any of its agricultural employees or in any other manner discriminating against individuals in regard to their hire or tenure of employment or any term or condition of employment, except as authorized by section 1153(c) of the Act.

c. In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of his/her rights guaranteed by section 1152 of the Act.

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

a. Offer to Juan Cornejo reinstatement to his former or substantially equivalent position and make him whole for all losses of pay and other economic losses he has suffered as a result of the discrimination against him, such amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with the Decision and Order in Lu-E'tte Farms,

Inc. (August 18, 1982) 8 ALRB No. 55.

b. Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay and interest due under the terms of this Order.

c. Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

d. Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this order, to all agricultural employees employed by Respondent from April 1984 to the present.

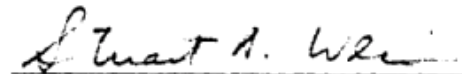
e. Post copies of the attached notice, in all appropriate languages, in conspicuous places on its property for sixty days, the times and places of posting to be determined by the Regional Director, and exercise due care to replace any notice which has been altered, defaced, covered or removed.

f. Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be give the opportunity, outside the presence of supervisors and

management, to answer any questions the employees may have concerning the notice and/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 in order to compensate them for time lost at the reading and during the question-and-answer period.

g. Notify the Regional Director in writing, within thirty days after the date of issuance of this order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: June 24, 1985



STUART A. WEIN
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, West Coast Dairy, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by promising benefits to discourage union activities and by threatening employees Juan Cornejo and Alfonso Gomez and by discharging employee Juan Cornejo because of his protected concerted/union activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about 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 and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above. Specifically,

WE WILL NOT promise benefits to discourage union activities or threaten any agricultural employee because he or she has engaged in any protected concerted and/or union activities.

WE WILL NOT discharge or lay off any employee for engaging in any protected concerted and/or union activities.

WE WILL reimburse Juan Cornejo for all losses of pay and other economic losses he has suffered as a result of our discriminating against him plus interest, and in addition offer him immediate and full reinstatement to his same or substantially equivalent position.

DATED:

WEST COAST DAIRY

By: _____
Representative Title

If you have any questions 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 319 Waterman Avenue, El Centro, California. The telephone number is (619) 353-2130.

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

DO NOT REMOVE OR MUTILATE

EMPLOYEE TENURE LIST

MILKERS

<u>Name</u>	<u>Employment</u>
D. Oliveria	07/25/84-present
A. Campos	07/11/84-present
H. Sabino	01/05/84-01/09/84
J. Cornejo	01/10/84-07/24/84
J. Viera	12/15/83-01/04/84
G. Sainz	12/07/83-12/13/83
J. Mendonca	10/10/83-12/13/83
A. Laurence	06/24/83-11/05/83
F. Diaz	03/23/83-02/22/84
R. Ramirez	12/13/82-12/15/82
A. Gomez	05/29/82-07/24/84
L. Franco	10/01/81-03/21/83
M. Orozco	10/01/81-05/04/82

13

RELIEF

<u>Name</u>	<u>Employment</u>
M. Alviso	01/04/85-present
J. Perez	08/16/84-12/00/84
C. Aguilera	01/27/84-02/22/84
X. Barajas	03/22/83-03/23/83
N. Barajas	11/05/82-12/17/82
F. Ponce	07/01/82-03/20/83
P. Quinonez	05/20/82-06/30/82
G. Ponce	05/01/82-05/26/82
J. Ybarra	02/24/83-04/15/82

9

RANCH HANDS

<u>Name</u>	<u>Employment</u>
A. Resales	06/10/84-present
B. Idsinga	03/20/84-05/29/84
I. Gonzales	10/26/83-present
L. De Souza	10/25/83-10/25/83
M. Medina	08/12/83-10/23/83
F. Medina	05/10/82-05/18/82
M. Quinonez	11/15/81-06/30/84

7

APPENDIX A

(From RX 1)

EMPLOYEE WORK HISTORY - DISCHARGED EMPLOYEES

<u>Year Discharged</u>	<u>Employee</u>	<u>JOB</u>	<u>Union</u>	<u>Reason for Termination</u>
1983	Lupe Franco	M	Yes	Insubordination
1984	Moises Quinonez	RH	No	Taking unscheduled vacation
1982	George Ponce	RP	No	Insubordination
1984	<u>Alfonso Gomez</u>	M	Yes	Very bad work performance
1982	Pedro Quinonez	RP	No	Could not communicate
1983	Felix Ponce	RP	No	Mixing up cows
1982	Ray Ramirez	M	Yes	Late and drunk
1983	Xavier Barajas	RP	No	Could not do job
1983	Alfred Laurencio	M	Yes	Insubordination
1983	Manuel Medina	RH	No	Unknown
1983	Genasio Sainz	M	Unknown	Failed to perform during trial period
1984	John Viera	M	Yes	Talking on phone
1984	<u>Juan Cornejo</u>	M	Yes	Bad work performance
1984	Hosea Sabino	M	Unknown	Failing to perform during trial period
1984	Bruce Id Singe	RH	NO	Poor work
1984	Jose Perez	RP	NO	Schedule dispute

Milkers 8
Ranch Hands 3
Relief Persons 5

APPENDIX B

(From RX 1, R.T., Vol. II, PP. 151-153)

<u>Date</u>	<u>PENSION/INSURANCE CONTRIBUTIONS</u>	
	<u>Number of Union Union Employees</u>	<u>Amount Insurance/ Pension</u>
October 1981	2	\$410
Novmeber 1981	2	\$410
December 1981	2	\$410
January 1982	2	\$410
February 1982	1	\$205
March 1982		
April 1982	2	\$480
May 1982	1	\$240
June 1982	2	\$480
July 1982	1	\$240
August 1982	2	\$480
September 1982	2	\$480
October 1982	2	\$480
November 1982	2	\$480
December 1982	2	\$480
January 1983	2	\$480
February 1983	2	\$480
March 1983	2	\$480
April 1983	2	\$480
May 1983	2	\$480
June 1983	2	\$480
July 1983	2	\$540
August 1983	2	\$540
September 1983	2	\$540
October 1983	2	\$540
November 1983	2	\$540
December 1983	3	\$710
January 1984	3	\$710
February 1984	2	\$540
March 1984	1	\$270
April 1984	1	\$270
May 1984	2	\$540
June 1984	2	\$540
July 1984	2	\$540
August 1984-present	0	0

APPENDIX C

COMPARATIVE BACTERIA COUNTS

<u>May 1983 - July 1983</u>				<u>May 1984 - July 1984</u>			
<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>	<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>
05/02	6	180	70	05/03	150	2800	70
05/15	2	10	100	05/12	10	230	20
05/20	1	20	90	05/18	2	10	40
05/27	1	20	60	05/26	2	30	10
06/02	25	500	70	06/03	10	290	100
06/08	3	80	150	06/09	1	80	10
06/17	1	20	70	06/17	2	20	80
06/23	3	70	160	06/25	9	30	10
07/03	6	80	50	07/04	2	10	70
07/08	4	60	20	07/12	1	10	10
07/18	22	230	100	07/20	66	3000	320
07/26	2	30	90	07/25	4	290	180
07/31	8	10	210	<u>12</u>	<u>259,000</u>	<u>6,800</u>	<u>920</u>
<u>13</u>	<u>84,000</u>	<u>1,310</u>	<u>1,240</u>	Excluding May 3 & July 20:			
				<u>10</u>	<u>43,000</u>	<u>1,000</u>	<u>530</u>

APPENDIX D

(From GCX 3)

MARCH/APRIL COMPARISONS

<u>1983</u>				<u>1984</u>			
<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>	<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>
03/13	3,000	370	90	03/03	2,000	160	30
03/19	3,000	70	90	03/09	1,000	20	10
03/29	3,000	270	40	03/14	2,000	290	90
04/06	9,000	10	50	03/22	4,000	10	250
04/14	1,000	10	50	03/31	1,000	10	30
04/22	1,000	120	60	04/10	2,000	10	10
04/27	4,000	10	90	04/19	2,000	10	10
<u>7</u>	<u>24,000</u>	<u>860</u>	<u>470</u>	<u>04/22</u>	<u>1,000</u>	<u>10</u>	<u>10</u>
				8	15,000	520	440

APPENDIX E

(From GCX 3)

BI-ANNUAL COMPARISONS

January- July

<u>Date</u>	<u>SPC</u>	<u>1983 COLI</u>	<u>LPC</u>	<u>Violations</u>
January	13	2-10	180	
February	106 (1)	13,400 (2)	290	3
March	17	790	250	
April	15	150	250	
May	10	230	320	
June	32	670	450	
July	34	<u>400</u>	<u>260</u>	
	227,000	15,850	2,000	<u>3</u>

January- July 1984

<u>Date</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>	<u>Violation</u>
January	25	420	450	
February	41 (1)	120	400	
March	9	480	380	1
April	6	40	60	
May	164 (1)	3,270 (1)	140	
June	22	420	200	3
July	<u>73 (1)</u>	<u>3,310 (1)</u>	<u>580</u>	
	340,000	8,060	2,210	<u>1</u>

January-March 1985

<u>Date</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>	<u>Violation</u>
January	47	100	110	
February	33	80	90	
March	55	830 (1)	370	
	<u>135,000</u>	<u>1,010</u>	<u>570</u>	<u>1</u>

APPENDIX F

(From OCX 3)

August-December 1983

<u>Date</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>	<u>Violations</u>
August	52	480	630	
September	124 (1)	11,060 (2)	420	3
October	8	580	540	
November	29	2,310 (1)	510	1
	<u>61</u>	<u>1,100</u>	<u>710</u>	
	274,000	15,530	2,810	<u>4</u>

August-December 1984

<u>Date</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>	<u>Violations</u>
August	47(1)	3,080(1)	350	2
September	56(1)	550	550	1
October	12	110	350	
November	18	160	260	
December	<u>71(2)</u>	<u>5,830(2)</u>	<u>420</u>	<u>4</u>
	204,000	9,730	1,930	<u>7</u>

APPENDIX F

(From GCX 3)

BI-ANNUAL COMPARISONS
(Union and Non-Union)

(Union) January 1984 - July 1984				(Non-Union) August 1984 - December 1984			
<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>	<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>LPC</u>
01/07	8	150	180	08/04	42	2800	100
01/15	7	90	110	08 /	2	30	80
01/23	6	170	140	08/25	2	-	80
01/28	4	10	20	08/31	1	20	40
02/02	35	50	180	09/08	3	20	160
02/07	1	10	80	09/15	48	500	220
02/15	3	50	110	09/24	4	10	130
02/23	2	10	30	10/03	3	20	150
03/03	2	160	30	10/15	2	10	80
03/09	1	20	10	10/21	6	60	110
03/14	2	290	90	10/23	1	20	10
03/22	4	10	250	11/03	10	30	160
03/31	1	10	30	11/12	4	20	50
04/10	2	10	10	11/20	2	80	40
04/14	9	10	10	11/23	2	30	10
04/22	1	10	10	12/02	5	20	140
05/03	150	3000	70	12/08	28	3000	170
05/12	10	230	20	12/14	4	10	40
05/18	2	10	40	12/20	34	2800	70
05/26	2	30	10	12/30	14	20	10
06/03	10	290	100	20	217,0	9,500	1,850
06/09	1	80	10	Average SPC:			
06/17	2	20	80	217,000/20 = 10,850			
06/25	9	30	10	Average COLI:			
07/04	2	10	70	9,500/20 = 475			
07/12	1	10	10	Average LPC:			
07/20	66	3000	290	1,850/20 = 93			
07/25	4	290	180				
28	340,000	8,000	2,180				

7 violations on 4 dates.

Average SPC:
340,000/28 = 12,143

Average COLI:
8,000/28 = 286

Average LPC:
2,180/28 = 78

5 violations on 3 dates.

APPENDIX G

(From GCX 3)

VIOLATION COMPARISONS

<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>VIOLATIONS</u>
February 4	70,000	8,000	2
February 16		4,800	1
September 1	90,000	8,000	2
September 12		2,800	1
November 29		1,800	1
			<hr style="width: 50%; margin: 0 auto;"/> 7

<u>1984 VIOLATIONS</u>			
<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>VIOLATIONS</u>
February 2	35,000		1
May 3	1,50,000	3000	2
July 20	60,000	3000	2
(3)			(5)
August 4	42,000	2800	2
September 15	48,000		1
December 8	28,000	3000	2
December 20	34,000	2800	2
7			<hr style="width: 50%; margin: 0 auto;"/> 12

<u>DATE</u>	<u>SPC</u>	<u>COLI</u>	<u>VIOLATION</u>
March 2		940	1
1			1
(Through March 29, 1985)			<hr style="width: 50%; margin: 0 auto;"/> 1

APPENDIX H

TRANSCRIPT CORRECTIONS

("R.T." denotes Reporter's Transcript.)

(1) Prehearing Transcript, page 5, line 22:
"payroll records".

(2) R.T., Volume I, page 10, line 23: "mastitis".

(3) R.T., Volume I, page 40, line 19: "Martinez".

(4) R.T., Volume I, page 49, line 16: "two employees
up to the office".

(5) R.T., Volume I, page 126, line 1: "at issue
if I understand General".

(6) R.T., Volume II, page 3, line 17: "quality
program report".

(7) R.T., Volume II, page 81, lines 8-9:
"limited questions".

(8) R.T., Volume III, page 11, line 3: "case in
chief".

(9) R.T., Volume III, page 11, line 3: "Cardenas:
'There was a question'".

(10) R.T., Volume III, page 11, line 9: "in
direct rebuttal".

(11) R.T., Volume III, page 11, line 11: "Samuel:
'My understanding'".

(12) R.T., Volume III, page 11, lines 25-26: "I am
going to allow you to proceed".

(13) R.T., Volume III, page 28, line 15: "he would
work a
man".

(14) R.T., Volume III, page 45, line 12: "actually".

(15) R.T., Volume III, page 63, line 27: "Wright
Line".

(16) R.T., Volume III, page 64, lines 1, 7:
"Wright Line".

(17) R.T., Volume III, page 64, lines 6-7: "eases
are the pretext cases".

(18) R.T., Volume III, page 66, lines 6-7: "I guess
this is ultimately going to come down to a burden of proof
question".