

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PHILLIP D. BERTELSEN, dba COVE)	
RANCH MANAGEMENT,)	
)	
Respondent,)	Case Nos. 84-CE-23-F
)	85-CE-6-F
and)	85-CE-48-D
)	
FAUSTINO CARRILLO; and)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	12 ALRB No. 27
Charging Parties.)	
)	
)	

DECISION AND ORDER

On February 28, 1986, Administrative Law Judge (ALJ) Arie Schoorl issued the attached Decision in this matter. Thereafter, General Counsel and Respondent timely filed exceptions to the ALJ's Decision, along with supporting briefs.

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

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings and conclusions and to adopt his proposed Order.

//////////

^{1/}The signatures of Board Members in all Board decisions appear with the signature of the Chairperson first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Phillip D. Bertelsen, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any other term or condition of employment because he or she was engaged in any union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the 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 Maximino Cerna and the thirteen members of the Trevino crew that Respondent discharged on February 1, 1985, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Maximino Cerna and the thirteen discharged members of the Trevino crew for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest

thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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

(d) 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.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent during a one-year period commencing August 1, 1984.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and placets) 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.

(g) 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 time(s) and placets) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors

and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during 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 Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved. Dated: December 11, 1986

JYRL JAMES-MASSENGALE, Chairperson JOHN

P. McCARTHY, Member

MEMBER CARRILLO, Concurring and Dissenting:

I concur with the majority's finding that Respondent violated section 1153(a) by discharging Maximino Cerna in retaliation for his attempt to negotiate a higher bin rate and that Respondent's reckless driving defense was pretextual.

With respect to the discharges and transfers of members of the Gilberto Trevino crew, however, "I" would find Respondent failed to meet its Wright Line burden as to either event. (Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].)

I agree with the Board majority and ALJ that General Counsel made out a strong prima facie case that the discharges of several members of the crew were in retaliation for the crew's collective action of the day before in support of better compensation. My conclusion with respect to the discharges, however, causes me to dissent from what I consider to be an inconsistent finding regarding the transfers of members of the

same crew one working day later. The fact that several calendar days elapsed between the work stoppage and the transfers does not, in my view, operate to negate the strong evidence that Respondent was retaliating against members of a crew whose protected activity threatened his continued relationship with grower Harris. Neither would I rely on the evidence of so-called "continued dissatisfaction" by Harris¹ superintendent, Ken Gibson. Although Gibson testified at the hearing about his long-standing dissatisfaction with the picking of the Trevino crew, he made no claim that his dissatisfaction continued even after the discharges. Gibson's "continued dissatisfaction" was testified to only by Bertelsen whose credibility was significantly eroded by the finding of the majority and ALJ that the reckless driving defense to which he testified was a pretext. Although no objection was made to Bertelsen's hearsay testimony with respect to Gibson's alleged continuing complaints, it is well established that it is permissible to draw an adverse inference when 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 Evidence Code section 412; The Garin Company (1985) 11 ALRB No. 18.)

In my view the strength of the General Counsel's prima facie case with regard to the discharges carries over to the subsequent transfers. Foreman Trevino's statement that both the discharges and the transfers were "because of the strike" is supported by several factors. On the one hand, Respondent's witnesses testified to a campaign to improve crew productivity

beginning several months before the discharges. On the other hand, although throughout this predischARGE period the workers were apparently picking into their own individual bins, there was no indication that any monitoring of individual picking techniques or production levels was attempted. Only on the day after the work stoppage, when workers were ordered to pick in pairs, rendering individual monitoring impossible, did the monitoring upon which the discharge orders were allegedly based begin. Although low production does appear to have been a problem, I question whether Respondent really believed the cause was the crew's picking practices rather than the poor condition of the orchard -- the reason for the workers' initial protest. I do not find persuasive Bertelsen's claim that, because he actually benefited from the increased bin rate, he had no reason to retaliate against the strikers. If, as Respondent argued, Bertelsen was truly in danger of losing his contract with Harris, collective action by Bertelsen's workers which cut into Harris¹ profit margin could reasonably be expected to further jeopardize that relationship.

Having found Respondent's business justification for the discharges to be without merit, I am compelled to question the same justification put forth to explain the subsequent transfers. Dated:
December 11, 1986

JORGE CARRILLO, Member

CASE SUMMARY

Phillip D. Bertelsen
(UFW)

12 ALRB No. 27
Case Nos. 84-CE-23-F
85-CE-6-F
85-CE-48-D

ALJ DECISION

The ALJ conducted a hearing concerning three separate incidents of alleged discrimination directed towards Gilberto Trevino's crew employed by Respondent. The ALJ found that Respondent violated section 1153(a) when it terminated tractor driver Maximino Cerna on the same day that he engaged in a work stoppage in order to negotiate a higher gondola rate. The ALJ determined that Respondent's asserted business justification, namely Cerna's day-long reckless driving to be a pretext.

The ALJ also found that Respondent violated section 1153(a) by firing 13 members of the Trevino crew one day after they engaged in a 10 minute work stoppage in support of an increased bin rate. The ALJ determined that General Counsel established a strong prima facie case.

The ALJ discounted Respondent's proffered justification. Bertelsen defended the dismissals as an ongoing attempt to improve the entire crew's work productivity. The ALJ doubted the sincerity of management's response. He reasoned that Respondent evaluated the crew on the worst possible day and that the discharged workers were randomly selected without relation to individual performance. As additional evidence of motive, the ALJ credited foreman Trevino's unobjected to hearsay statement that the 13 were terminated because of the strike.

The ALJ, unlike his conclusions regarding the discharge, found the transfer of the remaining Trevino crew members five days after the stoppage did not violate section 1153(a). The ALJ once again found the General Counsel successfully established his prima facie case. However, with respect to the transfer, the ALJ credited the crew's poor work performance as the reason precipitating the reassignment. Furthermore/ the ALJ found Trevino's hearsay statement, that the crew was transferred because of the strike, insufficient to offset evidence of Respondent's largest customer's dissatisfaction with Trevino's crew.

BOARD DECISION

The Board decided to adopt the ALJ's rulings findings and conclusions and to adopt his proposed order.

CONCURRENCE/DISSENT

Member Carrillo concurred with the majority's finding that Respondent violated section 1153(a) by discharging Cerna in retaliation for his attempt to negotiate a higher bin rate. Member Carrillo concurred with the majority that a strong prima facia case of discrimination was made by General Counsel concerning both the discharge and transfer. However he dissents from the majority's conclusion regarding the transfer because, in his view, the fact that several calendar days elapsed between the work stoppage and the transfer did not operate to negate strong evidence that Respondent was retaliating against the Trevino crew's protected activity.

* * *

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

* * *

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano and Fresno regional offices, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we 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 discharging Maximino Cerna and thirteen members of Gilberto Trevino's crew because they protested about working conditions. 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.

WE WILL NOT discharge, lay off, or otherwise discriminate against any employees who participate in meetings with company representatives to protest working conditions.

WE WILL reinstate Maximino Cerna and the 13 members of the Gilberto Trevino crew, whom Respondent discharged on February 1, 1985, to their former or substantially equivalent positions, without loss of seniority or other privileges, and we will reimburse them for all losses of pay and other economic losses they have suffered as a result of our discriminating against them plus interest.

Dated:

PHILLIP D. BERTELSEN dba COVE RANCH
MANAGEMENT

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 627 Main Street, Delano, California, 93215. The telephone number is (805) 753-2130.

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

DO NOT REMOVE OR MUTILATE. 12

CASE SUMMARY

Phillip D. Bertelsen
(UFW)

12 ALRB No. 27
Case Nos. 84-CE-23-F
85-CE-6-F
85-CE-48-D

ALJ DECISION

The ALJ conducted a hearing concerning three separate incidents of alleged discrimination directed towards Gilberto Trevino's crew employed by Respondent. The ALJ found that Respondent violated section 1153(a) when it terminated tractor driver Maximino Cerna on the same day that he engaged in a work stoppage in order to negotiate a higher gondola rate. The ALJ determined that Respondent's asserted business justification, namely Cerna's day-long reckless driving to be a pretext.

The ALJ also found that Respondent violated section 1153(a) by firing 13 members of the Trevino crew one day after they engaged in a 10 minute work stoppage in support of an increased bin rate. The ALJ determined that General Counsel established a strong prima facie case.

The ALJ discounted Respondent's proffered justification. Bertelsen defended the dismissals as an ongoing attempt to improve the entire crew's work productivity. The ALJ doubted the sincerity of management's response. He reasoned that Respondent evaluated the crew on the worst possible day and that the discharged workers were randomly selected without relation to individual performance. As additional evidence of motive, the ALJ credited foreman Trevino's unobjected to hearsay statement that the 13 were terminated because of the strike.

The ALJ, unlike his conclusions regarding the discharge, found the transfer of the remaining Trevino crew members five days after the stoppage did not violate section 1153(a). The ALJ once again found the General Counsel successfully established his prima facie case. However, with respect to the transfer, the ALJ credited the crew's poor work performance as the reason precipitating the reassignment. Furthermore, the ALJ found Trevino's hearsay statement, that the crew was transferred because of the strike, insufficient to offset evidence of Respondent's largest customer's dissatisfaction with Trevino's crew.

BOARD DECISION

The Board decided to adopt the ALJ's rulings findings and conclusions and to adopt his proposed order.

CONCURRENCE/DISSENT

Member Carrillo concurred with the majority's finding that Respondent violated section 1153(a) by discharging Cerna in retaliation for his attempt to negotiate a higher bin rate. Member Carrillo concurred with the majority that a strong prima facia case of discrimination was made by General Counsel concerning both the discharge and transfer. However he dissents from the majority's conclusion regarding the transfer because, in his view, the fact that several calendar days elapsed between the work stoppage and the transfer did not operate to negate strong evidence that Respondent was retaliating against the Trevino crew's protected activity.

* * *

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:

Case Nos.

84-CE-23-F

85-CE-6-F

85-CE-48-D

PHILLIP D. BERTELSEN, dba)
COVE RANCH MANAGEMENT; and)
HARRIS FARMS,)
)
Respondents,)
)
and)
)
FAUSTINO CARRILLO; and)
UNITED FARM WORKERS OF)
AMERICA, AFL-CIO,)
)
Charging Parties.)



Appearances:

William Lenkeit, Esq. for
the General Counsel

William S. Marrs, Esq. Gordon &
Marrs Attorney for the Respondent,
Phillip D. Bertelsen

Howard A. Sagaser, Esq. Jory,
Peterson & Sagaser Attorney
for Respondent, Harris Farms

Before: Arie Schoorl
Administrative Law Judge

DECISION OF ADMINISTRATIVE LAW JUDGE

ARIE SCHOORL, Administrative Law Judge: this case was heard by me on September 24, 25, 26 and 27 in Fresno, California. The initial complaint, which issued on April 12, 1985, based on a charge filed by Faustino Carrillo, a Charging Party, and duly served on Phillip D. Bertelsen alleged that Respondent Phillip D. Bertelsen committed a violation of the Agricultural Labor Relations Act (hereafter referred to as the ALRA or the Act). Subsequently, Respondent filed an answer denying the violation alleged in the complaint. A First Amended Complaint, which issued on August 1, 1985, based on charges filed by the United Farm Workers of America (AFL-CIO), the second charging party, alleged two additional violations of the Act. A Second Amended Complaint, which issued on August 12, 1985, alleged that Respondent Harris Farms was also liable for two of the violations of the Act.

At the pre-hearing conference held on September 24, 1985 General Counsel and Respondent Harris Farms entered into the following stipulation:

1. Concerning any order obtained by the General Counsel in the above matter, respondent Harris Farms agrees not to prevent the use of the Gilbert Trevino crew on any property farmed by Harris Farms for which Phillip D. Bertelsen is contracted to provide such agricultural employment or in any other manner preventing Phillip D. Bertelsen from implementing any order of the Agricultural Labor Relations Board with respect to the reinstatement and assignment of such crew on the above charge. Nothing contained herein shall prevent Harris Farms from exercising any legitimate business justification it may have to use to any other agricultural employer in place of Phillip D. Bertelsen or from exercising any of the legal rights that they have.

2. General Counsel agrees to dismiss Harris Farms from the above charge.

3. Phillip D. Bertelsen, Inc. herein admits that it is the agricultural employer for all purposes under this action."

Since General Counsel agreed to dismiss the charges against Respondent Harris Farms in the stipulation, I hereby dismiss the allegations in the complaint against Respondent Harris Farms.

General Counsel and Respondent Phillip D. Bertelsen (hereafter called Respondent) appeared at the hearing, but not the Charging Parties. General Counsel and Respondent filed post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the arguments and briefs of the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

I find that Respondent is, and at all times material herein has been, an agricultural employer within the meaning of Section 1140.4(c) of the Act and that Faustino Carrillo is and at all times material herein has been an agricultural employee within the meaning of Section 1140.4(b) of the Act and that the United Farm Workers of America, AFL-CIO, is and at all times material herein has been a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The Second Amended Complaint alleged that on August 24,

1984, Respondent discriminatorily discharged Maximino Cerna because of his protected concerted activities, that on February 1, 1985 Respondent discriminatorily discharged 13 members of the Trevino crew because of their concerted activities, and that on February 5, 1985 Respondent transferred the remaining Trevino crew members from their location at Harris Ranch to another location because of their protected concerted activities.

III. Did Respondent discharge Maximino Cerna because of his Protected Concerted Activity?

A. Facts

Maximino Cerna had worked for Respondent as a tractor driver during the grape harvest in 1982, 1983, and part of the 1984 season.

On August 24, 1984 Cerna reported to work with his fellow crew members to continue their work in the grape harvest. Foreman Trevino informed them that the gondola rate would be \$35 or \$38.¹ The crew members protested that it was too low. Trevino suggested they wait for the arrival of John Curiel. The latter arrived and told the crew that he would pay the same price as was paid last year. Cerna replied that that was good for the crew since last year Respondent paid \$50. Curiel retorted that Respondent would not pay that much, only \$38. Cerna showed him some check stubs from the previous year to substantiate his claim of the \$50 rate the previous year. Curiel replied that his year it would be \$38 and Cerna retorted that was very cheap. Curiel

¹It was not clear from the evidence whether the initial amount offered was \$35 or \$38.

told the crew that those who didn't want to work to leave and the others should commence to work. Some of the workers left.

Soon afterwards Phillip Bertelsen arrived and raised the rate to \$45. Foreman Trevino relayed this information to the crew members. The remaining harvesters expressed their consent and began to enter the vineyards. The tractor drivers including Cerna started their motors. For a few moments Cerna stood next to his tractor conversing with Phillip Bertelsen and vineyard owner John Rose.² Cerna ascended the tractor and revved up the motor. Curiel shouted "stop", turned down the throttle and said, "If you break the tractor, you will have to buy one³ as you are not going to work here any longer."

Cerna replied that there was no law prohibiting him from continuing to work and proceeded to drive the tractor into the vineyard.

Cerna, after entering the vineyard, got off and began to pick grapes with his two teammates Raul Gaona and Raul Sepian. After he had completed two vines, Trevino informed Cerna that Curiel had told Trevino that he did not want Cerna to work there and would not pay him. Cerna replied to Trevino, "If you fire me

²it was Curiel who testified to this fact of Cerna's conversation with Bertelsen and Rose.

³Curiel credibly testified to making the first part of this comment and his testimony was corroborated by two of General Counsel's witnesses, Raul Gaona and Antonio Casas on cross-examination. Cerna testified that Curiel asked him whether he would like to have a tractor but did not mention that Curiel included something about breaking the tractor in his remark. Cerna credibly testified about the last part of the comment and his testimony was confirmed by Gaona and Casas.

I will leave and if you do not I won't." Trevino answered that he could not fire him. Cerna said, "Well then I'm going to work." Cerna worked the rest of the day and drove the tractor in a normal manner.

Curiel's testimony about Cerna's day long careless driving has not been substantiated by the record evidence. Crew members Antonio Casas, Yolanda Baires and Raul Gaona credibly testified that Cerna drove the tractor in a normal manner. Cerna only drove twice to the loading zone. Curiel testified that he commented to employee Gilberto Allesando and Gilberto Trevino about Cerna's careless driving behavior when he, Cerna, delivered the last load of grapes to the loading site. However, Respondent failed to present evidence to corroborate such comments or such negligent driving. Trevino testified as to Cerna's driving behavior that day in general but did not testify as to this particular alleged incident.

After Cerna finished his second trip to the loading zone (at 2 p.m.), Trevino informed him that Curiel did not want him to return to work the next day and Cerna replied "O.K." and left.

B. Analysis and Conclusion

To establish an unlawful discriminatory discharge General Counsel must prove by a preponderance of the evidence that the alleged discriminatee engaged in protected concerted activities, that Respondent had knowledge of such activities and there was a causal connection between the protected activities

and the subsequent discharge of the employees. Lawrence Scarrone
7 ALRB No. 13.

Maximino Cerna engaged in protected concerted activities. Curiel testified in a narrative style and failed to mention the discussion between him and Cerna about the fairness of the rate and the rate paid by Respondent the previous year. However, Cerna and his fellow crew members credibly testified that such a discussion did occur.

Knowledge of Cerna's activity is imputed to Respondent since its supervisor, John Curiel, engaged in such discussion with Cerna.

Because there is seldom direct evidence of motive in discrimination cases, circumstantial evidence must be relied on. A frequent factor to be considered is timing. An employee engages in concerted activity, the employer learns of it and soon afterwards takes adverse action against the employee. In such a situation a strong inference can be made that the adverse action was due to the employee's concerted activity.⁴

The timing, the discharge of Cerna on the same day he protested the wage rate, clearly indicates an improper motive on the part of the Respondent.

Respondent contends that it discharged Cerna due to the reckless manner in which he drove a tractor on the day of his discharge. However, I find that the reason preferred by

⁴Rigi Agricultural Services Inc. (1983) 9 ALRB No. 31.

Respondent is clearly pretextual.⁵

Respondent presented evidence that Cerna revved the tractor engine to excess, that Cerna in backing his tractor had almost struck Curiel, that an unidentified tractor driver (Respondent contends it was Cerna) drove a tractor in such a negligent way that it knocked over an end post, that Cerna had driven a second load to the loading site at excessive speed, and that Cerna had driven the tractor recklessly throughout the entire day.

Curiel was the only witness who testified that Cerna had almost struck him with a tractor. Although other members of management and employees were present at the time and place the particular incident allegedly took place, no witness corroborated Curiel's testimony in this respect and Cerna denied doing so.

Vineyard owner John Rose and owner-manager Phillip Bertelsen testified about a tractor driver who backed up in such a negligent manner so as to strike an end post, but neither of them identified Cerna as the negligent driver they had observed. (In their testimony, neither Rose or Bertelsen mentioned the name of the tractor driver they saw hit the end post.) Cerna denied being involved in any such incident.

Curiel was the only witness who testified that Cerna drove the tractor in a dangerous manner when he drove the second

⁵In *Wright Line* (1980) 251 NLRB 150, 105 LRRM 1169, the NLRB makes the distinction between "pretext" cases and "dual motive" ones. I consider the instant case a "pretext" one.

load to the loading site at the end of the work day. Curiel testified that he had commented about this manner of driving to foreman Gilberto Trevino and crew member Gilberto Allesando and at that time both of them had confirmed his observation. However, Respondent did not call Allesando as a witness and failed to explain the reason for not doing so.⁶

Respondent failed to ask its witness, Gilberto Trevino, specifically about this incident but asked him about Cerna's driving behavior during the entire day.

Trevino's answer to Respondent's general question about Cerna's driving performance that day "real fast . . . speedy" in a way corroborates Curiel's testimony. However it loses much of its persuasiveness due to the fact that Respondent failed to ask Trevino about any of the particular incidents of negligent driving, including the one at the end of the day. Moreover such weak corroboration is clearly outweighed by the general unreliability of Curiel's testimony (see below), and the credible testimony of Cerna and his coworkers⁷ that he drove the tractor in a normal manner throughout the day.⁸

⁶I make no inference that if Allesando were called as a witness his testimony would have been unfavorable to Respondent since there was no showing that Allesando was still under Respondent's control and available as a witness.

⁷Raul Gaona, Antonio Casas and Yolanda Baires were credible witnesses as each one appeared to make a sincere effort to recall the events to which they testified.

⁸Respondent argues that Raul Gaona, Cerna's teammate testified on cross-examination that Cerna was "mad" all day because of the "low" payment per gondola and therefore this is evidence that Cerna drove the tractor in a negligent manner.

As I have already discounted the evidence as to Cerna's alleged near miss of Curiel, the alleged blow to the end post, and the alleged day long reckless driving, there only remains the incident of the alleged excessive revving up of the tractor motor.

The only direct evidence of such excessive revving is Curiel's testimony. Neither Trevino, Bertelsen, John Rose or any other of Respondent's witnesses corroborated it.

However, there is substantial evidence that Curiel remarked to Cerna, "If you break this tractor, you will have to buy a new one."⁹ Evaluating the evidence, I conclude that either Cerna revved the motor up in a normal fashion or somewhat above normal but not excessive¹⁰ and that Curiel seized upon the occasion to criticize Cerna in such a manner as to build a case for a discharge ostensibly for cause.

However, Gaona answered Respondent's subsequent question about whether or not Cerna drove the tractor as if he were mad, to the contrary and added that "we weren't comfortable because of the price". I credit Gaona's latter answer as being the accurate description of Cerna's mood throughout the day.

⁹Casas and Gaona both admitted on cross-examination that Curiel had made such a statement.

¹⁰Curiel's testimony was that Cerna was standing and talking to Phillip Bertelsen and John Rose just after he started the tractor motor and also that Bertelsen had observed the incident of the revved up motor. I make an inference that if Respondent had asked any of the three witnesses, Bertelsen, Rose or Trevino, about this incident the testimony would have been unfavorable to Respondent's version of the incident. It is permissible to infer unfavorable testimony for the failure of a witness, present at a hearing, to testify and refute testimony that has been presented by General Counsel. Merzoian Brothers, et al., 3 ALRB No. 62. Nevada County Publishing Co. d/b/a The Union. 251 NLRB 1030.

Furthermore, it is evident that Curiel decided to discharge Cerna at the beginning of and not at the end of the work day as Curiel would have us believe. To substantiate his claim that he made his decision at the end of the day, he has described certain incidents of reckless driving throughout the day.

However, there is virtually no corroboration of such driving. Moreover, there is reliable evidence that Curiel stated twice at the beginning of the work day that he had decided to discharge Cerna. The first time he stated his intention to do so when he told Cerna that he did not want him to work there after he reprimanded him about the revved-up motor.¹¹ The second time was when Curiel told Trevino to inform Cerna that he, Curiel, did not want Cerna to work at Respondent's anymore and Trevino did so 5 minutes after work started that morning.

The evidence of an early decision on the part of Curiel to discharge Cerna and Curiel's testimony to the contrary, casts a strong doubt not only on Curiel's testimony on this point but his entire testimony. (Testimony false in part, is suspect in its entirety.¹²) Moreover, Curiel in his testimony minimized Cerna's concerted activity, stating that Cerna was one of "4, 5, 8 or 7" employees who protested about the gondola rate when there was uncontroverted testimony by Cerna and his co-workers that

¹¹Cerna and co-crew members Casas and Gaona credibly testified to that fact.

¹²Witkin, California Evidence (2d Ed.) section 1125; Nelson v. Black 43 Cal.2d 612, 275 P.2d 473.

Cerna was the leader of the protest and argued about the rates based on his check stubs from the previous year. Curiel's minimizing of Cerna's role in the protest indicates the unreliability of the rest of his testimony.

I find that absent Cerna's protest about the wage rate Respondent would not have discharged him and thus find that Respondent has violated section 1153(a) of the Act.

IV. Did Respondent Discharge Thirteen Members of the Trevino

Crew on February 1, 1985 and Transfer the Remaining Members of the Crew Five Days Later Because of Their Protected Concerted Activities on January 31, 1985?

A. Facts

Respondent is a custom harvester who had harvested the oranges for the Harris Ranch since approximately 1975. Gilberto Trevino had been a foreman of the crew in question for 3 years. Many of the crew members were his relatives, friends and compadres.¹³

In the autumn of 1984, Ken Gibson, the Harris Ranch superintendent complained to Respondent's owner and general manager, Phillip Bertelsen, about the Trevino crew. He informed Bertelsen that the crew was deficient for three reasons: Pulling instead of cutting the oranges, leaving too many oranges on the trees and not filling the bins adequately. Bertelsen, in turn, communicated this complaint to his superintendent, K.C. Wharton, and directed the latter to tell the deficient pickers to improve or they would be discharged.

¹³A personal relationship similar to a family one based on godparents-godchildren ties.

At the beginning of January, K.C. Wharton told Trevino that if the crew did not improve Respondent would have to discharge the inefficient pickers. Wharton spoke individually with a number of crew members about improving their work.

Trevino, who usually reminded the crew about filling the bins, leaving oranges on the trees, etc., increased such remarks during the 3 weeks preceding the discharge.

On the morning of January 31, 1985 the crew members decided to refuse to begin to harvest oranges unless the bin rate was increased from \$9.50 to \$12.00. Evelio Gonzalez and other crew members informed Trevino of their demand. The latter replied that he would check with management about such a raise. Trevino left and returned in ten minutes and announced that the \$12.00 a bin rate was agreeable and the crew members began the picking.¹⁴

The next day Friday February 1, Trevino assigned two crew members to each bin because there were few oranges on each tree and it would be easier for two harvesters to fill a bin as it would require less walking.¹⁵ Trevino selected the pairs and marked the initials of each pair on their respective bins.

¹⁴Bertelsen credibly testified that his paying a higher bin rate actually increased his profit since his compensation was based on a percentage of the total wage bill. He further testified that a higher bin rate would redound to his benefit until it reached a point where the orange grove owner would refuse to pay it and contract another harvest company. There was no evidence that such a limit had been approached.

¹⁵Trevino decided that the harvesters would work in pairs that particular day. The harvesters customarily worked with individual bins.

At 10:30 a.m. Wharton arrived and checked some of the bins. He returned at about 2 p.m. and checked 7 bins. He wrote the names of the harvesters who worked with the 7 bins (with the exception of Santos Carrillo) and delivered the list to Trevino and instructed the latter to discharge the crew members on the list. According to Wharton, he found that the workers who were discharged had not filled the bins properly, had picked oranges with stems too long, and had pulled oranges rather than clipped them.

At the end of the day's work Trevino informed some of the workers that they had been discharged. As Trevino was leaving the orchard, crew member Hector Pena asked Trevino the reason for the discharge. Trevino replied that it was due to the work stoppage the day before. Later than evening Trevino delivered checks at the homes of crew members and informed the rest of the workers that they had been fired. A few nights later at one of the crew member's homes, Trevino, in response to -crew members' question commented that the "strike" was the reason for the discharge.¹⁶

The crew (minus the discharged workers) worked the following Monday on the Harris Ranch. Bertelsen testified that the crew still had problems so he decided to switch crews. Consequently, he transferred the Trevino crew to another ranch and transferred the Garcia crew that was working on the latter

¹⁶Crew member Thelma Escobar credibly testified to such question and response.

ranch to the Harris Ranch.

Ken Gibson, the Harris Ranch superintendent, testified that he was satisfied with the work of the Garcia crew and that the problem had been solved. The Trevino crew continued to harvest oranges on the other ranch for some additional months.

B. Analysis and Conclusion

To establish that Respondent discriminatorily discharged 13 crew members General Counsel must prove that they engaged in protected concerted activities, that Respondent had knowledge of them, and that there was a causal connection between the protected activity and the discharge.

It is undisputed that all members of the Trevino crew engaged in a protected concerted activity on the morning of January 31 when they refused to harvest the oranges for \$9.50 a bin. It is also undisputed that Respondent was aware of their concerted activity since its foreman, Gilberto Trevino, heard their protest and later informed them that their request had been granted.

In the instant case, the timing of the discharges, the day after the protected activity, is a strong indication that the cause of the discharges was the crew members' protest about the bin rate the previous day. Therefore, I conclude that General Counsel has established a prima facie case.

Respondent contends it discharged 13 crew members because they had engaged in deficient work performances.

In dual motive cases such as this, once a prima facie

case is proven by General Counsel, the burden shifts to Respondent to demonstrate by a preponderance of the evidence that its conduct, in the instant case, the discharges would have occurred even absent the employees' protected activity.¹⁷ According to supervisor K.C. Wharton's testimony he checked the workers' bins on February 1 and instructed foreman Trevino to discharge the harvesters who had not done a good job.

However it appears that the one day the harvesters worked in pairs was the worst day to evaluate them. It would be impossible to determine which one of each pair was responsible for the poor quality of the oranges, i.e., with stems too long or pulled rather than clipped.¹⁸

If Respondent had been sincere in its attempt to evaluate the harvesters, it would have made such an evaluation on a day the harvesters worked with individual bins.

Furthermore, Bertelsen testified that even after the discharges, the crew continued to do poorly. That would indicate that not the worst crew members were discharged. Trevino, himself, admitted to crew member Casas that he was sorry that Respondent had discharged the 13 crew members and that he was especially sorry about one employee, in particular, Isaias. Trevino told Casas that he felt that way as Isaias was his best

¹⁷Wright Line, supra; Rigi Agricultural Services Inc., supra.

¹⁸There was no testimony that Wharton had paired the more deficient crew members together. In fact according to Trevino's uncontradicted testimony, he, Trevino, had been the one who did the pairing.

worker and had a wife and children to support.¹⁹

It is evident from the foregoing that supervisor K.C. Wharton did not select the employees for discharge because of their work performances but at random.

Respondent argues that if it had wanted to retaliate against the crew members because of their protest, it would have fired only the protest leaders and not just some of them and some of those who merely supported the protest by refusing to work. It is true that discharging the protest leaders would have been an effective method of retaliation against the protest but it is not the only effective method of retaliation. The method used by Respondent constitutes another effective means to retaliate, e.g., discharge the employees at random a day after the protest. The unambiguous message is that the discharge was not due to work performance but due to the work stoppage the previous day. It amounted to a show of strength on the part of Respondent to send a message to the workers that those who actively or passively participate in a work stoppage will jeopardize further employment.

Additional proof of Respondent's discriminatory motive was Trevino's comments to the workers that the reason for the discharge was because of their January 31 protest. Trevino never denied making such statements as Respondent failed to ask him

¹⁹Respondent failed to introduce evidence to contradict Casas' testimony about this conversation.

such questions when it called him as a witness.²⁰

In view of the foregoing, I conclude that absent the Trevino crew members' protest about bin rates on January 31, 1985, Respondent would not have discharged them on February 1, the next day, and thus I conclude that Respondent violated section 1153(a) of the Act.

V. Did Respondent Transfer the Trevino Crew from the Harris Ranch Because of the Work Stoppage?

A. The Facts

Most of the facts have already been set out in the previous section so they will not be repeated.

Ken Gibson, the superintendent of the Harris Ranch, credibly testified that he had been dissatisfied with the work of the Trevino crew during the entire month of January and had given an ultimatum to Bertelsen that either the crew improve or that he would contract with another harvest contractor to do the work. He noticed that the Trevino crew's work performance did not improve. The last day the Trevino crew worked at the Harris Ranch was February 4. Subsequently, Respondent transferred the Trevino crew from the Harris Ranch and brought in another crew and its foreman George Garcia. Gibson credibly testified that he was satisfied with the work of the Garcia crew on the Harris Ranch. Gibson's testimony was corroborated by Phillip Bertelsen.

Two of the crew members testified that Trevino had informed them that the reason the crew was transferred was

²⁰Merzoian Brothers, et al., *supra*; Nevada County Publishing Co. d/b/a The Union, *supra*, 251 NLRB 1030.

because of the work stoppage. Respondent failed to ask Trevino any questions about these statements during his testimony.

B. Analysis and Conclusion

General Counsel has presented a prima facie case since the timing indicates an improper motive in that the transfer took place approximately one week after the discharges. Applying the procedure of Wright Line, supra, Respondent has the burden of proving that it had a legitimate reason for the transfer. Respondent has so proven such a reason. The record clearly indicates that Gibson was dissatisfied with the Trevino crew's work and threatened to contract the harvesting to another harvesting company unless the crew's work production improved. Since Gibson's opinion of the Trevino's crew never changed, Respondent had no other alternative but to transfer the crew.²¹

Consequently, I find that Respondent did not violate section 1153(a) of the Act when it transferred the Trevino crew. I recommend that the allegation be dismissed.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Phillip D. Bertelsen, its officers, agents, successors, and assigns, shall:

²¹The fact that two crew members, Antonio Casas and Yolanda Baires, testified that Trevino had remarked that the transfer was due to the work stoppage does not constitute sufficient evidence to offset the uncontradicted evidence with respect to Ken Gibson's ultimatum about the Trevino crew to Bertelsen and his continued dissatisfaction with the crew's work.

1. Cease and desist from:

(a) Discharging or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any other term or condition of employment because he or she was engaged in any union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the 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 Maximino Cerna and the thirteen members of the Trevino crew that Respondent discharged on February 1, 1985, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Maximino Cerna and the thirteen discharged members of the Trevino crew for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and

otherwise copying, all payroll records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of backpay and interest due under the terms of this Order.

(d) 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.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from August 1, 1984 until March 1, 1985.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) 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.

(g) 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 time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of management, to answer any questions the 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 nonhourly wage employees in order to compensate them for time lost at this reading and during 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 Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved. DATED: February 28, 1986


ARIE SCHOORL Administrative
Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano and Fresno Regional Offices, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we 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 discharging Maximino Cerna and thirteen members of Gilberto Trevino's crew because they protested about working conditions. The Agricultural Labor Relations 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.

WE WILL NOT discharge, lay off, or otherwise discriminate against any employees who participate in meetings with company representatives to protest working conditions.

WE WILL reinstate Maximino Cerna and the 13 members of Gilberto Trevino crew whom Respondent discharged on February 1, 1985, to their former jobs, or to comparable employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they lost because of their discharge from Phillip Bertelsen.

Dated:

PHILLIP BERTELSEN dba COVE RANCH
MANAGEMENT

By:

_____ 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 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE.