

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LA CUESTA VERDE GINNING CO.,)	
)	
Respondent,)	Case No. 85-CE-119-D
)	
and)	
)	
UNITED FARM WORKERS OF)	13 ALRB No. 23
AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

On March 5, 1987, Administrative Law Judge (ALJ) Thomas Sobel issued a Decision and proposed Order in this matter. Thereafter, Respondent La Cuesta Verde Ginning Co. timely filed exceptions to the ALJ's Decision and a supporting brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and brief and has decided to affirm the rulings, findings^{1/} and conclusions^{2/} of the ALJ and to adopt his proposed

^{1/}Respondent excepts to certain of the ALJ's credibility resolutions. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24, review den. by Ct. App., Second Dist., Div. 3, March 17, 1980; Standard Dry Wall Products, Inc. (1950) 91 NLRB 544 [26 LRRM 1531].) We have reviewed the record and find the ALJ's credibility resolutions to be supported by the record as a whole.

^{2/}One of Respondent's supervisors, Arturo Rodriguez Sr., testified without contradiction that while employee Ruben Duran was on an excused two-day sickness leave, Rodriguez informed Duran's immediate supervisor, Roberto Montoya, that Duran had

Order with modifications.

Pursuant to section 1160.3 of the Act, we hereby issue the attached Order.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent La Cuesta Verde Ginning Co., 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 because he or she has engaged in union activity protected by section 1152 of the Agricultural Labor Relations Act (ALRA or Act).

(b) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by the Act.

(fn. 2 cont.)

volunteered that he intended to leave La Cuesta Verde in order to accept other employment in Delano, California. Duran testified, also without contradiction, that immediately upon returning from his excused absence, he disputed Montoya's understanding that he had "quit." Although the ALJ found that Montoya seized upon Rodriguez' statement to get rid of a union activist, he neither expressly credited nor discredited either Rodriguez or Duran. For purposes of evaluating the ALJ's Decision, and Respondent's exceptions thereto, we accept as true the testimonial statements of both Rodriguez and Duran. Respondent cannot rely upon a disputed communication by one of its own supervisors to create what would appear to be a nondiscriminatory motive to defeat the prima facie case establishing a violation of the Agricultural Labor Relations Act (ALRA or Act). (See, e.g., Superior Farming Co., Inc. (1981) 7 ALRB No. 39, enforced Superior Farming Co., Inc. v. Agricultural Labor Relations Bd. (1984) 151 Cal.App.3d 100.)

2.

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

(a) Offer to Ruben Duran immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Ruben Duran for all losses of pay and other economic losses he suffered as a result of the discrimination against him, 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, 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 periods 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 purpose 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 from January 1, 1982 to January 1, 1983.

3.

(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 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 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 the 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

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report periodically thereafter, at the Regional Director's request/ until full compliance is achieved.

Dated: December 11, 1987

BEN DAVIDIAN, Chairman^{3/}

JOHN P. MCCARTHY, Member

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

^{3/}The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Regional office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO (UFW or Union), the General Counsel of the ALRB issued a complaint which alleged that we, La Cuesta Verde Ginning Company, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging Ruben Duran for exercising his rights under the Agricultural Labor Relations Act.

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 any employee for engaging in protests over working conditions.

WE WILL offer reinstatement and reimburse Ruben Duran for all losses of pay and other economic losses he has suffered as a result of our discriminating against him, plus interest.

Dated

LA CUESTA VERDE GINNING COMPANY

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite A, Visalia, CA 93291. The telephone number is (209) 627-0995.

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

La Cuesta Verde Ginning Co.
(UFW)

13 ALRB No. 23
Case No. 85-CE-119-D

ALJ DECISION

The ALJ determined that tractor driver Ruben Duran was the primary organizer for the UFW in the summer of 1985 and served as the UFW's observer at a representation election conducted by the ALRB on July 24, 1985. The ALJ also found that Duran worked two hours on the day following the election and then left work due to illness. He was absent the next day as well, also due to illness, and so advised the company. When Duran attempted to resume work, four days following the election, his immediate supervisor informed him that he no longer was employed by La Cuesta Verde. The ALJ concluded that Duran was discriminatorily denied further employment because of his union activities in violation of the Act,

BOARD DECISION

The Board observed that one of Respondent's supervisors, Arturo Rodriguez, Sr., testified without contradiction that while Duran was on an excused two-day sickness leave, Rodriguez informed Duran's immediate supervisor, Roberto Montoya, that Duran had volunteered to him that he intended to leave La Cuesta Verde in order to accept other employment in Delano. Duran testified, also without contradiction, that immediately upon returning from his excused absence, he disputed Montoya's understanding that he had "quit." Although the ALJ found that Montoya seized upon the first supervisor's statement to get rid of a union activist, he neither expressly credited nor discredited either Rodriguez or Duran. For purposes of evaluating the issues, the Board accepted as true the statements of both Rodriguez and Duran.

On that basis, the Board concluded that Respondent could not rely on a disputed communication by one of its own supervisors to create what would appear to be a nondiscriminatory motive to defeat the prima facie case establishing a violation of the Act.

* * *

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:)
LA CUESTA VERDE GINNING CO.,) Case No. 85-CE-119-D
Respondent,)
and)
UNITED FARM WORKERS OF)
AMERICA, AFL-CIO,)
Charging Party.)

Appearances:

Fred Capuyan
627 Main Street
Delano, California
for the General Counsel

Howard Sagasar
Jory, Peterson & Sagasar
600 West Shaw Avenue, Suite 450
Fresno, California
for the Respondent

Before: Thomas Sobel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:

This case was heard by me on various days between October 7-15, 1986 in Fresno, California. The complaint raises two issues: (1) Whether farmworker Ruben Duran was terminated because of his union activities and (2) Whether Respondent discriminatorily denied him re-employment after his termination.¹ Respondent contends that it took no adverse action against Duran at all, that, on the contrary, Duran voluntarily left its employ in order to work for the Charging Party, United Farmworkers of America, and, finally, that it did not discriminatorily deny him re-employment.

In the ordinary section 1153(c) case, in order to make out a violation of the Act, General Counsel must initially make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's treatment of the employee. Once General Counsel has made such a showing, the burden of proof shifts to Respondent to show that it would have acted the same way in the absence of the employee's protected activity. Wright Line, Division of Wright Line Inc. (1980) 251 NLRB 1082, 1089. Generally speaking, the elements of the prima facie case consist of proof of the employee's protected activity, proof of employer knowledge of that activity, and proof of a causal connection between the employee's protected activity and the adverse action taken by the employer. Duke Wilson Company (1986) 12 ALRB No. 19, ALJD, p. 16. In such

¹In view of my conclusion on the first issue, there is no need to discuss the second.

an ordinary case, then, the ultimate focus of inquiry is on the employer's motive for doing what it did.

In this case, since Respondent denies it took any action at all against Duran, the disputed casual element will turn less on why Respondent acted as it did than on what it did.² I should point out that in framing the issue in terms of the veracity of Respondent's version as opposed to that of the General Counsel, I am not imposing a burden of proof upon Respondent in the absence of General Counsel's having made a prima facie case; however, in what is essentially a "pretext" case, I cannot make any determination about the weight of General Counsel's proof in isolation from the conflicting factual contentions of Respondent. General Counsel always retains the burden of proof in the sense that I must find his version of events to be more credible than that of Respondent. Given the timing of the discharge, and the absence of Respondent's having offered any alternative motive for firing Duran than is fairly implied by the animus on the record, if I find that Duran was fired, General Counsel necessarily meets his burden of proof.

Before turning to the areas of dispute between the parties, it remains to point out that the the first two elements of the standard analysis -- protected activity and employer knowledge -- have been satisfied in this case. In the first

²Respondent itself puts the matter this way: "Essentially this case involves determination of the factual evidentiary issue of whether or not Ruben Duran quit work at La Cuesta Verde....or was....fired by Raul Montoya...." Post-Hearing Brief, p. 1.

place, Respondent acknowledges in its brief that Duran "was active on behalf of the UFW during the several weeks preceding the election [and was] a Union observer at the election." In addition to this admission, General Counsel's witnesses also testified without contradiction about an encounter between Duran and Respondent's owner, Bobby Lee, which would have marked Duran as an ardent union supporter.

According to Duran, two days before the election, he was having a discussion with the company's labor consultant when Bobby Lee and supervisors Raul Montoya and John Summers arrived. Speaking through Montoya, Lee asked Duran to give the company another chance because the bank was pressuring him and he needed to borrow more money; further, he told Duran "you don't need the union." Duran replied that the union was necessary because the foremen treated people badly. Then, referring to Montoya, Duran described him as a "terror" for yelling at everyone and further told Lee that Summers had tried to hit him once. To Lee's requests for another chance, Duran replied that he had his chances and that the election would be another one. After Lee left, Raul Montoya again asked Duran to give the old man a chance and asked him why he (Duran) would believe in people he didn't know. Duran replied, speaking of Montoya, that he knew him. Tereso Saucedo essentially corroborated Duran's account of the substance of these conversations.

Since the employees' account of these incidents is undisputed, little purpose would be served in detailing and analyzing the other incidents upon which General Counsel relies to

prove either employer knowledge of Duran's activities or Respondent's union animus. It seems clear from the exchange between Lee and Duran that Duran was treated by the company's owner as a spokesman for the employees and that he rebuffed personal appeals from both Lee and from his (Duran's) immediate supervisors. Although Lee's and Montoya's requests for "another chance" are privileged under Labor Code section 1155, both requests, and Lee's comments in particular, show the depth of Respondent's concern about unionization and may be used for this limited background purpose: "[Section] 8(c) [does] not prohibit the Board from considering....protected statements 'to draw the background of the controversy" and place other non verbal acts in proper perspective...." Darlington Manufacturing Company v. NLRB (4th Cir. 1968) 397 F2d 760, 769, cert. den. 393 U.S. 1023.

The evidence relating to the parties' contentions may be quickly stated. In mid-summer 1985, the United Farmworkers of America began an organizing campaign among Respondent's employees. Duran took an active part in the campaign which culminated in an election on July 24, 1984. It is undisputed that a few days before the election, and right after the encounter between Duran and Bobby Lee which I have previously related, Duran asked Roberto Montoya for his vacation pay.³ (it is undisputed that Respondent permitted its employees to receive their vacation pay in lieu of time-off.) It is clear from both Duran's and Montoya's account that Duran asked for his vacation pay only; according to Duran, he

³Duran placed the conversation on July 22, 1985

also explained to Montoya that he needed it "because [he] owed some money." Although Montoya did not mention that Duran told him why he needed the money, he confirmed that Duran asked for it. That Montoya clearly corroborates Duran's testimony that Duran only asked for his vacation pay is clear from Montoya's testimony in which he distinguishes between Duran's request to him for vacation pay and Duran's subsequent request for his final check.

According to Duran, so anxious was he for his money, that he asked Arturo Rodriguez on the following day, July 23, to remind Montoya about getting him his vacation check. The day after the conversation Duran claims he had with Rodriguez, the election was held. The day after the election, July 25, Duran reported to work, but received permission from Raul Montoya to go home sick. This "would be his last day of work for Respondent. According to Duran, on July 26 he again asked for his vacation pay, this time from John Summers whom he saw outside the house he and some co-workers rented from the company. According to Duran, Summers said "I'm going to make it out." Summers did not deny this conversation.

On Sunday, July 28th, Duran sought out Raul Montoya to tell him he was ready for work on Monday. According to Duran, the complete exchange went this way:

A I told him that I was ready now to work on Monday.

Q And what did he say?

A He said, "You no longer have any work."

Q Then what happened?

A Then I asked him why.

Q What did he say?

A He said that because he had been told that I was going to go over to work with the union.

Q Then what happened?

A I told him, "But I haven't told you anything."

Q Then what happened?

A Then he told me, "You already know why."

Q Then what happened?

A Well, I said, "If I'm fired, I'm fired by now, I'm going to go and file a charge or see what I can do."

Q Did Raul say anything to you about your check?

A Yes.

Q What did he say?

A That my check was already prepared since Friday but being that it was Sunday I couldn't go to the office to get it.

Q Then what happened?

A That's when I told him that I was going to have to go and do something. Then he said, "Do whatever you want to. Go wherever you please."

After this conversation with Montoya, John Summers arrived.

Duran said to Summers "John, look, I got the check but he's firing me.

And he told me, 'I don't think he fired you' He said 'Let me go see.

Then I'll tell you.'" Summers left and Duran did not see him until the

next day when Summers told him "Yeah, the son of a bitch fired you.'"

According to Duran, he asked Summers for work when he informed him that

Montoya had fired him and he continued to press not only Summers, but

also Raul and Roberto Montoya, for work during the following week before going

to work for the union as a volunteer.

Respondent's witnesses present a different version of the details of the few days after the election. Arturo Rodriguez testified that he spoke to Duran, but not about Duran's vacation check; rather, according to him, Duran asked him to prod Montoya for his "check because [he (Duran) was] going to go to Delano to work." According to Rodriguez, he spoke to Montoya the following day, asking him "whether the boy had seen him because he was looking for him," and further explaining to Montoya that, "he (Duran) wanted to see him because he wanted to ask him for his check so as to go to Delano." Roberto Montoya related that on Friday, July 26, Arturo Rodriguez told him that Duran had been looking for him "because he wanted the rest of his pay and his vacation pay." Montoya was very sure of the date because it was the payday after the election. Later that afternoon, Roberto spoke to his brother, Raul, and told him to get Duran's time straightened out and to prepare his vacation pay.

According to Raul, Duran had approached him that same morning to ask for his regular paycheck, which he did not have. Montoya saw Duran again at around noon and gave him his regular paycheck. When Duran initially testified, he denied receiving any paycheck on July 26, which contradicted the declaration he had given in support of the charge. However, when pressed by Respondent's counsel, Duran admitted receiving his regular paycheck on July 26, but he claims he received it from another foreman, Hector Sanchez, and not from Raul Montoya.

Raul testified that Roberto told him in the "early

afternoon" that Duran had requested his time be turned in and further instructed him to check on any vacation pay that Duran may have coming to him because he quit. As a result of this conversation, Raul asked Respondent's payroll clerk to prepare Duran's final check, which she did. Although the check was ready about 3:30 or 4:00 that afternoon, Montoya did not see Duran to give it to him.

Because the check was not delivered to Duran the day it was drawn, Montoya was able to speak to Bobby Lee prior to delivering it. According to Montoya, he spoke to Lee about Duran's final check on Monday, July 29, to ask him whether it was appropriate to have paid Duran for the hours he served as an observer during the election. When Lee said no, Montoya had the original check (which had been drawn on July 26th) voided and had a new check issued in a lower amount which reflected the adjustment in Duran's hours. This check (R 13) bears a July 29 issuance date and was cashed by Duran on August 2. John Summers admitted that Duran spoke to him about Raul's having fired him, but he was unsure about when the conversation took place -- he placed it during the two weeks following the election -- and he denied ever saying anything to Duran about it because "it was kind of a delicate issue" with Duran going around claiming he was going to win back his job. According to Summers, Duran never actually asked for work, but only indicated he would win his job back.

Obviously, little of substance is undisputed in this case and even when the parties can agree about what did take place, their interpretations of the meaning of those events immediately

diverge. For his part, General Counsel generally contends that Duran asked for his vacation pay because he needed money, but went home sick before he received it, reporting to Raul Montoya that he was available to work as soon as he was able, at which point Montoya told him he no longer had a job. Respondent, on the other hand, contends that Duran was not really sick and that he wanted his severance check in order to go to work elsewhere. It is undisputed that Duran did go to work for the union after he left Respondent's employ.

At the outset, I reject Respondent's contention that Duran was not genuinely ill during the period *he* claimed to be. Respondent would have me conclude otherwise for two reasons. First, because Duran was generally unreliable and second because both Arturo Rodriguez and Raul Montoya credibly testified that Duran was out and about during the period he claimed he was sick. On the record as a whole, including my observation of the demeanor of all the witnesses, I do not find Duran to be generally unbelievable, although he did contradict himself on a number of points which I shall discuss. Nor can I conclude that Duran was not ill, even assuming he was outside watching a ball game and that he left his house to speak to Raul Montoya.⁴ I can easily

⁴I do not regard whether Duran got his check from Montoya, as Respondent contends, or from Sanchez, as Duran contends, to be of critical importance. Since in my view nothing in Montoya's testimony about his paying Duran on July 26th bears directly on the question of whether Duran quit or was fired, and is only relevant to the question of his reliability, I see no need to resolve this particular factual dispute when my resolution of this case turns on other grounds.

understand that someone with diarrhea (which Duran claimed he had) would prefer not to be at work, even if he otherwise felt himself capable of going out for a diversion or on errands.

Respondent also argues that Duran's eventual admission that he received his regular check on July 26th, coupled with the documentary evidence showing that he could not have received his final check until at least July 29, demonstrates that he quit rather than that he was fired. To the extent Respondent is arguing that I believe Duran quit merely because of the logic of events, as opposed to any doubts I might have about his story, I reject the argument. I simply do not see how the fact that he was paid on July 26, and the fact that he could not have received his severance pay until after July 29th, point to the conclusion that he quit.

To the extent Respondent means that Duran could not have needed his vacation pay because he was going to be paid on July 26th anyway, and because he failed to pick up his final check until August 2nd, and, therefore, his "vacation" story must be false, I also cannot agree. Not only is there nothing improbable about someone needing more money than he is going to get in his paycheck, but also none of Respondent's witnesses testified they told Duran his check would be ready. For all the record shows, Duran kept asking for his "vacation" check without ever receiving any other response than that someone would get it for him. Accordingly, when he received his final check is not highly probative on the issue of what his intentions were.

Since I do not attach the same importance as Respondent

does to the details about which Duran was mistaken, I do not disbelieve the critical elements of his story merely because he got these facts wrong although I must certainly weigh his mistakes in determining the credibility of his account. Moreover, in assessing his credibility, in addition to these mistakes in his chronology of events, Duran also displayed a disquieting rigidity and tendency towards self-protection during parts of his testimony. In this connection, I am thinking of his testimony regarding when he discovered an "error" in his declaration and what, if anything, he did about it. Besides contradicting himself, there was an evasiveness in his responses on cross-examination that would ordinarily tell against the credibility of his account, but for a combination of circumstances.

Ruben Duran was the only witness to testify for any length of time and though the extensiveness of his testimony exposed his flaws as a witness, it also permitted me to take his measure, and, despite my consciousness of the difficulties I have adverted to, I did not find him unbelievable.

Of course, my overall impression of Duran as a witness would not count for much if his story were not consistent with the circumstantial evidence. Montoya confirmed that Duran only asked for his vacation check; Duran and Rodriguez agree they spoke, but disagree about the subject of their conversation; Summers did not deny Duran's testimony that he had a conversation with Duran which Duran placed after his conversation with Rodriguez -- in which Duran asked only for his vacation check. The only factual dispute

in this chronology is about what Duran said to Rodriguez; the two undisputed elements of Duran's chronology favor his account that two days before the election, he was not intending to quit, but wanted his money only, and as late as Friday, July 26, he still wanted his vacation money only. Nevertheless, Respondent would have me believe, based upon Rodriguez's testimony, that in the few days after Duran admittedly told Montoya he wanted his vacation pay, he changed his mind and expressed an intention to quit and that, rather than telling his immediate supervisor, Raul Montoya, that he planned to do so,⁵ he mentioned it to Arturo Rodriguez when they chanced to meet each other. This seems highly unlikely to me even in the informal world of agriculture; after all, even Roberto Montoya had to ask Raul to straighten out Duran's hours.

Two other factors also support the conclusion that Duran is telling the truth. The first is that Duran's account of his conversation contains at least one detail that he could not have known unless he had the conversation with Raul Montoya he claims he had. It will be recalled that Duran testified that when Montoya told him there was no work for him, Montoya also told him that his (final) check had been available since Friday which Duran could not have known since he never received the check.

Respondent nevertheless points to another feature of Duran's account of his conversation with Montoya that, it contends, undercuts Duran's position, namely, Duran's statement to Montoya that he hadn't told him anything about going to work for the

⁵Montoya testified he twice spoke to Duran on Friday, July 26th about Duran's "paycheck", but it is clear Duran never said anything to him about quitting.

union. But Duran's statement – suggestive as it is – is ultimately of no support to Respondent since it arises in the context of an unambiguous statement of his intention to return to work when no vacancy has been created because of his departure.⁶ Nevertheless, Duran's statement is suggestive of his

⁶The situation is reminiscent of that described in WCLY-TV (1979) 241 NLRB No. 22 in which Respondent construed an employee's outburst as a resignation despite the employee's insistence that he was not resigning. The Board found an unfair labor practice:

About 9 or 9:30 a.m. on August 26, Coleman came into Schuster's office. He was very angry. He told Schuster that Coleman had found out that one of the employees under him, assistant director Robert Nickerson, was making as much money as Coleman. Coleman said something to the effect that he wanted a raise that day or Schuster would have Coleman's 2-week notice. Coleman testified that he said he would like to know something by the end of the day whether he could or could not get a raise and wanted to talk to Spoeri. Respondent's officials interpreted Coleman's remarks as an ultimatum that he would resign if he did not receive a raise immediately. Schuster spoke to Spoeri at about noon or 12:30 p.m., and the decision was made by these officials at that time that Respondent could not live with such an ultimatum, that Coleman, in effect, had resigned and Respondent would accept his resignation.

* * *

Schuster told Coleman that the station had decided to accept his offer of 2 weeks' notice and to accept his resignation, and that in lieu of his having to serve for the 2 weeks Respondent would give him 2 weeks' severance pay. Schuster handed Coleman his final check. Coleman said that he had not resigned. Schuster insisted that Coleman had resigned, that he had delivered an ultimatum to Respondent that he was quitting. Coleman continued to insist that he had not resigned, but took the check, and left the office. A few minutes later Coleman returned to Schuster's office and tossed the check on his desk. Coleman said, "You said—you said you're not firing me, but I didn't quit. So I'll see you at work on Monday." As Coleman started to leave, Schuster stood up and said, "You did quit, and we're not firing you, and I would like to have you out of the office within half an hour. And if you come in the building on Monday, we'll have you forcibly removed."

having some sort of conversation with Rodriguez about going to work for the union although Duran denies making any such statement.⁷ But on the peculiar facts of this case, no matter what Duran said to Rodriguez, and no matter if Montoya initially acted in good faith in having Duran's final check drawn based upon what Rodriguez said to him, an unfair labor practice is still made out because Montoya exploited the situation and refused to let Duran return to work.

The final factor which supports my conclusion that Duran's version of his conversation with Montoya is accurate is my severe mistrust of the testimony of John Summers. As noted previously, when Summers was asked whether he had "ever talked to Ruben Duran about whether or not Raul Montoya fired him", Summers whole aspect changed, he became an evidently strained witness: he gave me the distinct feeling he was covering something up. Accordingly, I credit Duran about his conversation with Summers

Footnote 6 Continued

Coleman went back to his desk and packed his belongings. Before he left the premises he decided to take the check. He called Schuster and asked Schuster to slide the check under the door. After some bickering, Coleman agreed to go into Schuster's office for the check. Present in the office were Schuster, Purcell, and Spoeri. Coleman took his check but told Respondent's officials, "I didn't quit. You're firing me." They insisted that he had resigned. Coleman then left the premises.

⁷I do not mean to imply that Duran must have said he was going to work for the union; perhaps the two men joked about it; perhaps Rodriguez understood Duran's request for his check too broadly in the context of some reference to going to work for the union. I only wish to emphasize that even Montoya's good faith reliance on what Rodriguez said does not insulate him from an unfair labor practice finding in view of my conclusion that Duran told him he wanted to return to work.

and I conclude that Respondent discriminated against Duran for his union activities. In view of my conclusion that Montoya refused to let Duran return to work, I do not need to consider when Duran went to work for the union: Montoya's not permitting him to return to work makes Duran's subsequent actions in response irrelevant.⁸

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent CUESTA VERDE GINNING CO., 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 because he or she has engaged, in 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 of the Act.

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

⁸To put the matter another way, if Montoya had told Duran he could come to work on Monday and Duran had not shown up, Respondent could argue Duran had made his choice, but it is in no similar position when it foreclosed one of the choices. In saying this, I have fully considered any implication about the credibility of Duran's account based upon the union's response to the subpoena and I remain convinced that, Duran's faults as a witness aside, his account is the more credible one.

(a) Offer to Ruben Duran immediate and full reinstatement to then former or substantially equivalent position without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Ruben Duran for all losses of pay and other economic losses he 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. (Aug. 18, 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, 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 periods 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 purpose 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 from the beginning of the 1982 season (January 1, 1982) to the date of issuance of this Order.

(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 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 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 the 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: March 5, 1987



THOMAS SOBEL
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in Fresno Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that LA CUESTA VERDE GINNING COMPANY, 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 Ruben Duran for exercising his rights under the ALRA.

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 any employee for engaging in protests over working conditions.

WE WILL reimburse Ruben Duran for all losses of pay and other economic losses he has suffered as a result of our discriminating against them, plus interest.

Dated:

LA CUESTA VERDE GINNING COMPANY

By: _____
 Representative Title

DO NOT REMOVE OR MUTILATE