Porterville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

E. W. MERRITT FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 84-CE-143-D 84-CE-146-D 84-CE-147-D 84-CE-148-D 84-CE-180-D 14 ALRB No. 5

DECISION AND ORDER

On March 20, 1987, Administrative Law Judge (ALJ) Marvin J. Brenner issued the attached Decision and Recommended Order in this proceeding. Thereafter, Respondent filed exceptions to the proposed Decision and Order along with a supporting brief and General Counsel filed a reply brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ and to adopt his recommended Order, with modifications.[1/]

[1/] Consistent with our obligation to follow applicable National Labor Relations Board (NLRB) precedent (Lab. Code § 1148), we hereby modify our Lu-Ette Farms formula for computing interest to conform to modifications of that formula announced by the NLRB in New Horizons for the Retarded (May 28, 1987) 283 NLRB No. 181 [125 LRRM 1177]. In Lu-Ette Farms (1982) 8 ALRB No. 55, the Board adopted the same formula that the NLRB first applied in Florida Steel Corp. (1977) 231 NLRB 651 in computing interest on monetary awards, viz., the interest rate set forth in section 6621 of the Internal Revenue Code for the refund or payment of taxes. The Tax Reform Act of 1986 changed that formula and established two distinct rates, one for the underpayment of taxes and one for the overpayment of taxes.

[fn. cont. on p. 2]

ORDER

By authority of Labor Code section 1160.3,[2] the Agricultural Labor Relations Board (Board) hereby orders that Respondent, E. W. Merritt Farms, its partners, officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the United Farm Workers of America or any labor organization by unlawfully discharging, laying off, refusing to rehire, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any terms or conditions of employment, except as authorized by section 1153(c) of the Agricultural Labor Relations Act (Act).

(b) Interrogating any agricultural employee about his or her union activities or sympathies.

[fn. 1 cont.]

The former section 6621 interest rate was based on the adjusted prime rate (the Florida Steel rate); section 6621 as amended uses the so-called short term federal rate, which is determined quarterly by the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of three years or less. (26 U.S.C. § 1274(d)(C)(i) (Supp. 1985).) The current section 6621 interest rate for underpayment adds 3 percent to the short term federal rate, while the overpayment rate is equal to the short term federal rate plus 2 percent. In New Horizons, the NLRB selected the underpayment rate for monies owed, and we do the same. This interest rate shall be paid on all monetary awards, effective January 1, 1987. By relying on amended section 6621 rather than the former section, we preserve the principles enunciated in Lu-Ette Farms, while at the same time following applicable NLRB precedent.

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

(c) Threatening any agricultural employee with loss of employment or any other change in terms and conditions of employment because he or she has engaged in union activity protected by section 1152 of the Act.

(d) Restraining its agricultural employees from speaking with union supporters.

(e) 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 Jose Garcia and Manuel Montanez full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights and privileges, and make them whole for all losses of pay and other economic losses as a result of the layoff and refusal to rehire Jose Garcia and the refusal to rehire Manuel Montanez, the amounts to be computed in accordance with established Board precedents, plus interest computed in accord with our Decision herein.

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

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purposes set forth in this Order.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this Order, to all agricultural employees in its employ between July 25, 1984 and July 25, 1985.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 days, in conspicuous places on its property, the exact 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.

(f) Arrange for a representative 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 piece-rate employees in order to compensate them for time lost at the reading and question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken

to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

Dated: April 26, 1988

BEN DAVIDIAN, Chairman[3/]

JOHN P. McCARTHY, 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. Member Smith did not participate in the consideration of this matter.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, E. W. Merritt Farms, 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 laying off Jose Garcia and refusing to rehire Jose Garcia and Manuel Montanez. 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, which restrains or coerces you or any other farm worker from doing or refraining from doing, any of the things listed above.

WE WILL NOT interrogate our employees about their union activities or sympathies.

WE WILL NOT threaten any of our employees with loss of employment or other change in terms and conditions of employment because he or she has engaged in union activity.

WE WILL NOT restrain our employees from speaking with Union supporters.

WE WILL NOT discriminate against, or suspend or discharge any agricultural worker in violation of the Act.

WE WILL offer Jose Garcia and Manuel Montanez reinstatement to their former or substantially equivalent jobs without prejudice to their seniority and other rights or privileges of employment, as though they had not been laid off or denied rehire.

Dated: E. W. MERRITT FARMS

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, California 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

E.W. Merritt Farms (UFW)

14 ALRB No. 5
Case Nos. 84-CE-143-D
84-CE-146-D
84-CE-147-D
84-CE-148-D
84-CE-180-D

ALJ DECISION

This case involved numerous alleged violations arising out of the beginning phases of a union organizing campaign. The ALJ found numerous instances of unlawful interrogation and threats, including threats to sell if employees chose to be represented by a union. He also found one of thirteen alleged discriminatees to have been discriminatorily laid off and another discriminatee to have been unlawfully denied rehire. In both cases of unlawful discrimination, the ALJ found the proffered business justifications to be pretextual. In recommending the dismissal of the remaining charges, the ALJ found (1) General Counsel established a prima facie case of the discriminatory discharge of Daniel Rocha, an acknowledged leader of the organizing drive, but Respondent established a legitimate business reason for discharging him, viz., the employer's honest belief, even if harsh and unreasonable, that Rocha had disobeyed orders by getting his combine stuck in the mud immediately after having been told to avoid muddy spots; (2) General Counsel established a prima facie case of the discriminatory discharge of Juan Rocha, the other acknowledged leader of the organizing campaign, which Respondent rebutted by showing that it discharged Rocha during a slow period because there was little work and because Rocha had announced he was looking for other work due to his unhappiness over the employer's refusal to accede to his unlawful request concerning the manner of paying his wages; (3) General Counsel established a prima facie case as to the discriminatory discharge of another union activist and long-time employee, Paulino Ceballos, but Respondent rebutted it by showing that, unlike workers in other classifications, cotton pickers who do not complete the season are not selected for the succeeding season; (4) General Counsel established a prima facie case for the unlawful discharges of Ismael Acosta, Ricardo Salazar, and Jose Rodriguez, based on their known union support, but Respondent had a legitimate reason -- lack of work -- for laying them off; (5) Respondent rebutted General Counsel's prima facie case with respect to the discriminatory discharge of Santos Acosta by showing that Acosta failed to proffer a social security number despite having been given a month in which to do so; (6) Respondent rebutted General Counsel's prima facie case regarding the layoff of Jose Estrella and Raul Orozco by showing they were laid off for lack of work; and (7) in two additional cases General Counsel failed to establish

prima facie cases. The ALJ also found that General Counsel failed to establish that any of the alleged discriminatees had been discriminatorily evicted from company housing.

BOARD DECISION

The Board adopted the ALJ's findings, conclusions, and, his recommended Order, with modifications. The Board also announced that in accord with applicable NLRB precedent, it will modify the Lu-Ette Farms interest rate formula to reflect amendments to the Internal Revenue Code section upon which the interest rate first applied in Lu-Ette Farms (1982) 8 ALRB No. 55 is based. The NLRB did the same in New Horizons for the Retarded (1987) 283 NLRB No. 181 [125 LRRM 1175].

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the Agricultural Labor Relations Board.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
E. W. MERRITT FARMS,	)	Case Nos. 84-CE-143-D
	)	84-CE-146-D
Respondent,	)	84-CE-147-D
	)	84-CE-148-D
and	)	84-CE-180-D
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

Appearances:

Juan F. Ramirez
627 Main Street
Delano, California
for the General Counsel

Richard J. Pabst
3008 Sillect Avenue, Suite 200
Bakersfield, California 93308
for the Respondent

Before: Marvin J. Brenner
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Judge: This case was heard by me on 16 hearing days from June 17 - July 16, 1985 in Porterville, California. The Complaint was based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter referred to as "Union" or "UFW") between August 6 and September 18, 1984. The original Complaint was filed on February 3, 1986 followed by the First Amended Complaint, filed on June 16, 1986. Upon the entire record,[1] including my observation of the demeanor of the witnesses and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

FINDING OF FACT

I. Jurisdiction

Respondent was and is engaged in agriculture in the State of California within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act (hereafter "Act"), as was admitted by Respondent in its Answer. Accordingly, I so find.

Respondent also admitted, and I find, that the UFW was and is a labor organization within the meaning of section 1140.4(f) of the Act.

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[1]Hereafter, General Counsel's exhibits will be identified as "G.C.___", Respondent's exhibits as "Resp's___". References to the Reporter's Transcript will be noted as (Volume: page).

Respondent admitted the supervisory status of Richard, Erie, Mark, and Earl Merritt.

II. The Alleged Unfair Labor Practices

The First Amended Complaint alleges that Respondent through its supervisory personnel during 1984[2] violated sections 1153(a), (c), and (d) of the Act by firing and/or laying off Daniel Rocha, Juan Rocha, Jose Garcia, Manuel Montanez, Jose Estrella, Ismael Acosta, Santos Acosta, Ricardo Salazar, Jose Rodriguez, Alfredo Alvarez, Pablo Ceballos, Raul Orozco, and Francisco Prieto and of refusing to rehire and/or recall all of the above (except for Daniel Rocha, Alfredo Alvarez, and Francisco Prieto), and discriminatorily evicting Juan Rocha, Jose Estrella, Ismael and Santos Acosta, Ricardo Salazar, Alfredo Alvarez, Pablo Ceballos, and Raul Orozco. In addition, Respondent is accused of unlawfully making threats if its employees brought in the Union, interrogating its employees regarding Union activities, engaging in surveillance of its Union supporters, promising to provide medical insurance if its employees did not bring in the Union, and restraining its employees from speaking with Union supporters Daniel and Juan Rocha.

III. The Business Operation

Merritt Farms is a 7,000 acre, family run partnership whose partners are Richard Merritt (55%) and his three sons, Earl,

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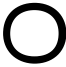
[2]All dates refer to 1984 unless specifically designated otherwise,



Eric, and Mark.[3] (15% each). The primary crops are wheat, milo, cotton, melons, and sometimes alfalfa and corn. The Merritts also raise cattle, maintaining grazing land for them, and they run a packing shed. (I: 45-47, 72)

The Company's work force is basically employed in two separate divisions, the "Ranch" and the "Field". The Ranch employees include irrigators, tractor, truck and machine operators, and cowboys (G.C. 2). Field workers do the hoeing, thinning, weeding etc., and the harvesting of the crops. They are hired through labor contractors Pedro and Pete Garay.

A. The Layoff Policy

There is no seniority list; nor does Respondent have any established practice of laying off employees in reverse order of their date of hire. Richard testified that seniority played no role in his decision to lay off an employee. Instead, it was an employee's versatility that might make the difference, e.g., an irrigator who could also drive a cotton picker. Though it was different when financial conditions were better, no longer was a worker kept on with extra work when there was no job for him. If he could not do other available work at the time his job was completed, he was laid off. (I: 53-54; XV: 190)

[3] For the sake of clarity and easier readability and with no disrespect intended, the Merritts will generally be referred to by their first names. The same format will be employed with respect to supervisors Pedro, Pete, and David Garay, and to alleged discriminatees Daniel and Juan Rocha and Ismael and Santos Acosta.

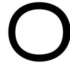
B. The Duties of the Partners

Richard oversees the entire operation and takes care of most of the grain and cattle buying and selling.

Eric has overall responsibility for the conduct of the cotton and wheat harvests, including the supervision of the tractor and machine drivers and the running of the shop where equipment is overhauled and repaired. As such, he tries to see to it that all the equipment is working and remains so for the harvest, that the employees follow the work schedules, and that the quality of the harvest is maintained. (I: 47-50; XIII: 2-3)

Earl oversees the planting and cultural practices of the crops, and he is in overall charge of the melons in the field. He supervises the Garays who are in charge of the melon start-up (thinning, weeding) in April through May. By July, though he may still be in the field for a 'short time in the mornings (Earl also is in charge of the milo planting during this time), the melon packing operation is, starting up, and Earl is basically full time there. During the melon operation, Earl is in charge, including the decisions over layoffs. (XI: 86-87)

In early November after the packing house work is over, Earl helps with the cotton picking operation (Eric is primarily responsible for the cotton) by supervising the discing of the fields that had been in melons or where no crops had been planted. (In 1984, the melons weren't disked until late November or December, later than usual.) Earl also, assisted by employee Lupe



Carbajal whose main job it was and Mark, irrigates the melons. During the cotton harvest, Earl also helps Eric by being in charge of hauling trailers. Towards the end of the cotton season - the mid to end of December - Earl gets involved with other agricultural operations. (XI: 82; XII: 88; I: 50)

Mark dispatches the trailers and trucks and hires all the drivers. For example, as the wheat progresses, it is put into trucks and moved to the silos in Pixley during June and July; and Mark is responsible for its (and the milo's) storage. (I: 49; XIV: 116-117).

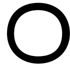
Between the cotton irrigation and the cotton harvest, Mark is planting and irrigating a little milo (assisting Earl) and helping in the melon picking (XIV: 113-118).

By late October, the milo irrigation is finished, and Mark goes to Pixley for 2 - 3 months to oversee the milo harvest. The harvest is usually over by January at which point he comes back to the ranch to help supervise the wheat planting in January and February and after that the pre-irrigation of the cotton, beginning in March and the planting of the cotton in March and April. (XIV: 113-116)

C. The Agricultural Operations

1. Cotton

The pre-irrigation of the cotton usually begins in March, and the planting, with Earl in charge, takes place in March and April, sometimes May. By June, the cotton is planted and coming



up, and irrigation commences in the middle of June lasting until late August/early September. (XI: 83-84)

The cotton harvest begins in late October or the beginning of November and lasts until December, sometimes into January or even February. The State requires that the harvest and discing afterwards be completed by approximately December 20 (the "plow down" period) in order to prevent the spread of the pink boll worm. As December 20 approaches, the Company is trying its best to get this process all completed;[4] thus, there is increased activity. For example, caterpillar and tractor work starts to pick up dramatically after the cotton has been harvested, and a number of discs are run. But often during this time the cotton pickers are operating in fields that are not in prime condition, as they are wet, and the drivers can get stuck. (XII: 28, 48-49; XIII: 9-10; XIV: 113-118)

a) The Machines

The cotton picking is performed by cotton picking machines (or harvesters) at the end of August or beginning of September, and later on in November and December. There were fourteen in operation in 1984. Only one-half of the cotton picking machines would be going the first week of operation because the other half would be in the shop being repaired.

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[4] The State can impose a penalty against the farmer for non-compliance with the December 20 deadline.

Gradually, the number of machines working would increase so that several weeks later almost all would be operating at the same time. Usually, a worker was assigned to one machine at the beginning and stayed with that machine for the duration of the harvest. (XIII: 13-15; XIV: 28)

b) <u>The Selection of Drivers - The Opportunity for Rehire</u>

Because Earl was still tied up with the melons when the cotton picking season started, Eric usually did the hiring, though Earl has certainly been involved in the process. According to Earl, drivers for the machines were selected according to whether they had been capable drivers in the past and had stayed on to finish the season. Preference for rehire would be given to such an employee under those conditions. (XI: 76-80, 85-86; XII: 28-32, 91-93)

Eric testified that the cotton pickers would be rehired only if they had encountered no difficulties in the past. In addition, as Respondent was always looking for new, capable drivers, Eric testified he would sometimes ask Pete Garay for suggestions of such individuals and then interview them personally. (XIII: 4-5)

2. <u>Melons</u>

The melons are planted in the middle of March or in April, though sometimes it takes place as late as mid-July. (XI: 83-84) The hoeing, weeding, and thinning are under the overall

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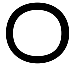
supervision of Earl who directs two foremen, Pedro Garay and his son, Pete. (The Garays are also involved in other crops, as well). Pedro is getting older so Pete is gradually taking over his duties. For example, Pete, unlike Pedro, will actively participate in the supervision of and the keeping of time for the melon hoeing crews. (G.C. 3) But once the picking starts for the harvest, Pedro will resume supervisory duties along with his son. Another son, David Garay, has the authority to hire field workers and is a supervisor in the packing shed for 3 - 4 months beginning in mid-July. (However, the rest of the year David works as a unit employee in the Ranch operation on a caterpillar and tractor). The Garays hire the field workers, but is is Respondent that actually pays them their salaries. The Garays' crews perform work for Respondent from May until the end of October. (I: 60-65, 71; XI: 86-87)

3. Melon Packing

During an average year, the melon packing begins with probably 10-25 employees reaching a peak of 40-45 the first part of August which lasts a week to 10 days at which point the work force slacks, off to 30-35. The packing operation usually comes to an end in late October. At its height in August, Respondent is harvesting 600-800 acres. (I: 69-72; XI: 69-70, 86-87)

4. Wheat

The planting commences in late December, January and into February, and the irrigation lasts until the end of May or first



part of June at which time the harvest begins and goes into July. During this time there are four wheat mechanical harvesting machines in operation. (XI: 83-84; XIII: 12)

5. Milo

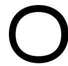
The pre-irrigation work in milo begins in June and goes to the middle of July; planting follows shortly thereafter. The milo irrigation follows and is finished by late October. The harvest is usually over by January. (XIV: 117-119)

D. The Exchange of Employees with Other Operations

1. The Transfer of Ranch Employees to the Melon Packing Shed

Earl testified that he kept a list of employees who had worked in the melon shed and that he got most of his crew going by telephoning persons on this list 10 days to 2 weeks before the start-up and by telephoning again just a few days before the actual commencement. According to Earl, it was rare that he didn't have enough persons to fill the positions available and in fact, usually had extra people at the start. However, there were times at peak when it was necessary to hire Ranch employees to fill positions in the shed for a week to 10 days. The hiring of these workers was affected by whether they were needed at the shed and not whether work had slacked off in the Ranch operation. (XI: 70-72; XII: 2-3, 5, 7)

As the packing season wound down, shortages of workers would occur because quite a few of the employees left (some to work at a cotton gin in Tipton) as they knew the job at



Respondent's was coming to an end. Some years those workers were replaced, and some years they were not depending on how their departures fit in with Respondent's need to cut back on the number of employees on its payroll because of the slowdown. Earl testified that those times he needed extra workers he would either contact specific people he had in mind that had worked for him before in other seasons or call his dad for help.[5] If the workers contacted were too busy, he would take someone with no prior experience. According to Earl, for only half the years since 1980 would workers from the Ranch operation come over to work in the melon packing shed towards the close of the season, e.g., Pablo Ceballos, Armando Medrano, Luis Ernesto, Rosendo Escobedo, Joel Espinosa, and Willie Campa (XI: 72-75, 93; XII: 86-88, 22-25)

2. Transfer of Ranch Employees to the Melon Harvest

Richard testified that between 1981-1983 there were times, only if needed, that Ranch employees would be sent over to drive the melon trucks and other times when they harvested melons, but Richard also testified that this was not done on a regular basis because Pete Garay preferred to hire his own people. While Richard was Garay's supervisor and could have ordered him to take Ranch employees, Richard testified he let Garay run the operations his own way. (I: 58-59, 135; XII: 8-9)

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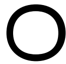
[5] However, Richard could not recall ever sending anyone over to Earl from the Ranch. (I: 135-136)



Richard also testified that even if Pete had used Ranch employees more frequently, none would have been hired in 1984 as Pete didn't require any extra workers that year,[6] the reason being that there just happened to be more people available, as had been the case the last few years. (XVI: 57, 68-69)

Mark testified that in prior years the need for extra workers arose because students would leave the melon crew to return to school[7] and also because Pete used to be under contract to provide workers for a grape harvest at another employer, and some of his workers would leave to join that grape harvest. According to Mark, before 1983, if informed of the need by his dad or Pete, he would take some (5 or 6 at the most but usually 2 or 3) of the irrigators or irrigation prep people to the melon harvest for at most a few days during late August or September. Prior experience was a factor in the selection; but if such an employee were unavailable, then it depended on who had the most free time. Some of those chosen for this melon crew were Raul Orozco, Pablo Ceballos, Porfirio Barajas, Juan Delgado, Jesus

[6]Mark testified Pete required fewer workers but still hired Ranch employees Porfirio Barajas, Juan Delgado, and Jesus Robledo for the 1984 melon harvest as truck drivers. (Barajas and Delgado were both Union supporters. (See G.C. 17))

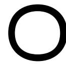
[7]It was customary for Pete to hire around 6 high school and college students at the end of their school year until they left to return to school in September. They were often used to load packed boxes, a job requiring no specialized skills. (XVI: 57-58, XII: 16-17, 22-25)

Robledo and possibly Ismael and Santos Acosta. However, the need for extra workers decreased in 1983 and 84 owing to the fact that Pete had gotten out of the business of contracting for grape pickers. (XIV: 122-128; XV: 2-3)

IV. Union Activities

Daniel and Juan Rocha, brothers, helped to initiate and were the leaders of the UFW organizational drive among the workers at Merritt Farms. Beginning around mid-May of 1984, they began to speak to workers at work and at their home about the UFW. There was also a meeting at Pablo Ceballos' house during this time frame. Thereafter, a meeting was held at Murray Park in Porterville on June 3 in which a UFW representative spoke. This meeting was attended by the Rochas, Pablo Ceballos, Jose Garcia, Humberto Cervantes, Armando Medrano, Francisco Prieto, and Manuel Montanez. Thereafter, the Rochas continued to have meetings at their home, sometimes 2-3 per week, with small groups of workers. These were attended by, in addition to those listed above, Alfredo Alvarez, Ricardo Salazar and Raul Orozco (II: 18-26; VI: 58-60). All of the above are alleged discriminatees with the exception of Cervantes and Medrano.

There was a second Union meeting on July 8, at the UFW office in Porterville, attended by the Rochas, Cervantes, Ceballos, Montanez, Ray Nebliss, and David Garay, Pedro Garay's son. (The latter two stayed a very short time, only 10-15 minutes). A UFW representative spoke and authorization cards were passed out. (II: 38, 41)



There was other activity in August, as well. Around August 6, a UFW organizer presented Richard with a petition (hereafter the "Petition") signed by 31 employees demanding that the workers therein listed not be discriminated against for their Union activity. (I: 85-86) (G.C. 17). Thereafter on August 16, a Notice of Intent to Take Access and Notice to Organize were filed with the ALRB and served on Respondent. (I: 78)

A. The Company's Knowledge

Earl testified he first heard of Union activity when one of the Ranch workers, Jesus Robledo, volunteered that Porfirio Barajas had been passing around Union authorization cards. Earl denied that Robledo had told him that either Manuel Montanez or Jose Garcia were involved. The information about the authorization cards was quickly passed on to the other Merritts. Earl also testified that later in July, David Garay told him about the Union meeting he had attended and that the Rochas had been there.[8] This information was relayed to his father. (XI: 89-93; XII: 58-62)

Richard confirmed that during the first week of July, one of his sons told him that Robledo had mentioned the existence of

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[8] While at the meeting, Garay observed, in addition to the Rochas, Jose Garcia, Humberto Cervantes, and Manuel Montanez. Garay testified that two or three days later he brought up the subject matter of the meeting to Earl at which point Earl asked him for the names of those who attended. Garay further testified that he told Earl only that the Rochas had been there and deliberately chose not to mention Garcia or Cervantes because they were friends of his. (XII: 155-156, 164-169, 180)

Union activity on the ranch. Richard also testified that he became aware through "little bits of gossip" that the Rochas, Porfirio Barajas, and Juan Delgado were Union supporters.[9]

At that point, according to Richard, he decided to call Western Growers Association to find out what to do. (I: 72-88) (G.C. 30). (See also XIV: 89-90; XV: 110, 170-172)

B. The Company's Campaign

Jose Ybarra, a labor consultant for the Western Growers Association and whose job it was to assist growers in conducting pro-company campaigns in the face of union organization, testified that in mid-July he met with Richard, Earl and Eric[10] immediately after they informed him that an organizational campaign was

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[9]Richard testified that there were others whose Union support he became aware of later, e.g., Jose Garcia later in July, Ismael Acosta in mid-August when Ybarra, infra, informed him he was a strong Union supporter, (I: 81); III: 78), Pablo Ceballos whose Union button he saw in August (I: 83-84), and Manuel Montanez, whom he observed talking to employees about the benefits of unionization subsequent to his layoff on July 30. (I: 77-78)

[10]Mark arrived late for this meeting, but Ybarra could not recall if he met Mark on that day or at a later time. Respondent spent a lot of time trying to convince me that even so, he was still informed by his brothers and father of those things which were unlawful and could not be done and those which were permissible. (See XIII: 147-151; XVI: 24-26; XV: 112-113). However, Ybarra testified that in mid-August while accompanying Mark to a meeting with individual workers as part of the Respondent's pro-Company campaign, Mark told him he wanted to be aware of what he could or couldn't say and asked him for instructions. Ybarra further testified that he informed Mark, for the first time on that occasion, the proper way in which to counter a union organizational campaign. (XII: 142-143, 148)

underway on their farm.[11] Ybarra testified that he went over with the Merritts "...what they could say and couldn't say...", e.g., no threats, interrogation, promises of benefits or surveillance. In addition, Ybarra testified that he later met with Pedro, Pete and David Garay.

Thereafter, the Company organized a "pro-Company campaign" which lasted between approximately mid-July to the latter part of August, which included Ybarra"s conducting a series of meetings in mid-August with individual groups of workers in which he explained the benefits of maintaining the farm non-union. (XII: 124-131, 139-142; XV: 189).

Mark testified that either alone or with Ybarra he probably talked to all of the irrigators and pipe setters-some 10-15 workers - about the campaign, either at their homes or at work, and with some frequency. He recalled either individually or in a group speaking to Ismael and Santos Acosta, Orozco, Ceballos, Salazar, Rodriguez, and Estrella. He denied making any promises but instead testified he only tried to make the employees aware of what they already had obtained from the Company without the need of a labor organization. (XV: 114-117)

Richard, Earl, and Eric also spoke to workers but not nearly as much as Mark did (XV: 156, 189)

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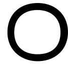
[11]Ybarra's records indicate that he received Richard's phone call on July 16 and met with him and his sons the very next day, July 17. (G.C. 31)



C. The Company's Animus

Respondent's position was that it did not know of any Union activity on its farm until mid-July at which time it contacted the Western Growers Association for advice. But the General Counsel provided credible evidence that Respondent was aware of activity earlier than July. Much of this testimony from a legion of witnesses demonstrated not only earlier knowledge but also the existence of a substantial degree of anti-union animus on the part of Mark Merritt.

Some of the most damaging testimony in this regard was provided by alleged discriminatee Pablo Ceballos. I credit Ceballos because he convinced me that he was telling the truth. His straightforward descriptions of his conversations with Mark were stated with evident sincerity and honesty. In addition, he possessed the gift of an excellent memory and was extremely articulate.[12]

Ceballos and Mark had several conversations. The first occurred two days after the June 3 Union organizational meeting at Murray Park at which time Mark told Ceballos that a little bird had made him aware of Union activity and that the Rochas were behind it.[13]

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[12]Mark denied that he had made the various statements attributed to him, infra. (XV: 125-127) I do not credit these denials and find that Mark's various assertions and inquiries were threats, interrogations, and surveillance all in violation of section 1153(a) of the Act.

[13]I do not credit Mark's testimony that it was not until after the meeting between his family and Ybarra that he first even learned

The next conversation occurred a short time after the July 8 Union meeting at the UFW's office in Porterville. At that time Mark told Ceballos that if the workers voted for the Union, the ranch would either be sold or subdivided; and if subdivided, there would be a decrease in the number of workers necessary for the Company's operation.[14] (X: 23)

(Footnote 13 Continued)

about the Murray Park meeting though Jesus Robledo. (This would place his knowledge of the event no earlier than July 18 and at least 10 days after the second UFW meeting, the one of July 8) Why would Robledo have informed Mark about the June 3 meeting sometime after July 17? Mark was asked by his own counsel whether Robledo had mentioned anyone's name in relation to the June 3 meeting. His response: "Oh, I think he said that he thought Juan Delgado, you know, was going." (XV: 126) I find significance in Mark's use of the future tense.

Mark places this conversation in the mid-July to August time frame following one of his campaign speeches during Respondent's "pro-Company" effort. According to Mark, Ceballos had asked him how he knew there was Union activity going on, and he responded: "Well, I just told him -- I told him that -- I didn't want to tell him the informer. You know, I just told him that a little bird had told me." (XV: 191) But why in the midst of a union organizational campaign, after the Merritts had heard from Robledo about Union activity, after they had contacted Ybarra, and after Mark, Ybarra, and others had embarked on a speaking campaign with the workers to urge them to support the Company, would the question of how Mark learned about that activity have any relevance? And why would Robledo at that point in time be called an "informer"? And would not Robledo 's views by then be fairly well known so that there would not have been any further reason to protect him? Mark's lack of candor here is a further reason for discrediting him and crediting the testimony of Ceballos.

[14]Similar remarks were made on a separate occasion in the presence of alleged discriminatee Jose Estrella (VII: 41-50) and on another occasion to alleged discriminatee Raul Orozco (IX: 17-23) I have credited this testimony, infra. I also credit alleged discriminatee Ricardo Salazar that in July, Mark made reference to the fact that he knew that certain workers had not really gone to town but instead were conducting secret union meetings and that if the UFW ever came in, the ranch would have to be sold. (VI: 96-101)

Two or three days later when Ceballos asked Mark for permission to leave work to go to the flea market to buy a pair of pants, Mark told him it was okay but that he shouldn't attend any Union meetings on the way. Upon his return, Mark demanded to see if there really were pants in the trunk and told him that he had been going to Union meetings ever since he started hanging out with the Rochas.[15] (X: 24-26)

Ceballos next explained that about four days after the August 6 Petition (G.C. 17) was sent to Respondent, Mark asked him if he had signed a Union card. When Ceballos denied it, Mark told him that he knew he had signed and that if the Union came in, it would be bad for him as his father would sell the ranch, and in fact, some men from Corcoran had already been out to look at it. Mark also stated that the Union would never be allowed to come in because the Merritts didn't want it but that if it were to win a vote, they wouldn't sign a contract. (X: 29-30)

Other evidence of Mark's animus was provided by alleged discriminatee Ismael Acosta. I also credit this testimony over Mark's denial. Ismael testified in a low key, serious, and very believable manner. He convinced me that the conversation with Mark that follows occurred as he described it. According to

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[15]admitted that he knew Juan and Ceballos were "pretty good friends", and he saw Ceballos over at the Rochas[1] house with some frequency during June, July, and August, 1984. (XV: 167-169)

Ismael, after he received his first paycheck in June of 1984,[16] as he and co-worker Ismael Toledo were unloading a truck, Mark approached them and said that he wanted to talk. Mark then said that the Rochas were bringing the Union in and advised that they not speak to them. He also told them that those who went with the Union would not have work and those who chose not to would receive work and a place to live. (III: 71-73) Finally, Mark said that " . . . those who do not go into the union we're going to give them rifles so they will kill each other with the union... "[17] (III: 73)

Alleged discriminatee Jose Estrella testified that Mark frequently went over to Jesus Robledo's house when he (Estrella) was there during July and August and that during those times often spoke about the UFW. (VII: 35-38) On one such occasion Mark stated that people that opposed the Union would be friends of his.

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[16]This conversation would have occurred sometime in late June. Ismael at first testified it was one week after he received his first 1984 paycheck which would have made the date of the conversation approximately Saturday, June 30. (G.C. 2)(III: 70). He then testified that it most likely occurred on a Tuesday, 3 or 4 days following the receipt of the paycheck. This would have made it June 26.

[17]To give this bizarre statement about rifles its true meaning, seemingly out of character and a little too extreme even for Mark to make, one has to look to the context and how it was understood. Ismael testified that he understood it to mean that Union organizing going on at the ranch would result in a strike in which case the strikers would attempt to keep the non-strikers from working and that the company would provide a means to prevent this.

He also remarked that no one should sign an authorization card. (VII: 34-39) On another occasion Mark asked the workers assembled at Robledo's if they would sign a sheet of paper stating they would not support the Union. (VII: 40) Another time Mark suggested that the Union could be kept out by dividing up the ranch among the Merritts, thereby cutting down on the number of workers to be hired. (VII: 46) On still another occasion, after Estrella had moved into Company housing at a residence on Avenue 112 where many of the alleged discriminatees, all of whom were Union supporters, were residing, Mark told him that they were "not good people", that they didn't like the Merritts, and that Mark should have been consulted before he moved in.[18]

D. The Isolation of the Rochas

There was testimony that following the discovery of Union activities at the ranch and the participation of the Rochas in it, Respondent took steps to isolate them at their work station at the machine shop from contact with other employees. Both Daniel, Juan, and alleged discriminatee Manual Montanez testified that Respondent began to insist that employees not engage in any non-work related conversations when they went to the shop area where the Rochas worked and that if they had problems, they should go to the office. (II: 32-33; V: 70-73; IV: 103-105) The General Counsel argues that Respondent's conduct demonstrates its

[18]Estrella was Jesus Robledo's cousin. When he was first hired by Mark, it was Robledo who went to tell him. When he began working for Respondent, he lived at Robledo's house for the first 1 ½ months before moving into the house on Avenue 112 with the

intention to keep the Rochas' pro-Union views from the attention of other employees.

I credit the testimony of Eric that what the General Counsel sees as an attempt to isolate the Rochas was nothing more than the Company's continued enforcement of a policy against talking on the job.

Eric testified that Respondent has had a policy for a number of years that irrigators and tractor drivers weren't supposed to come into the shop and talk to the mechanics.[19] Of course, on some occasions tractor drivers had breakdowns of their machines or irrigators needed oil so that it was necessary for them to come around to the shop area; but, according to Eric, they knew that the Company didn't want them to linger around there conversing. Eric testified that he knew Juan and Daniel were

(Footnote 18 Continued)

Acostas, Salazar, Rodriguez, Ceballos and Orozco. (VII: 27, 29-30) Mark was not aware that Estrella was a Union supporter. When Mark made these remarks to Estrella, it was in the presence of the Robledo family. Mark, in speaking before Robledo, one of the more vociferous Company supporters (as well as turning in the names of Union sympathizers to Merritt management), was more apt to let his true feelings surface. I credit Estrella's testimony as he was an excellent witness, testifying in a very sincere manner.

[19] Daniel, after some reluctance, admitted that employees had been warned before Murray Park not to talk so much at work but, according to Daniel, it was "with a different tone." (II: 114) Daniel also admitted that it was routine that tractor drivers with a problem on their piece of equipment would bring it into the shop and assist him in the repair but that even under those circumstances they were not supposed to be standing around chatting. (II: 100-101)

aware of this policy because he told them several times throughout their employment, as he had also so reminded others such as Porfirio Barajas, Lupe Carbajal, and Robert Thompson. (XIII: 113-115; XIV: 106-107)

Eric also recalled observing Montanez coming out of the shop in May or June of 1984 and testified he told him of the Company's policy and also that the search for a grass spray, the purpose of his visit to the shop, could in the future be handled outside the shop. Eric testified that he remembered telling Montanez not to speak with the mechanics in the shop but could not remember if he specifically mentioned the Rochas[20] or if there were any other mechanics in the shop at this time besides the Rochas. (XIII: 117-118)

Eric also testified that he once saw Jose Garcia waiting for his check in the shop and that he explained to him what the Company policy was and asked him to wait outside. (XIII: 120)

Likewise, Richard, after seeing Porfirio Barajas enter the shop sometime in late-July, complained to the Rochas that there was too much talking going on and that things were getting out of hand. (XVI: 4-6)

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[20]The General Counsel emphasizes that there was testimony that the Rochas were mentioned by name. (V: 78-84, 87) But the Rochas worked full time in the shop, were among the main personnel there, and indeed, some of the workers were observed speaking to them. In view of the fact that I have found Eric's conduct to be proper, the fact that the Rochas[1] name may have been specifically mentioned in those conversations does not alter the essential nature of that conduct.

Thus, I believe the evidence is insufficient for me to infer that the reason Respondent cautioned workers against talking at the shop was because it was attempting to isolate two leaders of the Union movement from the work force. Thus, I decline to find that Respondent's conduct here was a violation of section 1153(a) of the Act.[21]

However, while I find Eric and Richard's insistence that there not be talking in the shop to be a non-discriminatory application of a Company policy, not so as regards Mark's attempts to keep people who were working close to the Rochas' home from visiting with them.

Ceballos testified that some time prior to June 28 - he was not sure of the date - while he was irrigating the field next to the Rochas' house, a field he had irrigated all the years he had worked for Respondent, Mark arrived and told him he didn't want him talking to the Rochas because "they were bad persons" and assigned him to another field to irrigate. (X: 31-37) A similar thing happened four days to a week later when Mark told him to stay away from the fields adjacent to the Rochas[1] because otherwise he'd start talking to them. (X: 39-41) (It will be recalled from the preceding section that Mark also told Ismael not to speak to the Rochas because they were bringing the Union in.)
(III: 71-73)

[21] similarly, the evidence is insufficient that Respondent violated the Act by allegedly denying breaks to Daniel and Juan at the shop after it discovered the existence of the organizational campaign, (II: 98-99, 109; XIII: 124-125; XIV: 110-111; XVI: 4-5),

I find that these statements were made by Mark and that they were intended to keep workers from conversing with the known Union leaders on the Merritt's property. As such, they are violations of the Act. I come to this conclusion based upon the animus expressed by Mark on numerous occasions before as well as on the reliability of Ceballos and Ismael as witnesses. (See preceding section). In addition, there was no evidence presented that the Company had a policy prohibiting employees from speaking to other employees while working in the fields.

D. The Alleged Surveillance

On the occasion of one of the Union meetings at the Rochas' house, Daniel, Ceballos, Prieto, Alvarez, and Salazar were outside talking when Ceballos saw Mark approaching in his car. According to Daniel, Ceballos told him to open the hood to make it look as if the car had broken down so that Mark would not think there was a meeting going on. Mark stopped and asked what had occurred and was told that the car had developed a carburetor problem. Mark then asked Ceballos how the irrigation water was running and hearing that all was okay, then left. Fifteen to twenty minutes later, while the Union supporters were still having

(Footnote 21 Continued)

restricted Daniel's use of the Company pickup, (XIII: 108-110) moved the oil from the shop to other locations, (II: 28-31, 109, 111; III: 5-6, 8-9; XIII: 104-107, XIV: 120-122) or changed for the worse Daniel and Juan's working conditions. (II: 34, 37-38) Nor does the General Counsel address these issues in his Post-Hearing Brief.

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their meeting outside, Mark passed by the house again, traveling very slowly and looking side to side; he did not stop. (II: 26-28, 107-108; III: 14-20)

Mark's version did not disagree with this description of events. Mark testified (and Daniel corroborated (III: 40)) that the Rochas' house was basically in the middle of the ranch adjacent to several fields. He further testified that these fields were being irrigated during May, June and July 1984, and that on several occasions he would drive by their house as he checked the irrigation. At times he would stop in to give work assignments, as well. On one occasion he recalled stopping to give assistance when Ceballos and Salazar were standing around a car with its hood up. Mark asked Ceballos about his irrigation, then left to check some fields, and went by the Rochas[1] house again on his return, observing that Ceballos and his car were still there.[22] (XV: 33-41) (G.C. 18(a) and (b)).

I find no violation of section 1153(a) here. Mark's short presence on a road adjacent to a work area where he had as much right to be as did the workers did not constitute unlawful surveillance. M. Caratan, Inc. (1979) 5 ALRB No. 16

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[22]Eric also testified that his duties often required him to drive by the Rochas' house, sometimes 5 to 6 times a day, especially if he were harvesting wheat. Eric recalled doing so in June or July of 1984 during the wheat harvest and though he couldn't remember seeing the Rochas outside their house, he did observe other workers there. (XIV: 55)

V. The Discharge of Daniel Rocha

A. The Facts

First hired in October of 1981, Daniel Rocha originally drove a cantaloupe truck, next a cotton picker and finally, went over to the shop because he knew something about fixing cotton pickers. He also welded and sprayed cotton. During 1982 or 1983 he planted wheat and used a tractor though he testified his experience on the tractor was limited. But most of his time (and that of his brother, Juan) was spent at the shop where the two of them, according to his testimony, were the main personnel. They would be assigned to field work only if there wasn't enough work in the shop. Daniel testified that though there were others that worked almost full time at the shop, e.g., Alien and Jack Thompson and Juan Delgado, they didn't work as much there as did the Rochas. In addition to working on the cotton pickers, Daniel also repaired pickup trucks, tractors, discs, and the cultipack. Daniel testified that after he began working in the shop, he worked there virtually continuously until about a month prior to his discharge. (II: 5-7, 11-15, 96-98, 116; III: 13-14, 27-28, 36-37; XIII: 27-30)

While Daniel spent most of his time in the shop, in late June he was called upon to drive a wheat harvester. During the course of its operation, as described below, he drove it so negligently that he was fired on the spot. I have credited Eric's

version of this event.[23]

Eric, around the end of June, 1984, needed a driver for a wheat harvester and as Daniel had shown an interest in harvesting with one in the past, he selected him for this duty. Though Daniel had not harvested with this machine before, he had driven one around the shop in preparation for the harvest for the past three years.[24] And on one occasion in 1983, he had transported one from a field to the shop, a distance of 7-9 miles, including driving on public roads. Eric testified he spent 20-30 minutes riding with Daniel on the harvester (Daniel drove) showing him all the levers until he (Eric) was satisfied that he could do an adequate job. Daniel had no questions, then went to work without any difficulties that first day, all afternoon and early evening, and the following day, as well. (XIII: 15, 30, 36-45)

It was the 3rd or 4th day, June 28, that the incident occurred. Both Daniel and Alien Thompson were told by Eric to drive their harvesting machines down a public road over to a new

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[23]Eric impressed me with his openness and knowledgeable and thoughtful responses. In contrast, Daniel stumbled around, on the one hand trying to show he was competent and able to learn quickly how to drive the harvester and on the other, having to admit that he really didn't know how to drive it. In addition, Daniel was successfully impeached about two separate incidents, infra. (XIII: 32-35)

[24]It is also true that the mechanical operation of the wheat harvester, in the steering and the movement of the machine itself, is similar to that of a cotton harvester, a machine Daniel had operated in the past.

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field where harvesting was to commence. Eric arrived and noticed that Daniel's machine was about 50 feet out from the road, was broken down, and required welding to fix it. Eric told Daniel that he (Eric) would have to leave the field to get the welding implement and that while he was gone, Daniel was to take the harvester outside of the field where it could be easier to weld back together. When Eric returned, 15-20 minutes later, he saw that Daniel was stuck in the mud. There was a leaky valve nearby, and the ground was visibly darker from the water. One of the tires was down in some mud, and part of the frame of he harvester was actually touching the ground and digging so that it was difficult to pull the machine out at that point. Eric was very angry at this discovery and asked Daniel how he had managed to get stuck since the field had already been harvested and there was not much stubble.

Daniel's harvester was stuck so badly that it had to be hooked to a chain and pulled out. When it was then unhooked, Eric testified he "....instructed him, I said, don't -- I said, stay away from any water or any mud. You know, I don't like having to pull these things out. I specifically instructed him to stay away from any water or any mud."[25] (XIII: 59) After the machine was welded back together, Eric told Daniel to begin harvesting where

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[25]Daniel acknowledged that he had gotten stuck and that Eric angrily told him not to let it happen again. (II: 126)

Allen Thompson was, but first he "...reminded him again to stay away from any water and any mud." (XIII: 64) Eric then left the area in order to go to a house to do another combine repair. The field that Daniel was assigned had a tail ditch that carried the water coming through the cotton field, and the field was also muddy that day because of leaky valves. (XIII: 45-64)

As Eric arrived at his destination, he looked down from a bluff and saw the header on the front of Daniel's combine tilt way down at which point Eric realized that he had gone into a cotton ditch as he had attempted to pass around a set of trailers to get on their other side. Eric, now furious as he had repeatedly told Daniel to stay away from the water and mud, turned around and hurriedly returned to where Daniel was trapped. (XIII: 65-68)

Eric testified that when he arrived at the scene, he noticed that the right front and rear tires of the harvester were stuck in the ditch, that the front tire was spinning, and that the header was tilting and dragging the ground. There was no damage to the combine. He asked Daniel how he had gotten the combine in the water again but received no explanation.[26] Eric then

[26]Daniel’s testimony, though not admitting that he in fact actually got stuck, borders on an admission of negligence. Daniel acknowledged that in attempting to drive the combine between the trailers and the ditch, he went into the ditch as he didn't know how wide the header was on his machine. (II: 73-77, 126-127).
Daniel also admitted to being inexperienced and very nervous:

> Q (By General Counsel): "Now, if you had some room towards the side of the trailers, why did you hug the ditch-why you drove so close to the ditch?" (sic)
>
> A "Well being that I don't know how to drive that

angrily[27] told him that he was fired and indicated that maybe this was just as well in that Daniel had earlier told him that he was looking for other employment anyway, infra. (XIII: 69-74; XIV: 77-78; III: 39)

Though no other employee had ever been terminated for getting stuck before (usually, just a chewing out), Eric testified that no one else had ever gotten stuck in the same manner as Daniel, i.e., while not actually harvesting. (In the other cases, workers sometimes had been ordered to work on wet grounds, often during the "plow down" part of the cotton harvesting season, when time was of the essence). In Eric's view, Daniel clearly should have avoided the muddy spots by following a dry path to the road. (XIV: 17-20, 24-25, 78)

B. Analysis and Conclusion of Law

Labor Code section 1153(c) of the Agricultural Labor Relations Act makes it an unfair labor practice for an agricultural employer "to discriminate in regard to the hiring or

(Footnote 26 Continued)

> machine, I got somewhat nervous and then Eric had already told me not to get stuck." (II: 76)

In addition, Daniel never asked Eric why he was being fired nor complained that he thought such action be be unfair. (II: 85-86) Daniel's reply to a very leading question that he didn't complain because Eric was so angry was not very convincing.

[27] Daniel testified that he had never seen Eric so "mad" before. (II: 134) It is my opinion, based upon my observation of him during his testimony, that Eric would generally be slow to anger.

tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." In order to establish a prima case of unlawful discrimination, the General Counsel must ordinarily prove: 1) that the worker engaged in protected activity, 2) that the employer had knowledge of such participation, and 3) that a casual relationship or connection existed between the protected activity and the adverse treatment suffered by the worker. Verde Produce Company (1981) 7 ALRB No. 17; Jackson and Perkins Rose Co. (1979) 5 ALRB No. 20. Once the prima facie case has been established, i.e., once the General Counsel has made a sufficient showing to support the inference that protected conduct was a motivating factor in the employer's decision, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. If the employer fails to carry his burden in this regard, the Board is entitled to find that the conduct was improper. Wright Line Inc. (1980) 251 NLRB 150, 105 LRRM 1169, 1174-75; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 175 Cal.Rptr. 626; Nishi Greenhouse (1981) 7 ALRB No. 18.

By this standard, the union activist who is guilty of misconduct can still be disciplined; yet, the employer has the burden of showing that this employee would have been disciplined anyway, regardless of his union activity.

In this case, the General Counsel has been able to demonstrate that Daniel engaged in Union (and concerted, infra)

activities, that this was known to Respondent through its partner, Mark, at least as early as June, and that judging by the substantial evidence of Mark's animus, there was a causal connection between Daniel's efforts on behalf of the UFW and Respondent's decision to discharge him. Thus I find that General Counsel has made out a prima facie case. The question is, did Respondent show that it would have taken the same action it did against another employee if that employee had not engaged in Union or concerted activity?

The General Counsel's position consists basically in denying that this incident was as serious as Eric claims. In the General Counsel's view Daniel was not really stuck but was still moving forward; and that in any event, it was impossible, due to the dimensions of the trailers, harvester, and road for Daniel to pass the trailers without straddling the ditch. But the significant question is whether Eric, in fact, believed Daniel to be stuck and in violation of his orders. Just cause for the discharge (as in a labor arbitration) is not the issue. Here the employer's motivation is the controlling factor. Respondent could be completely mistaken about Daniel's culpability for the incident, but the discharge will stand. Mueller Brass Co. v. N.L.R.B. (3rd Cir. 1978) 581 F.2d 363, 368. In this case, I believe Eric honestly felt that Daniel's operation of the harvester was so contrary to his explicit instructions as to

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constitute gross negligence[28] and to therefore justify a discharge and that this decision would have been made even in the absence of protected activity. I come to this conclusion based upon the spontaneous, angry reaction of Eric to the fact that his instructions had been disregarded right before his eyes, Daniel's acknowledgment that he had never seen Eric so angry before, Daniel's admission of some degree of fault, and Daniel's failure to complain that he was being treated unfairly.[29] Where the Board could as reasonably infer a proper motive as an unlawful one, the act of management cannot be found to be unlawful discrimination. N.L.R.B. v. Huber Motor Express (5th Cir. 1955) 223 F.2d 748. The General Counsel argues that others had done the same thing with much less discipline, but Eric repeatedly explained that the difference was that no one had ever gotten stuck before who was not actually harvesting. But even if Eric's emotional response was harsh and unreasonable, it was not unlawful unless motivated by a desire to discourage protected union or concerted activity. N.L.R.B. v. Federal Pacific Electic Co. (5th

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[28]In the face of this evidence, the General Counsel's ultimate argument that Daniel's entering the ditch gave Eric his hoped for pretext to feign anger and discharge Daniel on the obviously false grounds of getting stuck when, in fact, he was punishing him for his protected activities seems rather fanciful and contrived. (See G.C.'s Post Hearing Brief, pp. 37, 39)

[29]It was so obvious that this accident, with just a little more care, could have been avoided that Daniel was afraid that Eric would think that he had done it on purpose. (II: 86-89, 130)

Cir. 1971) 441 F.2d 765. The Act does not insulate a pro-union employee from discharge or layoff. It is only when an employee's union activity or concerted activity is the basis for the discharge that the Act is violated. Florida Steel Corp v. N.L.R.B (5th Cir. 1979) 587 F.2d 735. "In the absence of a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." Borin Packing Co., Inc. (1974) 208 NLRB 280. See also Lu-Ette Farms, Inc. (1977) 3 ALRB No. 38 and Hansen Farms (1977) 3 ALRB No. 43.

I recommend that the allegation alleging discrimination against Daniel Rocha because of his Union and/or concerted activities be dismissed.

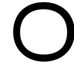
VI. The Layoff of Juan Rocha

A. The Facts

1. Work History

Juan Rocha commenced working for Respondent in 1979, first doing hoeing, then driving a melon truck, next driving a cotton picker and finally ending up working in the shop during that year. Between 1979 and the date of his layoff, August 3, 1984, he remained mainly in the shop performing maintenance and repairs on all sorts of vehicles and machinery,[30] though he would

[30]Eric testified that in addition to Juan, Jack and Alien Thompson had worked regularly in the shop on cotton pickers and other equipment for a long time. And others that worked in the shop were Jack Thompson's son, James, Armando Medrano, Eric's brother-in-law, Frank Shepard, Richard Felix on an irregular basis, and Jesus Robledo. (XIII: 16-23, 29)



still drive a cotton picker or combine occasionally if Eric need him. At no time during those years was he ever laid off. (V: 39-43; XIII: 26)

According to Juan, at the time of his layoff, there was still work to be done in the shop, including 2 tractors that needed to be torn down and the immediate check of 3 melon trucks. (V:III)

2. Union Activity

There is no question but that Juan and his brother, Daniel, were leaders of the Union's organizational campaign at Merritt Farms. Respondent admits that it was aware of Juan's Union activities. (Resp's Post-Hearing Brief, p. 35) Further, Richard and Juan discussed on one occasion the pros and cons of unionization. (XVI: 7-8)

3. Concerted Activity - The Walkout

Both Juan and Daniel were concerned about the fact that they felt they were paying much too much in taxes and wanted some relief from the Company to deal with this problem. Discussions were held with Company personnel, the result of which was that both Juan and Daniel walked off their jobs on Saturday, June 9 and did not return until the following Tuesday. What was said by the various parties over this issue is hotly disputed.

Daniel testified that early Saturday morning, about a week after the Murray Park meeting, he and Juan were told by Eric that they were to work the next day, Sunday. Daniel testified

that they both told Eric that "we were not going to work" and that the reason was that " . . . we were paying too much tax and they weren't deducting income tax money." (II: 41) Following these remarks, Daniel testified that he suggested that Eric pay them in two checks, one a Company check and the other a personal one, or that they be paid in cash, but that Eric said this could not be done. At that point Daniel, according to his testimony, told Eric that he wanted the Company to deduct money from his paycheck so he wouldn't have to pay a lot at the end of the year, but that Eric rejected this idea, as well. (II: 41-43, 118-120)

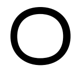
Having failed to convince Eric, Juan and Daniel next spoke to Richard. Daniel testified that he discussed this problem and his alternative solutions with Richard (Earl and then Eric also arrived during the conversation) and that Richard said that he wasn't able to accommodate them because he had a lot of work at the office and would have to hire someone else to make the deductions they were seeking. Juan testified that he suggested to Richard that two separate checks be made out, one for 40 hours and the other one for any excess.

On cross-examination, Daniel acknowledged that he informed Richard that his brother and he would be looking for another job. Juan and Daniel both testified that Richard told them that if they weren't happy there, they should look for work elsewhere but that they could return to Respondent's if they couldn't find any work. When both failed to find work over the

weekend and apparently on Monday, as well, they reported for work again on Tuesday at their old job which was waiting for them. (II: 45-47, 54, 124; V: 106, 108; VI: 59-63, 76)

Eric testified that June was usually a busy month in the shop because that was the time that he was attempting to get the wheat harvesters ready, as well as the tractors. (XIII: 77) This particular June, not only was the wheat harvest starting, but cotton cultivation and irrigation was going on. According to Eric, in the past both of the Rochas had worked on Saturdays and on Sundays, if needed. On this occasion Eric testified he told the Rochas on a Friday that he needed them to work over the weekend but that they both didn't have to work Sunday, one of them could work Saturday and the other on Sunday.

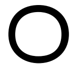
Eric also testified that on Saturday both Juan and Daniel showed up for work but were willing to work only half a day, stating that they would not work Saturday or Sunday afternoon and complaining that to do so would result in their having to pay too much income tax. According to Eric, Juan wanted the Company to make out a check in his son's name and under his son's social security number. Eric told him this could not be done. When Juan next asked that the money be withheld for income tax, Eric suggested a sum be held out as savings, a method that had been used for the Rochas in the past; but Juan again repeated that he wanted the Company to make out a check under his son's name. At that point the conversation turned nasty as Juan and Daniel



announced they weren't going to work that day or on Sunday, and Eric told them that if they weren't going to work on Sunday, they need not come back on Monday either. Both Rochas stated they wanted to talk further with Richard. (XIII: 77-78; XIV: 43-45; II: 42, 118-119)

Richard testified that he did not speak to the Rochas until Monday morning.[31] By then he had already become emotionally upset because Eric had already told him what happened and the essential thing that stood out was that the Rochas had refused to work on Saturday. Richard was so concerned that he had already told Eric to fire them if it ever happened again. According to Richard, when the Rochas came back on Monday, he told that if they didn't want to work when needed, they might as well leave the ranch. The Rochas, responded that if they worked weekends, they would have to pay income tax on the additional money and couldn't afford to do it. Richard couldn't remember their talking about his withholding of salary for income tax purposes. He did recall that the Rochas indicated they wouldn't mind working Saturday and Sundays if checks were made out in their children's names. Richard told them this could not be done. (XVI: 16-17) (I : 105) (See also XIII: 77-87; XIV: 43-45)

[31]There is disagreement over what day of the week this conversation occurred, Eric agreeing with his father that it was on the Monday following the weekend, the Rochas placing it on Saturday. I conclude that it was Monday, though what day it was is not crucial to the analysis.



Richard further testified that at that point the Rochas stated that they would return to work and even work Saturdays but that they were going to be looking for another job. (I: 105-106) (See also Eric's corroborating testimony at XIII: 93-94 and Earl's at XI: 114-119).

4. The Layoff

In August of 1984, the wheat harvest had ended, and Respondent had also just finished getting the melon trucks repaired and ready; according to Eric, there was only one left to do. Though Juan had not been laid off in previous years at this time, he was on this occasion. (XIII: 97) Eric explained why:

> Well, I told him that, you know, he had indicated to me back in June that he was looking for other employment, and the wheat harvest was over and things in the shop had just about caught up, I was going to just finish the last truck, and so we were just cutting back on expenses." (XIII: 98)

Eric testified that his dad and he discussed whether Juan should be laid off about 3 or 4 days before the event but that it was his dad's decision to do so.

Richard testified that the reason he was brought into the discussion, since Eric already had the authority to lay off employees on his own, was the concern about whether such conduct was lawful in view of Juan's well-known Union activity. Richard testified he felt Juan should be laid off. Weighing heavily in favor of that decision was the fact that Juan had refused to work that weekend plus the fact that he had also indicated that he would be looking for another job anyway. (XVI: 18-23, 43-45,65)

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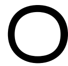
Eric testified that after the layoff, there was still work in the shop but less work and that he was doing it. According to Eric, the only persons remaining in the shop besides him were Frank Shepard and Charlie Ramsey, a welder who also did tractor work and odd jobs with the pickup. (XIV: 107-108, 112)

B. Analysis and Conclusions of Law

The General Counsel focuses on the fact that Juan (and Daniel) walked off their jobs the weekend of June 9 and argues that they were participating in protected, concerted activities in protest against Respondent's failure to provide them with a solution to their problem of having to pay too much in income taxes because of their weekend work. The General Counsel further argues that there was a nexus between this supposed protected, concerted activity and the Rochas' subsequent layoffs. (See G.C.'s Post-Hearing Brief, pp. 18-26, 38-41, 74)

I agree that Juan was laid off because of the walkout. This is clear from the testimony of both Richard and Eric. The initial questions in this case, however, are whether this activity was concerted and whether it was protected.

I find that the Rochas activity in pursuit of their income tax problem was concerted activity though it is a closer question than may appear at first glance. To make such a finding it is necessary for me to conclude that discussions between employees and employers over whether money is to be withheld from paychecks as an income tax deduction falls within the mutual aid



or protection language set forth in section 1152 of the Act.[32] I find that it arguably does keeping in mind, however, that the U.S. Supreme Court has said that "some concerted activity bears less immediate relationship to employees' interests as employees than other such activity" and "at some point the relationship becomes so attenuated" that an activity cannot fairly be viewed as within the meaning of "mutual aid and protection." Eastex, Inc. v. NLRB (1978) 437 U.S. 556, 565, 98 LRRM 2717, 2720. But here I find that requesting an employer to withhold from or make a deduction from a paycheck so that they might have more money left over to pay their income taxes is sufficiently related to the amount and method by which wages are made out as to have an immediate and direct relationship to employees' interests at the ranch.

It is certain that Richard's decision to lay off Juan was motivated because of the anger he still felt for the Rochas' having walked off their jobs seven weeks earlier. As I have found the Rochas' activity to be concerted, Respondent's subsequent layoff of Juan for engaging in such activity ordinarily would have been in violation of the Act in that it is well established that an employer violates section 1153(a) by suspending or otherwise discriminating against employees because they walked off their

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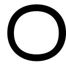
[32] section 1152 states, in part, "Employees shall have the right to. . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...."

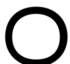


jobs to protest a working condition. Anton Caratan & Sons (1982) 8 ALRB No. 83, citing NLRB v. Washington Aluminum Co. (1962) 370 U.S. 9, 50 LRRM 2235.

But more is required, of course, than merely proof that the activity was concerted. Even though activities are found to be for mutual aid or protection, such activities may be held unprotected, either because the employees' objective is thought to be reprehensible or because the means employed for carrying out the concerted design are thought to be indefensible. German, Basic Text on Labor Law (1976), p. 302. Examples of unprotected conduct are activities which are unlawful, violent, in breach of contract, or disloyal. NLRB v. Washington Aluminum Co., Id.,(1962) 370 U.S. 9, 17, 50 LRRM 2235, 2239.

The matter is also analogous to the National Labor Relations Act's prohibition from inclusion in a labor contract of provisions which are deemed particularly contrary to the interest of the public or of the employees. To insist upon the inclusion of such a provision as a condition of agreement will constitute bad faith bargaining in violation of sections 8(a)(5) or 8(b)(3). Even if many of these illegal subjects can be said to relate to wages, hours, and working conditions, it should follow that one ought not be permitted to condition a discussion of mandatory subjects on the agreement of the other party to violate the law. German, Basic Text on Labor Law (1976), p. 530.

In the present matter, I find that what the Rochas told Richard and Eric was that they wanted the Company's payroll



department to begin making out two separate checks, one in their own name and another in the name of their children. I make this finding for several reasons.

First, I credit Richard and Eric[33] that this was the demand the Rochas put to them.

Second, Daniel's rejection of the savings concept that had been in practice before indicates that he was after something different this time. When Eric heard the Rochas request some kind of a deduction from their paycheck, he suggested, quite naturally as it had been done in the past for the Rochas and other workers, that a sum be withheld from each week's salary check as savings.[34] Daniel rejected the idea. (I: 97, 100; III: 30) But it is not reasonable to conclude that the Rochas would have walked

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[33]I was very impressed with Richard Merritt's calm, polite, and candid demeanor. He tried very hard to answer the questions posed to him truthfully, though at times he had difficulty recalling all the facts without prodding. But this did not detract significantly from his overall credibility. I was particularly impressed by his honesty in stating his reasons for the layoff which he admitted, in effect, to be Juan's concerted activity.

Eric's testimony on this subject was sincerely and honestly stated in a matter of fact, logical manner. His recollection of events was good. His frequent long pauses before answering a question, which the General Counsel interpreted as showing a lack of candor, I find to be consistent with his generally cautious style in which he was merely trying to make sure that his recollections were accurate.

[34]While Richard couldn't remember any discussion of withholding, had the Rochas suggested some sort of a savings plan, there is every reason to suppose that Richard would have acceded to the request as he had done the same thing for Juan in the past.

off their jobs over the supposed failure of Respondent to deduct income tax withholding when their main purpose was not to have to pay so much in taxes at the end of the year and a simple savings plan, as they had had in the past, would have accomplished the same thing as withholding. Why then was the savings plan rejected? Logically it makes sense that what the Rochas really wanted was not just to have the money saved up at the end of the year to pay taxes with but to pay fewer taxes as well; ergo, the idea of putting the money into their children's names.

In addition, the Company had loaned money to the Rochas in the past without interest and would no doubt have done it again so that they could pay their taxes with it if this had been what the Rochas wanted.

When the Rochas told the Merritts they wanted checks written in their children's names as a solution to their apparently costly tax problem, the clear message which this conveyed was that the Rochas wanted to use this device as a means of cutting down on their own total income, thereby evading their full tax liability, clearly an illegal act. Thus, the objective of the Rochas concerted activity was not to protest their having to work Saturdays or Sundays (except insofar as it gave them additional income on which to pay taxes) or to protest Respondent's supposed refusal to deduct money for them from their paychecks but rather it was to show their dissatisfaction with Eric's and Richard's refusal to commit an unlawful act.[35] It was

[35]Even Daniel's version that he suggested that Eric pay them

the refusal of Respondent to go along with this plan that caused the Rochas to engage in the walkout.

There can be no doubt, as I have previously stated, that there was a link between the Rochas' walking off their job and refusing to work the weekend of June 9 and Juan's layoff on August 3, seven weeks later.[36] Prior to 1984, Juan had worked pretty much full time, including shop work in July, August, and September. Even in the slower months, like August, Respondent was always able to find work for Juan. Even though work slowed considerably during June of 1984, I have no doubt that Richard would have found work for Juan, as he had done in the past, had he wanted. The main reason he didn't want to and the one stated quite bluntly by him was that he was still angry and smarting over Juan's refusal to work during one of the busy weekends of June in the dispute over his tax liability, conduct which Richard regarded as insubordination (XVI: 62-63), So Richard wasn't about to go out of his way to find extra work for Juan this time, especially since

(Footnote 35 Continued)

in two checks, (Juan also testified he wanted two checks), one a Company check and the other a personal one or alternatively, that they be paid in cash smacks of illegal intent in that it has nothing to do with solving his and Juan's problem of their making too much money and wanting some kind of a deduction off their paychecks. As a matter of fact, it is hard to see how any deduction for income tax purposes could help with their main problem of earning too much and having to pay too much in taxes.

[36]I find that it was this conduct and not Juan's Union activity that caused Richard to lay him off.

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he was looking to cut expenses anyway (though this was not a major factor). Furthermore, Richard was not very pleased that the Rochas had told him at the conclusion of their Monday meeting that they were going to be looking for another job, a fact over which there is no dispute.

While it is true that a main concern of Richard in deciding to lay off Juan was the fact that he had refused to work on the weekend, it is also true that it was the illegality of the objective to be accomplished by the walkout which likewise troubled Richard a great deal. Richard testified as follows:

> Q (by General Counsel) "But you do agree that they did mention the fact that you didn't withhold taxes?
>
> A They didn't mention to me about withholding tax. -- They didn't mention that they wanted me to hold out or otherwise I would have. We discussed this, oh I'm sure for probably fifteen minutes or something like that, and the only thing that came up was they said that they would work on Saturdays if I would put it in their child's name, which I told them I wouldn't do.
>
> Q "-- Did they also suggest that you issue two checks instead of one?
>
> A No, they wanted me to issue a check to them and then to their son for part of their work. They were just babies.—".
>
> And that was illegal."
>
> Q "And did he tell you that the reason he wanted the check issued that way was so that they wouldn't pay so many taxes at the end of the year?
>
> A Well, yes, that was the reason. They wanted me to put that so they wouldn't have to pay the income tax." (I: 109-110)

Thus, I find that even though Juan engaged in concerted activity and even though such activity played a role in the

decision to lay him off, such conduct in and of itself cannot be said to be unlawful in view of the unprotected activity that was the object of the activity.[37] "An employer may discharge an employee for good cause, bad cause, or no cause at all without violating section 8(a)(3) as long as his motivation is not union discrimination and the discharge does not punish activities protected by the Act." L'Eggs Products, Inc. v. N.L.R.B. (9th Cir. 1980) 619 F.2d 337, 104 LRRM 2674 at 2675-2676. Such being the case, General Counsel failed to prove one of the elements of a prima facie 1153(a) case — that the concerted activity was protected. I recommend the dismissal of this allegation.[38]

[37]While I find that Respondent's principal reason for Juan's layoff was lawful only because the conduct being punished was unprotected, I want to make it clear that I am not impressed with Respondent's other reasons it supposedly had for the layoff, e.g., Juan's alleged "attitude", his alleged refusal to work on cotton pickers or the pickup, his not wanting to put heads on the caterpillars or the alleged "out of control situation in the shop with people going and coming too much." (XVI: 62-63; XIV: 107-109) Here Respondent is simply overreaching and exaggerates the nature of these events in an attempt to shore up its defense of the layoff.

[38]The First Amended Complaint also contains an allegation that Juan was discriminatorily denied rehire (Paragraph 15). However, there was no evidence that any attempts at rehire were made by Juan, and the General Counsel appears to have abandoned any such claim as no reference is made to the subject matter in his Post-Hearing Brief. I recommend the dismissal of that portion of Paragraph 15 that pertains to Juan Rocha, as well.

VII. The Layoff of Jose Garcia

A. The Facts

1. Work History

Jose Garcia began working for Respondent in November of 1979, according to his testimony, or in 1978, according to Eric's. During his employ, he operated cotton pickers, tractors, combines, and a melon truck (for a very short time). Between the date of his hire until his layoff on July 25, 1984, Garcia generally worked continuously with no layoffs. From January-March or April he operated a cotton picking machine and then disced mostly with the caterpillar but sometimes on the tractor. From April - June or July he cultivated. (Eric testified he also helped prepare the land for cotton planting with the mulcher). Prior to 1984, he had operated the combine during the wheat harvest but not in 1984. (When the wheat harvest ended, those fields were planted in milo.) In past years, following the wheat harvest (at the end of July), Garcia would usually be assigned duties such as fixing the cotton spindles on the cotton pickers in the shop or discing by or on the roads. According to Garcia, these kinds of jobs were given to him because there wasn't much else going on as the tractor work slowed down in August and stayed that way through September and October. Then in October and through December Garcia would operate a milo harvester and sometimes a cotton picker. (VIII: 3-9, 12-21; XIII: 125-131)

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2. Union Activities and Company Knowledge

Garcia attended the Murray Park meeting and the meeting at the UFW office in Porterville on July 8. He also distributed authorization cards in early July. (VIII: 31-33, 39-40)

Respondent had knowledge of his Union support. Richard testified that in late July, Eric or Mark told him that one of the truck drivers had reported that Garcia had been talking to him about the Union. (I: 75-76) In addition, Garcia told Eric that he was a Union supporter, as Eric acknowledged. Eric testified that in Mid-July he was out at the field early in the morning where Garcia was supposed to be cultivating cotton, and he noticed his absence. Later he asked a worker, Genaro Toledo, what time Garcia had started work that morning and was told it was 7:00 a.m., a half hour after starting time. When Eric heard this, he testified he became a little "riled up" as he felt Garcia was padding the time sheets and confronted Garcia with this accusation.[39] Garcia became a little angry, made a derogatory remark about Toledo and then announced, "well, we're going to bring the union in." Eric testified that he replied, "not on this ranch you're not."[40] (XIII: 153-154; XIV: 70)

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[39]Eric testified the padding the time sheet allegation played no role in his subsequent decision to lay Garcia off.

[40]Garcia's testimony differs in the sense that he has Eric initiating the conversation about the Union by asserting that he (Eric) knew of Garcia's (and others) intent to bring in the Union. The difference is not important as we are only concerned here with the fact that Respondent did have knowledge of Garcia's Union activities a short time before his July 25 layoff.

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3. The Layoff

Garcia was laid off on July 25, 1984. Eric testified that he did so because the cotton cultivation was winding down with no more work to be done, and he needed Garcia's tractor to replace one that had broken down and to connect it with an implement that made ditches, work which, according to Eric, Garcia had not previously done.[41]

Eric also testified that he figured Garcia. would be taking off anyway to work at another ranch picking grapes which he did, according to Eric, almost every year prior to 1984 after the cultivation work slowed down in August and September. Eric testified that when he laid Garcia off, he "-- asked him if he could find work picking grapes until we needed him again and I told him to check back with me in the fall when we start picking cotton."[42] (XIII: 133; XIV: 100)

Eric further testified that though the milo cultivation was still being performed and continued for four more weeks (until the end of August), he decided not to place Garcia into the milo

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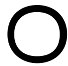
[41]On rebuttal Garcia testified that during his employ with Respondent, he operated the tractor hooked up with a blade which made ditches, two or three times during 1983 and one or two times during 1982. He made no ditches in 1984 and couldn't recall if he made any during 1981. This work was assigned him by Eric. (XVI: 75-77, 88-89) I credit this testimony. Garcia was a mature, self assured, convincing witness. He was especially certain that he had prior experience making these ditches, a matter, of course, that he would be in the best position to know.

[42]Garcia denied that he ever left Respondent's employ during August or September to pick grapes. Garcia testified, however, that he pruned grapes prior to 1984 during November or December while continuing to work nights for Respondent. (XVI: 79-80) Company records show



work because this would mean that he would have to lay off someone else. (XIII: 132) Garcia testified that at the time of his layoff, at least four other workers with less seniority than he remained on the payroll, Humberto Cervantes, Benito Moreno, Palemon Delgado, and Ismael Acosta.[43] Two other tractor drivers, Robert and James Thompson, also remained. (VIII: 45-48)

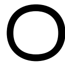
4. The Attempts at Rehire

I credit Garcia's factual account of his attempts to be rehired by Respondent following his layoff. Garcia testified that four weeks after his layoff, he began going to Respondent's weekly to ask Eric for work. Each time Eric told him there was no work until the cotton picking machines started up again. On some occasions Eric told him he would call if work became available. During the 2nd week in October, Eric told him that the cotton season was almost ready to start and that as soon as it did, he would go to Garcia's house and tell him. (Garcia observed that the season had actually started at that time as workers were already picking. (VIII: 50-52, 56)).

(Footnote 42 Continued)

that Garcia was not absent from work during August or September of 1982 (G.C. 11), though he was absent the weeks ending September 3 and 10 of 1983. (G.C. 6) Garcia testified he could not remember where he was during those two weeks, but he was not picking grapes (XVI: 79-82) Records were not introduced into evidence for any of the other years prior to 1984. For reasons that will appear obvious, infra, it will not be necessary to resolve this conflict in testimony between Eric and Garcia.

[43]Cervantes, Delgado, Moreno, and Acosta all signed the August 6 Petition (G.C. 17), but the evidence fails to establish that Respondent was aware they were Union supporters prior to that date,

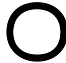


Garcia was rehired to disc melons on December 4, 1984. On the day he was hired back, Garcia observed cotton pickers preparing the machines. He recognized Humberto Cervantes and Robert Thompson and six other workers he had not seen working on those machines before. At the time of his testimony in this hearing, July 2, 1986, Garcia was still employed by Respondent. (VIII: 53-54, 58, 7-8)

B. Analysis and Conclusions of Law

On April 8, 1985, Respondent informed a Board agent for the ALRB that the reason Garcia had been laid off was because of a lack of work when the cotton cultivation was over and that the "[r]emaining tractor driver (sic) worked between 10 and 45 hours per week, due to low workload."[44] (G.C.28) However, Company records submitted at the hearing do not bear this position out. Of those employees who remained cultivating milo -- Humberto Cervantes, Joseph Garcia, Robert Thompson, Benito Moreno, Palemon Delgado, and Ismael Acosta -- the payroll records reveal that with the exception of Thompson, they all worked far more than

[44]Respondent did not mention the additional reason, mentioned by Eric during the hearing, that Garcia's tractor was needed to give to another driver to make ditches, which Garcia had supposedly never done in the past. General Counsel argues that this omission is evidence of Respondent's shifting reasons for its action and amounts to an inconsistent statement. I note that Respondent has not abandoned its original reason but merely added another one. I am not convinced that this "omission" is, in fact, clearly an inconsistent prior statement. (See Brooks v. Willig Truck Transportation Co., (1953) 40 C.2d 669, 675. Though the failure of Respondent to mention this additional reason for the layoff, which it now urges upon me with as equal a fervor as the original reason, is evidence to be considered in assessing the overall credibility of Respondent's true intent in taking the



10-45 hours set forth in Respondent's letter to the ALRB.[45] In fact, the records show a substantial amount of work over 45 hours throughout the late summer and fall of 1984. (G.C. 2) Thus, I find that one of Respondent's asserted reasons for the layoff -low workload[46] - was untrue. Where a respondent's asserted reason for discharge is proven to be false, the Board can infer that there is another, unlawful motive which the respondent desires to conceal, where surrounding facts, such as anti-union animus tend to reinforce that inference. The Garin Co., (1985) 11 ALRB No. 18.

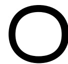
Thus, there is just no reasonable explanation why Eric could not have assigned Garcia milo cultivation duties, especially when it was known he had performed these duties in the past. At first, on direct examination, Eric tried to justify his action on the rather tenuous grounds that to place Garcia in the milo would have upset some of the milo cultivators already working. But this

(Footnote 44 Continued)

action it did, I do not agree that Respondent has thereby "shifted" the reasons.

[45]The week ending August 3, Joseph Garcia (hired only about a month before) worked 69 hours, Delgado, 70 hours, Moreno, 60 hours, Cervantes, 67.5 hours and Acosta 70 hours. The week ending August 10 shows Joseph Garcia working 66 hours, Moreno, 50 hours and Cervantes 55½. The week of his layoff, Garcia had worked as many as 44 hours (G.C. 2)

[46] Though Company records shows a somewhat reduced production of cotton between 1983 and 1984, they also show a dramatic increase in milo production. (G.C. 19)



justification hardly seems convincing in view of the Company's prior attempts to find a place for Garcia, the number of years he had worked for Respondent, his overall record,[47] and the relative junior status of many of those that remained.[48] Even Eric was forced to later admit on cross-examination that the feelings of displaced milo cultivators was, at best, a minor consideration. (XIV: 50)

Another reason that Eric laid Garcia off was that he supposedly needed his tractor to make some ditches which, according to Eric, Garcia had not previously done. But Garcia testified credibly both on direct and rebuttal that he had made ditches before, though not frequently. (VIII: 91-92; XVI: 76-77). It remains a mystery why Eric would not have known this. Assuming arguendo that he had honestly forgotten Garcia's prior experience, it seems strange that at the point of taking Garcia's tractor from him, Eric would not have asked if he had ever made ditches before. Moreover, given the Company's prior attempts to keep Garcia employed in the past and his long seniority, why would Eric not have assigned him this work anyway, including any further training

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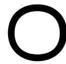
[47]Richard called him a good worker. (I: 123)

[48]For example, Joseph Garcia had only been employed since the first week in July (G.C. 2).



that it supposedly would have entailed.[49]

Likewise, Eric's contention that Garcia had participated in the grape harvest in the past, even if true, was not a reasonable justification for laying him off. Eric suggests that Garcia was selected for layoff because he regularly, along with members of his family, left Respondent's employ anyway to pick grapes at another ranch so there was no big deal about letting him go.

There are two main problems with this explanation. In the first place, Eric testified that each year prior to 1984, after the cultivation work had slowed down a bit, Garcia would leave Respondent's to pick grapes in late August or September. (This would conform with Mark's estimate as to the starting time of the grape harvest as late August, early September. (XIV: 124)) But in this case Garcia was not let go at the end of August or beginning of September, but at the end of July, a full month, at least, before the commencement of the harvest.

Second, Eric testified that when Garcia participated in the grape harvest, he usually stayed away 1-2 weeks. If Garica's

[49]Eric testified that he was aware that Garcia had operated the ditcher before, but claimed he had never made any ditches. Though Eric asserted that the making of ditches was different from the kind of work Garcia had been doing with the ditcher, e.g., levelling, knocking down, etc, he never explained what this supposed difference consisted of or why Garcia couldn't have been easily trained to do it. (XIII: 134)

participation in the grape harvest only took 1-2 weeks, why lay him off at all? Why not just allow him to do what he supposedly had always been allowed to do - participate in the grape harvest and then report back to work with Respondent when it was all over? After all, even assuming arguendo that Garcia had been in the grape harvest virtually every year, including 1982 and 1983, around late August/early September as Eric had testified, Respondent never had found any necessity to lay him off before. It is also clear that Garcia on this occasion had never requested any time off to pick grapes, which Eric acknowledged. Why should Eric have taken it upon himself to decide that Garcia should be picking grapes at this time and lay him off?[50]

The General Counsel established a prima facie case of discriminatory layoff. The burden then shifted to the Respondent. There are several factors that cause me to conclude that Respondent failed to carry that burden and could not show that it would have laid off Garcia irrespective of his strong Union support, as follows: 1) the fact that Garcia had worked full time every year since 1979 and had never been laid off during any summer before; 2) the fact that Eric could not explain why this summer was different; 3) the fact that in the past Respondent had always bent over backwards to find Garcia work during this same time period when things slowed but not this time; 4) the fact that

[50]It is worthy of note that Eric provided no testimony of Garcia's response to Eric's alleged question to him at the time of the layoff as to whether he could find work picking grapes until he was needed again. (XIII: 133) (There was a response supposedly

Respondent did not show that low work load necessitated the layoff; 5) the fact that Garcia was not offered either milo cultivation or ditch making work, when he had done both kinds before; 6) the fact that Garcia had made ditches in the past for Respondent, yet had his tractor taken from him on the grounds that he had not; 7) the fact that Respondent failed to mention this tractor matter in its letter to the ALRB Board agent. 8) the fact that Respondent's excuses for not retaining Garcia—that to do otherwise would be upsetting for workers already employed who might have to be laid off and that Garcia was going to be participating in the grape harvest anyway--were both pretextural; 9) the fact that just a short time before Garcia's layoff, the Union campaign had been heating up to the extent that Ybarra had been called in to meet with the Merritts and help organize a "pro-Company" campaign to take effect shortly thereafter; and 10) the short time that transpired between Respondent's first knowledge of Garcia's Union support and the time of his layoff.

It is also clear that Respondent failed to rehire Garcia to work on the cotton picking machines in October or at any time during the cotton or milo harvest despite the fact that Eric told

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(Footnote 50 Continued)

from Garcia but not to the question). Given the importance of the question to the reasons for the layoff, the omission of an answer casts doubt on Respondent's position that Garcia was laid off because he was about to leave Respondent's employ to join a grape harvest.

him that he would notify him when work started up again. The fact that work became available during the time Garcia had made a proper application, the fact that new workers were hired, and given the other circumstances of this case that led to Garcia's discriminatory layoff can only lead to the conclusion that it was Garcia's previously expressed strong support for the UFW which played the decisive role in Respondent's decision not to rehire him, at least until December 4, 1984.

I recommend that Respondent be found to have violated sections 1153(a) and (c) of the Act.

VIII. The Layoff of Manuel Montanez

A. The Facts

1. Work History

When Montanez first came to work for Respondent in 1982,[51] Eric put him to work on the caterpillar (after a brief and apparently unsuccessful try, according to Eric, on the combine) which he continued to drive until the spring of 1983. At that point he left the employ of the Company to work at another ranch, returning in the winter of 1983. Upon his return and during 1984, he did a variety of different kinds of jobs for short periods, e.g., welding, planting melons and milo with the tractor,

[51]Montanez testified that he did not go to work for Respondent until November of 1983, but he was in error as Company records (G.C. 26) show him commencing work in 1982.

cultipacking , hoeing, weeding, cleaning valves, cutting and burning grass with chemicals, and hoeing around the area where Eric's grandmother lived. His last job before his layoff by Eric on July 30 was spraying grass in front of the office. (IV: 76-83; V: 4-7)

Eric testified that Montanez had not worked previous summers as he had gone to work for this other ranch. According to Eric, Montanez wasn't a bad caterpillar driver but was not as satisfactory on some of the other jobs; he did not elaborate. (XIII: 139-144) Richard testified that he was a good worker. (I: 129-130)

2. The Layoff and Attempts at Rehire

Eric testified that at the time of Montanez' layoff, July 30, the cultipacking was over, there wasn't as much hoeing going on as before, and the Company was cutting back. But Montanez testified that at the time, he was spraying an 80 acre field and had only finished about 20 acres. He further testified that there was plenty of work going on. Though he didn't see any hoeing, he testified that there were irrigators working, workers raising the melon vine, and shop work available. (V: 25-26)

Upon hearing that he was being laid off, Montanez asked about work in the melons, and Eric told him he didn't hire those people but that he would talk to Earl and maybe they'd call him in one or two weeks. Montanez next asked about packing shed work. Eric told him that they had already gotten their crew lined up as

it was late July and they had begun the packing. Eric also told him that he'd have to see Earl. (IV: 109; XIII: 144)

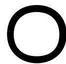
The Monday following the July 30 layoff, Montanez returned to ask Eric for work and was told that he had already been informed there was none and for him to go to Tipton[52] to the packing shed and talk to Earl. He did. Earl told him that work was slow in the melons and that in any event, only employees who had already worked for him for four or five years were being selected. But Earl added that when there was more melon crop, he would call Montanez or have Eric do it but for him to keep checking in the meantime. Montanez testified that he went back to Tipton on several occasions, beginning 3 or 4 days later (August 2 or 3), and that each time he would either see Earl who would send him to Eric or vice versa. On one occasion he spoke to Richard. He was never given any work. (XIV: 110-115) (XVI: 27-28) (IV: 111-112)

On cross-examination Earl testified that Montanez asked him for work one time in late July or August and that he- would have hired him if he had needed him at the time. He then testified that a position did indeed become available but he didn't contact him. (XII: 6). On redirect, for the first time, Earl testified that the reason he failed to contact Montanez for

[52]Tipton was approximately 5-6 miles from Montanez' home. (IV; 11-112)

this position was that he had observed him working on the ranch and concluded that he couldn't really handle shed work as he (Montanez) seemed to have more problems than most employees in driving the disk and also had a tendency to talk to others on the job when he should have been working. In addition, Earl testified that as melons peaked around the 5th to 15th of August and then declined after that, it usually worked very well for him to make those jobs available to Tipton high school kids who were anxious for summer work, even for just 2 or 3 weeks, and who were preparing to go back to school just about the time they would have to be laid off anyway. Furthermore, these high school kids tended to come around the packing house every day looking for a job and could be hired on the spur of the moment. Earl also testified that the positions that became available were mainly on the loading dock and that they were filled by the high schoolers because they took directions well and could move at a rapid pace. (XII: 84-86, 92-93)

Montanez applied for work again during the cotton picking season, either in October or November. Upon his arrival at the field, he noticed that all the cotton picking machines were in operation and that there were quite a few new workers. Eric told him that those workers were machine operators, that he didn't have any work for him, and that he should go see Earl. Eric testified he didn't want Montanez driving a combine because of what he considered to be an unsatisfactory performance back in 1982



so he told him to come back in a couple of weeks when they would need caterpillar drivers.[53]

3. Union Activities

Montanez attended the Onion meeting at Murray Park and the one on July 8 at the Porterville UFW office, the one which David Garay also attended. He also attended the meetings at the Rochas house, spoke to workers about the benefits of unionization, and asked workers to sign authorization cards, including Jesus Robledo. (IV: 83-91)

Following his layoff, he continued his Union activities. In the early part of August (probably around the first two weeks) on a daily basis he accompanied UFW organizer Jesus Villegas to Respondent's melon fields where he was observed by Richard and Mark.[54] Montanez also signed the August 6 Petition. (G.C. 17) (IV: 93-97, 100-101, V: 27)

Montanez testified that on July 23 he was going to get a tractor when Eric asked him to help get another tractor at another ranch. As they rode along in Eric's pickup, Eric asked him if he

[53]Montanez testified he could not remember if he had ever operated a mechanical picker for Respondent but that he had operated one at his previous employer, information which he conveyed to Eric at the time of his hire. (IV: 116-118; XII: 144-146)

[54]Both Richard and Mark confirmed that following his layoff they did observe Montanez on occasions when he was assisting the UFW representative in attempting to organize Respondent's workers. (I: 77-78; XV: 45-47)

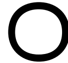
knew what was going on at the ranch. When he asked, "what?", Eric told him that "....we know the union is going to come in....that Johnny Rocha already is talking to Chavez...."[55] (IV: 106-107) Montanez told Eric that he didn't know anything about the Union.
(IV: 107)

B. Analysis and Conclusions of Law

In analyzing the legality of the Montanez layoff and subsequent alleged failure of Respondent to rehire him, it must initially be determined whether Respondent knew about Montanez' Union activities at the time of his discharge on July 30 and if so, when it became so aware. The General Counsel argues, inter alia, that Respondent became aware of these activities through part-time supervisor David Garay, who attended the July 8 UFW meeting and saw Montanez there.[56] On the other hand, Respondent takes the position that Garay was not a supervisor at

[55]Eric denied ever telling Montanez that Juan was speaking with Chavez or that he knew the Rochas supported the Union. (XIII: 155) Though I have credited Eric before, I do not believe him here. I credit Montanez and find that Eric's inquiry amounted to unlawful interrogation. Montanez was an extremely believable witness who impressed me with his candor, simplicity, clarity and memory of events.

[56]Conversely, prior to July 20, Garay would have to be classified as a unit employee for all purposes, even if an election had been held during that time. J. Oberti, Inc., et al. (1983) 9 ALRB No. 7. Thus, there cannot be nor is there any claim of unlawful surveillance in Garay's attendance at the UFW meeting as he had a right to be there. In fact, even if he had been a supervisor at the time of the meeting, the facts indicate that he was invited to the meeting and never asked to leave.



the time, and further, that there is no evidence that Garay ever told anyone from the Company that he had seen Montanez at the meeting.

On July 20, 1984 Garay commenced his supervisory duties in the packing shed as this was when the season began. (G.C. 24) As of that moment, his knowledge of the Union activities of Montanez and others was imputed to Respondent unless there was credited testimony in the record that his knowledge of such activity was not passed on to the higher management officials who were the ones that made the decision to take the adverse action against Montanez. George Lucas & Sons (1985) 11 ALRB No. 11. There is no such specific evidence. Garay testified that he saw Montanez at the Union meeting on July 8. He later told Earl that the Rochas were present and testified that he did not tell him that Humberto Cervantes and Jose Garcia were there because they were friends of his. He did not specifically deny telling Earl that Montanez was there and testified that Montanez was neither friend nor enemy (XII: 168, 183, 185-186). In my view, the burden was on the Respondent to prove by credible evidence that Montanez was definitely not one of the names given to Earl. In this way the Company knowledge imputed to Respondent through Garay's assumption of his supervisory position could have been refuted. George Lucas & Sons, id. But the evidence submitted was too vague and ambiguous to support Respondent's position that this information was never passed on. The Respondent failed to carry

its burden.[57]

I find, therefore, that as of July 20, Respondent, through Garay, was aware that Montanez was a Union supporter.[58]

I also find that the General Counsel has made out a prima facie case of discriminatory discharge. Here, in addition to the layoff just ten days after the knowledge of Montanez' activity was imputed to Respondent, there is a substantial record of anti-union animus, characterized by threats and interrogation.

In Foster Poultry Farms (1980) 6 ALRB No. 15 a low level supervisor received a union authorization card from one employee. That knowledge was held to be attributable to Respondent. A short time afterwards, the employee was discharged. The Board found that the timing of the discharge, occurring shortly after Respondent became aware of the employee's Union activity, the

[57]Garay was not a sharp, direct witness, and sometimes wandered and muddled through the answers in a kind of stream of consciousness delivery. There was always the possibility that not the whole story was being told, not because he didn't want to tell it but because it was too disorganized in his own mind for it to flow forward naturally. This only emphasizes the need for more specific evidence of whether Garay declined to mention Montanez to Earl. The problem is that what we are left with in this record is that Garay was aware of the consequences of turning over the names of his friends who attended the UPW meeting to Earl, yet didn't necessarily consider Montanez a friend. The inference is that Montanez, not being a friend of Garay' s, was not therefore protected by him.

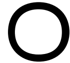
[58]Of course, there is no question that Richard and Mark both directly became aware of Montanez[1] Union activity in early August, around the time he was applying for rehire.

procedure used in discharging him, in light of Respondent's anti-union animus as evidenced by its unlawful interrogation and threats, revealed that a prima facie case of discriminatory discharge had been established.

But after the burden then shifted to Respondent, I find that it presented, through the testimony of Eric, persuasive evidence that Montanez[1] layoff was not due to discriminatory factors but rather was attributable to a lack of work, as demonstrated by the odd jobs he performed prior to the event, including hoeing in Eric's grandmother's yard, and the short duration of the varied employment.

Did Respondent unlawfully thereafter refuse to rehire Montanez? It is the general rule that to establish a prima facie case of discriminatory refusal to hire, the General Counsel must show by a preponderance of the evidence that the employees were engaged in protected concerted or Union activity, that Respondent had knowledge of such activity, and that there was some connection or causal relationship between the protected activity and the subsequent failure or refusal to hire. (Anton Caratan & Sons, supra (1982) 8 ALRB No. 83, citing Jackson and Perkins Rose Company, supra (1979) 5 ALRB No. 20.)

In addition, the General Counsel must ordinarily show that the alleged discriminatee(s) made a proper application for employment at a time when work was available and was not hired because of his/her protected concerted or union activity.



(Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98, citing Prohoroff Poultry Farms (1979) 5 ALRB No. 9 and Giumarra Vineyards, Inc. (1981) 7 ALRB No. 17.) Once a prima face case has been established, the burden of producing evidence to show it would have reached the same decision absent the employee's protected activity shifts to the Respondent. (Nishi Greenhouse, supra (1981) 7 ALRB No. 18; Wright Line, Inc. supra (1980) 251 NLRB 150, 105 LRRM 1169.

In this case, the General Counsel has made out a prima facie case. Two days after his discharge, Montanez asked Earl for work in the packing shed and did so 'on other occasions during the first part of August. Earl (and Eric) both told him that the melons were slow and that there was no work available. However, Company Records reveal that hiring for the shed was going on between July 30 and the first week in August (G.C. 4 and 24).[59] (See also G.C.'s Post Hearing Brief, p. 54)

Respondent failed to carry its burden of showing that Montanez would have been refused rehire even absent his Union support. Earl told Montanez that there was no work available but testified at the hearing that he would have given him shed work if he had needed him. Having so testified, Earl then stated,

[59]Among the new hires were Earl Blevins, Julian Recendez, Juan Valencia, Nat Westbrook, Raul Serrano, Colter White, Genaro Contreras, Mike Moyle, Len Giddings, Martin Macias, and Joel Espinoza.

apparently unaware of any contradiction, that when he did need him, he didn't hire him. However, Earl's reasons for not hiring Montanez were discredited through the re-cross examination by General Counsel (XII: 97-101) Earl had testified that Montanez had problems operating a disk, but further inquiry forced him to admit that disk work and nothing at all to do with any of the work Montanez would have been asked to perform at the shed. Earl also had testified that Montanez talked to others on the job too much, but the evidence showed that most of Montanez[1] job assignments required him to work alone. Earl had to admit that his conclusion was based on the fact that supposedly on just two occasions he observed Montanez at 'distances of 1/4 and 1/8 miles away talking to another worker while spraying weeds and that he couldn't be sure if these discussions were or were not work related. There is no evidence to suggest this matter was regarded important enough for Earl to either stop and discuss the problem with Montanez or give him a verbal or written warning.

I find that Earl's reasons for not rehiring Montanez despite repeated requests were pretextural. Respondent failed ". . . . to rebut the presumption of discrimination by producing evidence that plaintiff was rejected for a legitimate non-discriminatory reason.. . . " Texas Department of Community Affairs v. Burdine (1981) 450 U.S. 248, 101 S.Ct. 1089, 1094, cited in Martori Brothers Distributors (1982) 8 ALRB No. 15.

As to Montanez' applying for work as a cotton picker in October or November of 1984, Respondent did meet its burden as it

was able to show through Eric's testimony which I credit here, that Montanez had worked on a combine in the past but had failed to do so to the Company's satisfaction. Montanez did not rebut this testimony. It will be recalled that one of the things stressed by Respondent in the selection of drivers for its cotton picking machines was whether the driver/applicant had been a capable driver in the past. Therefore, Respondent's rejection of Montanez' application for work as a cotton picker in October and November was for legitimate, non-discriminatory reasons. In addition, Montanez testified that all the cotton picking machines were in operation when he arrived at the field to ask for work. Thus, there was an insufficient showing that work was available when he applied. Finally, the General Counsel did not show that there was work available in other job classifications at this time that Montanez could have been given.

I recommend that Respondent be found to have violated sections 1153(a) and (c) of the Act.

IX. The Layoffs of Ismael Acosta, Ricardo Salazar, and Jose Rodriguez

A. The Facts

1. Work History of Ismael Acosta

Ismael Acosta first came to work for Respondent in 1980 and fed cattle, performed pre-irrigation work and irrigated the cow pasture. He did not, however, irrigate the cotton, milo, or melon fields. The cow pasture work, which merely involved the

setting of valves, was the only irrigation work he ever did. During 1980 Ismael was involved in a serious motorcycle accident. He remained in Company housing for a few months and then left for Mexico where he remained for around three years. He did not return to Respondent's until June of 1984 where he worked until his layoff in August.

During 1984, Ismael carried alfalfa bales, hauled hay, opened and closed valves on the pumps, drove a small tractor and did irrigation prep work. From the first part of August until his layoff on August 27 or 28, he planted single row corn or milo and did cultipac work. Ismael testified that at the time of his layoff the cultipac work had finished. He also did irrigation prep for the milo during this last period of his employment. Ricardo Salazar and Jose Rodriguez worked with Ismael during 1984 doing irrigation prep work.[60] (111: 54-60, 100-105; XV: 63-65)

2. Ismael's Union Activity

Ismael testified that during one of the times that labor consultant Ybarra addressed the workers, he also spoke up and asserted that the workers were with the Union and would continue

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[60] Irrigation prep work consists of getting the irrigation equipment ready for irrigation such as uncovering the valves, placing the pipes, and shovel work. This work takes place after the cultivation. Mark testified that cultivators Robert Thompson, Joseph Garcia, and Humberto Cervantes were laid off just prior to Ismael's, Rodriguez, and Salazar's layoffs. (XV: 66-68) (G.C. 2)

to support it. (III: 78) Though Ybarra claimed that it was not his policy to pass such information on to the employer (XII: 124-131, 139-143, 148), in fact, Richard testified that sometime around mid-August Ybarra told him that Acosta was one of the more "vociferous" supporters of the Union. (I: 81)

According to Ismael, one week before he was laid off, Mark told him that he (Mark) was aware that he had signed an authorization card and asked why he would do this when he always had a job there when he returned from Mexico. And Mark also told him that he had spoken to his brother, Santos, about signing a paper like the one he (Santos) had already signed for the Union (referring to G.C. 17) indicating support for the Company, that Santos had refused, and that he assumed Ismael would likewise refuse. Ismael confirmed that he would refuse. Mark then shook his head in disgust, and left.[61] (III: 74-75)

Ismael also testified that he started wearing a UFW button on his shirt the week before he was laid off and that Mark was in a position to clearly see it. (III: 107, 123) Ismael also signed the Petition. (III: 128-129) (G.C. 17)

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[61]Mark denied he ever asked Ismael to sign any paper on behalf of the Company. According to Mark, Ismael told him he had signed an authorization card, and he told Ismael not to sign anything unless he knew exactly what he was signing. (XV: 118-120) I credit Ismael's version of this conversation for reasons previously stated.

3. The Layoff

On August 27 or 28, Mark told Ismael, Rodriguez, and Salazar that the cultivator work and "winging out" was over and that they weren't needed anymore but that they could remain in Company housing if they wanted. Mark testified that he also told them that if he needed them for work in the melons "or whatever", he'd be back to get them. (The melon harvest was just beginning around this time.) (XV: 69, 150) (See also VI: 119-120)

4. Work History of Ricardo Salazar

Ricardo Salazar's only employment with Respondent was in 1984 from May 25 until his layoff at the end of August (XV: 66). During that time Salazar cut weeds with a shovel in the cotton, applied fertilizer to the melons, irrigated a cotton and wheat field, and did irrigation prep work. At the time of his layoff, he had been doing the same kind of irrigation prep work as Ismael and Jose Rodriguez. (VI: 86-90)

5. Salazar's Union Activity

Salazar attended one Union meeting in Porterville prior to his layoff, signed an authorization card and the Petition. He also discussed unionization with co-workers at the Rochas' house. (VI: 91-95) (G.C. 17) Salazar testified that on August 7, 1984, the day after he signed the Petition, he, along with co-worker, Rodriguez, were preparing for melon irrigation when Mark approached them and asked if they signed authorization cards, and

both replied that they had.[62] (VI: 109-113). In addition, though Salazar did not mention it in his testimony, his uncle, Pablo Ceballos, testified that he (Salazar) wore a union button to work and that Mark asked Salazar "if he, too, or if he also had the button", and Salazar replied that it was for the protection of his work. (X: 18-19)

6. Work History and Union Activity of Jose Rodriguez

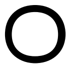
Rodriguez did not testify. He was first hired sometime during the week ending June 22, 1984 (G.C. 2) and worked for Respondent until his layoff at the same time as Ismael's and Salazar's. As mentioned, at the time of his layoff, he was also doing the same kind of irrigation prep work that they had been doing. (XV: 65-66)

Rodriquez signed the Petition and, according to Salazar, admitted to Mark that he had signed an authorization card. (VI: 109-113)

7. The Alleged Refusal to Rehire

Mark testified that two days after they had been laid off, Ismael, Rodriguez, Salazar, and Santos Acosta, infra, saw him working in a melon field and asked if he intended to use them anymore. He replied that he didn't know but that if he did need

[62] Mark had also told alleged discriminatee Jose Estrella, in a conversation in which authorization cards were mentioned, to stay away from Salazar and Rodriguez as they were not his (Estrella's) friends. (VII: 58-59)

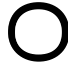


them, he would come and get them. When Ismael asked about unemployment compensation, Mark testified that he told him to go ahead and apply. Mark never called any of them for work testifying that the Garays never contacted him for additional workers which they would have done had there been positions available. Mark also testified that none of the group ever asked him for work again.[63] (XV: 69-72) (See also VI: 124-126)

B. Analysis and Conclusions of Law

The General Counsel has made out a prima facie case that Ismael, Salazar, and Rodriguez were discriminated against because of their Union activities. Ismael was such an outspoken Union supporter that Ybarra reported him to Richard. Salazar and Rodriguez, in addition to signing the Petition, also admitted to Mark 2-3 weeks prior to their layoff, that they signed authorization cards after being interrogated by him about it. Mark's animus towards Union supporters has been previously shown. More specifically, Mark had told Ismael not to talk to the Rochas because they were bringing the Union in and that those who went with the Union would not have work. He also asked him why he would want to sign an authorization card. In the case of Salazar, Mark told him that if the Union came in, the ranch would be sold. (VI: 96-101)

[63]Ismael testified that the week following his layoff he applied for rehire around 3 times, and that the reason he did not return again to seek work was because he had spoken to Mark several times already and to continue to do so seemed useless. (III: 90-95)



At that point the burden shifted to Respondent to show that the three alleged discriminatees would have been laid off even in the absence of their protected conduct. Wright Line, supra (1980.) 251 NLRB 150, 105 LRRM 1169, 1174-75; Martori Brothers Distributors v. Agricultural Labor Relations Board, supra (1981) 29 Cal.Sd 721, 175 Cal.Rptr. 626; Nishi Greenhouse, supra (1981) 7 ALRB No 18. I believe the Respondent has carried this burden.

It is the General Counsel's position that the main reason for the layoff of Ismael, Salazar, Rodriguez, (and Santos, infra, was not so much their participation in Union activities as it was the fact that they supposedly engaged in concerted activity by participating in a California Rural Legal Assistance (hereafter "CRLA") investigation of allegations that the Company provided housing which they occupied by the cattle pens was below standard. To support this claim General Counsel points to the August 9, 1984 letter (Resp's 2) requiring the employees involved to move to other facilities as being close in time to the CRLA investigation and much further in time from the event that supposedly was the reason for the move - the May 5 (Cinco de Mayo) party that caused the cattle to break out of the corrals and to cause damage. The General Counsel argues that Respondent moved its employees to another location as a pretext to prevent the CRLA access to the old location in the cattle pen area. (See G.C.'s Post-Hearing Brief, pp. 94-98)

Of course, the difficulty in General Counsel's claim is proving that Respondent ever had knowledge of the CRLA investigation in the first place. The General Counsel recognizes the problem calling the evidence circumstantial. (G.C.'s Post Hearing Brief, p. 95) In fact, the only evidence bordering on knowledge in 16 days of hearing was the brief testimony of Pablo Ceballos. Ceballos testified that he allowed CRLA people to take a photograph of him inside his house by the cattle pens and spoke to a woman about housing conditions twice, once for three minutes and another time for half an hour. The first visit occurred about a week after the Company had received the Petition (G.C. 17), which would make it at the earliest August 13. The second visit occurred the following week. According to Ceballos, right after the first visit, Mark told him that "....he didn't want too many people there and that he knew that they had come over to photograph the housing." (X: 71). Ceballos denied this. Mark then said that "if they should come out again, for me to run them off, because they scared the cows." (X: 71) Ceballos told him that it was his (Mark's) ranch and he should be the one to run them off. (X: 66-71)

From this sketchy account, I cannot take the initial evidentiary leap General Counsel would have me take and conclude that Respondent was aware that the CRLA was conducting an investigation on its property. In the first place, Ceballos' first contact with the CRLA was around August 13, according to his

testimony, and the Company's directive to move from the cattle pens was issued on August 9, before the CRLA meeting with Ceballos. (Resp's 2) Second, Mark's comment that he knew "....they had come over to photograph the housing" does not, without more, lead to the conclusion that Mark knew the Company was under investigation by an outside organization. And finally, and most important, even if it could be concluded that Mark knew about the CRLA investigation, there is no evidence that he knew that Salazar, Rodriquez, Santos or even Ismael were actively involved in it.[64]

Respondent showed that it had a legitimate business reason for laying off Ismael, Salazar, and Rodriguez. All three were irrigation prep workers at the time of their layoff. As such, their work was intimately connected with that of the cultivators, e.g., Humberto Cervantes, Robert Thompson, Joseph Garcia, as it followed it directly in time. When the work for these cultivators ended at the end of August, they were laid off. It should not be surprising therefore, that the irrigation prep workers who were dependent upon the cultivators for their work would, a few days later, be laid off, as well, as their jobs had come to an end.

But the General Counsel points out that the Company payroll records (G.C. 3) show that Pete Garay hired a number of

[64]Let us suppose that Mark was aware that something was going on at the Company's housing and that there was a possibility that, based on the photographs, some kind of an investigation by some group was occurring or could at some point ensue. But there is still a

workers for the melons at a time when Ismael, Salazar, and Rodriguez were being laid off. Thus, the General Counsel's theory is based upon the proposition that Respondent's discriminatory intent is shown by the fact that it did not take these three Ranch employees and immediately transfer them to the melons, despite the fact that the evidence demonstrated that both Pete and Pedro Garay traditionally hired their own crews, and Richard, who had never hired people for the melons, would simply rely day to day on whomever the Garays selected to show up. (XVI: 33)

When Mark told Ismael, Salazar, and Rodriguez at the time of the layoff that if there was a need for them in the melons he would contact them, he did not mean he would interfere with the Garays normal selection of their crews. What he meant was that he would hire them if the Garays put out the call, as they had done on a small scale in past years, for additional melon workers after the season was in progress. Though Ranch employees were sometimes sent to the melon harvest to drive the trucks or harvest the melons, the record evidence is that the number used in 1984

(Footnote 64 Continued)

failure of proof that this activity was concerted. Furthermore, the evidence does not convince me of General Counsel's claim that Respondent, having gone to all the trouble to provide better living conditions so as to avoid some kind of a charge of inadequate housing, would then turn around a short time later and fire the occupants of the housing for bringing it to Respondent's attention in the first place. The evidence simply fails to sustain this position).

was below that of other years,[65] for one reason because the Garays had lost a grape contract with another employer the result of which was that workers from his crews were no longer leaving the melons early to work in the grapes. There was no evidence to suggest that the Garays, after having filled up their crews with their regular workers, thereafter refused to fill any vacancies with Ranch people who were Union supporters or that the Garays, in fact, did contact Mark for additional workers but that Mark deliberately refused to pass the word on to Union supporters and specifically to, Ismael, Salazar, and Rodriguez.

What the General Counsel needed to show to prove his case was that other Ranch employees, who were not Union supporters, were offered work in the melons rather than being laid off or alternatively, that after the Garays filled their crews and then requested additional workers, if they did, that those positions went to Ranch employees who were supportive of the Company's position. The fact that the General Counsel makes no such argument displays the weakness in his case. He cannot argue such a position because the evidence will not support it.

The General Counsel further argues that Respondent was obligated to place the three alleged discriminatees here anywhere in

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[65]Richard thought that no one from the Ranch had worked in the melons in 1984. But Mark, who was probably in a better position to know, testified that 3 workers -- Porfirio Barajas, Juan Delgado, and Jesus Robledo - worked in 1984 driving melon trucks. Both Barajas and Delgado were strong Union supporters and signed the Petition. (G.C.. 17).

the Company, thereby causing the displacement of three other workers based upon the Company's "practice of giving longer term employees preference in work assignments." (G.C.'s Post-Hearing Brief, p. 101) But such a policy could not have been intended to apply to the alleged discriminatees, all of whom were basically new workers that summer.[66] Nor is there any evidence of Respondent's use of a seniority list of any kind or of any kind of a procedure allowing for bumping rights based upon length of service.

I recommend the dismissal of these allegations.

X. The Layoff of Santos Acosta

A. The Facts

1. Work History

Santos Acosta, Ismael's brother, first came to work for Respondent in July, 1979. He worked in the melons picking and also weeded cotton and corn. In November of 1979 he was laid off. The next year he worked from May 9, until his layoff on October 24, 1980 doing irrigation prep for the cotton and corn and also weeding. Mark then sent him over to the melon packing shed. He began working in 1981 sometime during the week ending May 1 and worked until sometime during the week ending June 5. He cleaned up the warehouses where they stored wheat and mowed the lawn at

[66] Ismael was like a new worker. Though he had worked for Respondent before, he had not done so for the past 3-4 years.

the office. His work was cut short when he was picked up by the INS. Santos did not work for Respondent during 1982. In 1983 he worked there from July 8 - October 28. He did irrigation prep for two months, was picked up by the INS, and returned 22 days later. He went back to irrigation prep for cotton and then began irrigating milo which he did for 2 - 2 ½ months. He also weeded cotton and milo. In October, while stomping on cotton in the trailers, he was again picked up by the INS. (IV: 1, 5-20)

In 1984, Santos worked from sometime during the week ending July 13 until somewhere around the week ending August 24. Mark hired him and put him to work doing irrigation prep which he did for around a month and then began irrigating milo. He also irrigated the cow pastures and cleaned up some melon ditches. At the time of his layoff he was irrigating milo. (IV: 13, 20-21)

2. Union Activity

Santos signed a Union authorization card on July 24 and the Petition (G.C. 17) around August 6.

Mark engaged Santos in two conversations in which the Onion was mentioned. The first occurred sometime between July 24 and August 6. Mark approached, asked if he had signed a card, and told him that the Company had allowed him to leave work and then return to his job and that a union would be of little benefit. Santos replied "--if you do know, so be it." Mark then exclaimed, "oh, God." (IV: 22-24, 26, 28-30)

A second conversation occurred a short time after the Petition had been delivered to Respondent. Mark again asked him

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if he had signed a Union card, and Santos replied that he had. Mark then told him that the Union was no good for the workers and asked him if he would sign a letter rejecting his support for the Union. When Santos rejected the offer, Mark told him that there was going to be work the next year for those who had not signed with the Union and as to those who had signed, they could go ask the Union for work.[67] (IV: 33-35)

3. The Layoff

Mark testified that from time to time his sister, Sarah, who worked in the office and did the payroll, would present him with a list of employees whose social security numbers were needed by the Company either because they had gotten lost or because the numbers the Company had were incorrect or false. Santos name, along with 15-20 others, was on this list.[68] (XV: 54)

Mark further testified that he asked Santos for his social security number during the latter part of July or early

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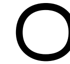
[67]I credit Santos that Mark made these remarks on both occasions. Though sometimes uncertain about dates, and though seemingly confused and inarticulate, his testimony contained the aura of truthfulness and overall it rang true.

[68]Sarah did not testify, and there is no evidence as to exactly why Santos' name appeared on the list. Mark testified all he knew was that his sister had requested the social security number. The parties stipulated that a number did appear on Santos' 1984 Company records in the space provided for social security numbers. That was the extent of the Stipulation. (XVI: 106) Santos' 1979 Company records also contained a social security number, but the number has been crossed out (G.C. 33). What can be read of it indicates that it is a different number from the one appearing for 1984. There was no explanation provided as to why the number was scratched out or who did it. The parties also stipulated that Company records showed no social security number at all for Santos in 1980 or 1981. (XVI: 105-106)



August[69] and had 3-5 conversations with him about it.[70] Mark testified that initially Santos had no excuse for not having the number but later told him it was in Los Angeles.

Both Santos and Mark essentially agree on what happened next. Santos testified that when Mark told him he needed his social security number, he replied that he would try to get the number from Los Angeles and that Mark gave him a month to do it. (IV: 68) When he still didn't have it after the month went by and Mark asked him for it again, Santos told Mark that he (Mark) already had it since he had worked there last year.[71] At that point, Mark told him that he needed it and that no work would be provided to him without it.[72] Mark then took him off work. According to Santos, Mark said that he would give him his work back when he got the number. Santos testified that at this time he had been irrigating milo.[73] (IV: 38-40, 68-69; XV: 52-58)

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[69]Santos testified this was after his first conversation with Mark regarding the Union authorization card but before the second conversation. (IV: 38)

[70]Santos testified there were only 2 conversations.

[71]Mark regarded this as a smart alecky, arrogant remark. (XV: 198-199)

[72]Mark testified that all others on Sarah's list had provided him with their social security numbers. (XV: 196-197)

[73]Mark testified that Santos had just completed the work on a milo field so that this was a good time to lay him off anyway.

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Santos testified that anywhere from a week to 2 weeks later Santos, along with Ismael, Salazar and Rodriguez, as referred to in the previous section, asked Mark for work. According to Santos, Mark told the workers there was no work, but he told Santos that he would have his job as soon as he provided him his social security number. (IV: 41-42)

Santos also testified that a week to 2 weeks after this event,[74] he gave Mark his social security number but was told there was no work available. (IV: 43-45, 49)

Mark testified that after Santos was taken off work, he had assigned Ceballos[75] to irrigate the milo that Santos had been doing but that by the time Santos finally brought in his social security number, the milo irrigation had gotten all caught up. Mark testified that he told Santos he could remain living in Company housing for a period of time and work elsewhere if he wanted. (XV: 60-63)

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[74]Mark's estimate of this time frame was much shorter. Mark testified that Santos brought in his social security number only a week - 10 days after Mark had taken him off duty, which was only 2 days after he had laid off Ismael, Salazar, and Rodriguez. (IV: 57-60, 72) This would have made it the first days of September.

[75]Mark testified that prior to Ceballos' taking over the milo irrigation, he had been irrigating other fields. However, as things had been slowing down and since the Company was shutting off some of the cotton water, Ceballos was able to take on the milo field that Santos had been irrigating. (XV: 204)

4. The Alleged Refusal to Rehire

Santos testified that a week later he again asked Mark, who had come by his house to assign irrigation duties to Ceballos and Orozco who were also living there, for work but was told there was none. (IV: 48-49)

Thereafter, when they began picking cotton in mid - late November, Santos testified he spoke to Mark again about work and that Mark told him to see Eric. Not finding Eric, he spoke to Earl[76] who said he didn't know and for him to see his dad. Santos could not find Richard either so he went home and shortly thereafter left for Mexico. He did not speak to the Merritts again about work and did not return to the ranch during 1985.[77] (IV: 50-51, 70)

B. Analysis and Conclusions of Law

The General Counsel had made out a prima facie case that Santos' "layoff"[78] and subsequent failure to be rehired were for

[76]Earl was very uncertain about whether Santos contacted him for work at this time. (XI: 106-107)

[77]On direct examination by General Counsel, Santos explained that he did not speak to the Merritts again about work because he went to Mexico. Much later, on redirect, he gave a different answer and testified that it was because of Mark's previous statement that there was not going to be any work for those who supported the UFW. (IV: 72)

[78]In reality, taking Santos off duty the week ending August 24 until such time that he brought in his social security number was not a layoff but rather a non-disciplinary suspension pending his compliance with the Company's requirements.

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discriminatory reasons. Aside from the reasons already stated in previous sections, I am particularly persuaded by Mark's threat stated directly to Santos that workers who supported the Union would be denied work while workers who opposed unionization would be hired.

The burden shifted to Respondent. The key question then becomes whether Mark's request for a social security number from Santos was a pretext for ultimately getting rid of a Union supporter, as General Counsel argues,[79] or was a legitimate, non-discriminatory business request based upon a Company need, as Respondent argues.

For the General Counsel's theory to be successful, I must be persuaded that in late July, assuming arguendo that Mark had knowledge of Santos' Union support at that time,[80] Mark (and possibly Sarah his sister, and others) concocted a scheme whereby

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[79]The General Counsel does not appear to argue with the proposition that by the time Santos brought in a social security number, the need for an irrigator had decreased as work had slowed down. (It is particularly worthy of note that the person assigned to Santos' duties during this time was Ceballos, an active Union supporter) The General Counsel's argument instead focuses on his belief that the original request for the social security number was pretextural.

[80]Santos testified at the time Mark asked him for his social security number, he had already had his first conversation with Mark in which the Union authorization cards were mentioned. However, Santos' reply to Mark's inquiries was so vague - "if you do know, so be it" - that it would be problematic to say that the General Counsel had established the element of Company knowledge at that point.

they would ask Santos for his social security number, knowing full well that he would be unable to submit it for some time, after which they could lay him off for non-compliance with their request. (Quaere as to why Mark would give Santos as long a time as over 4 weeks, well into the intense period of the Union campaign, to come up with the number? And why would Mark have told Santos that he would be restored to his old job when he submitted the number, a promise he never intended to honor, just to get his hopes up?) I am not persuaded.

The General Counsel also argues that evidence of pretext can be found in the fact that Sarah, the person who put together the list of 15-20 workers whose social security numbers needed clarification, did not testify. I decline to make an adverse ruling regarding her absence. In reality, her testimony was not crucial because what matters is that I credit Mark here that he honestly believed that the social security information was needed by the front office for whatever reason.[81] Santos response to Mark's simple request for the number was to wait more than 4 weeks, despite interim requests, to submit the information. Either he did not take the request seriously or was simply unable to comply in a timely fashion to a reasonable management requirement. No special burden was placed on Santos, as the same request was made of at least 15-20 others, all of whom apparently

[81]Though I have found Mark, more than any other Merritt, to have possessed abundant animus towards the concept of unionization of his employees which he expressed openly and directly, in many other ways he was an impressive witness. He was self-assured,

complied. Nor has there been any showing that Santos was somehow singled out for special treatment. If the General Counsel suspected foul play, he could have just as easily subpoenaed Sarah or her list of 15-20 other workers.[82]

From the time of Mark's first request for the social security number (late July) until the time Santos finally brought it in (late August, according to Mark; early-mid-September, according to Santos), a period of anywhere from 5-8 weeks had passed. During that time, the milo irrigation had gotten caught up, and there was no longer any work available for Santos to do. Respondent's inability to place Santos in a job was occasioned by the fact that by the time he did produce the social security number, Mark no longer needed him, a fact which does not seem to be in dispute. Though work was promised Santos when he did bring in the number, no one anticipated it would take as long as it did.[83]

Finally, Santos testified that he returned to Respondent's looking for work in mid-late November. More than

(Footnote 81 Continued)

articulate, and low key; quite often a solid witness. I have credited other parts of his testimony, and I credit him here. It is not uncommon to believe some but all of a witness' testimony. Broadmoor Lumber Co. (1977) 227 NLRB 1123; Enterprise Products Co. (1982) 265 NLRB 544.

[82]General Counsel argues that the Company paid Santos during 1984 under the social security number listed on the Company's personnel form. (XVI: 106) But obviously, there was something wrong with that number, else why would Respondent take the trouble to question it?

[83]As I have found the original "layoff" during the week ending August 24 to be more akin to a non-disciplinary suspension pending

likely the harvest was well underway by then as it usually began in late October or the beginning of November, and there was no evidence that any jobs were available at the time he applied for work. Moreover, he failed to stick around long enough to see Richard about work, which is what Earl told him to do. Not finding Richard, he left that day for Mexico and did not reapply for employment. Furthermore, it is not clear what kind of work he was seeking. If he were seeking work on one of the cotton picking machines - he mentioned the picking of cotton in his direct examination - those drivers were selected at the beginning of the season on the basis of experience and the ability to perform the work; and there is no evidence he ever did that work before.

I recommend that the allegations concerning Santos Acosta be dismissed.

XI. The Layoff of Jose Estrella

A. The Facts

1. Work History

Jose Estrella first began working for Respondent in July of 1984 doing pre-irrigaticn work in the cotton and milo and

(Footnote 83 Continued)

the outcome of the social security matter, I do not find an inconsistent statement, as General Counsel argues, in Respondent's failure to mention the social security problem in its letter to the Board agent. (G.C. 28) I am also not persuaded that Respondent's error in the letter in equating Santos with the irrigation prep workers (Ismael, Salazar and Rodriguez) showed anything but a minor mistake on its part. After all, Santos was an irrigation prep worker for about a month (which was most of his employment) during 1984. It was not reflective of any inconsistency.

continued doing this work for a month and a half. He was then assigned as an irrigation helper to Pablo Ceballos, and he would turn the valves on and off, change the water and make sure it would travel through several rows. He did this work until the cotton irrigation was over. He also helped Ceballos irrigate the milo, and he cleaned out the ditches in the melons. (VII: 27, 30-32)

2. The Layoff

Estrella was laid off in late September. The work he performed for Respondent on his last day was cotton irrigation, which he had been doing for over a month. He also did irrigation prep in the milo. (VII: 105, 109) At the time of his layoff, Mark told Estrella that he was going to stop the cotton irrigation, that there would be no more work, and that he wouldn't need him anymore but would call whenever he did. (VII: 77) Estrella acknowledged that the cotton irrigation was virtually over but testified that there was still work available finishing the irrigation prep in the milo field where he had been helping Ceballos and which was still only a little over one-half completed. He based this conclusion on the fact that friends of his at the house where he was living were still doing that work. Estrella testified that there was also work picking melons, basing this on the fact that he saw workers there. (VII: 30-32, 79, 106-107) Though Ceballos had been working in the same field, he was not laid off. According to Mark, there was work for Ceballos but not enough work for the both of them. (XV: 73-75)

3. The Alleged Refusal to Rehire

Two weeks after his layoff, Estrella (and alleged discriminatee Alfredo Alvarez) reapplied for work. Mark told him not to worry, that he would send for him whenever he had work, possibly on a cotton machine, though Estrella had never operated one before.[84]

On another occasion, 3-4 weeks later (in October or November), Estrella again spoke to Mark and was told there was no work available. At that time, according to Estrella, he observed that they were already picking cotton and that the machines were operating. (VII: 86-87)

Sometime in 1985 Estrella asked Earl for work but was told there was none. At the time he observed new workers getting ready to irrigate the ground to plant cotton.[85] (VII: 89-91, 111)

4. Union Activity

Estrella's only Union activity consisted of his signing an authorization card about 1½ months after he was first employed. (VII: 33) However, there is no evidence that anyone from the Company ever found out about it. (VII: 101) Mark asked him if he

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[84]Estrella testified that in an earlier conversation in late August, Mark had indicated to him and others who were Company supporters and associated with Jesus Robledo that he was going to teach them how to operate the cotton machine. (VII: 81-83; 60-65)

[85]Estrella could not identify this date with any degree of precision. Earl testified that it was in the late winter or the early spring of 1985, after the cotton harvest was over, that he told Estrella there was no work and to check back at a later time. (XI: 106-107) Mark testified that in January of 1985 Estrella

had signed one; he denied it and told Mark he would never sign one. (VII: 58, 60) Estrella's cousin, Jesus Robledo, asked him whether he had signed, and Estrella denied it to him, as well. Estrella testified that while he was still living with Robledo, a co-worker, Guadalupe Delgado, told Robledo that he (Estrella) had signed the card. Estrella continued to deny having done so. (VII: 55-57)

On another occasion he told Mark he was not going to sign with the Union. (VIII: 75)

On the other hand, while it can be said that Respondent had no knowledge of Estrella's Union sympathies during the time he lived with his cousin, Robledo, a different situation came to exist when Estrella commenced to live with several of the alleged discriminatees at the house on Avenue 112. Upon his learning that Estrella had moved there, Mark told him that those living there were "not good people", that they didn't like the Merritts, and that he (Mark) should have been consulted before he had moved.[86]

(Footnote 85 Continued)

asked him for work, and he told him to come back later when they were a little busier because at that time the only irrigation going on was on some of the wheat fields where a sufficient number of irrigators were already working and that later on all the wheat fields would be under irrigation and the pre-irrigation of cotton and melons would be occurring. According to Mark, Estrella never reapplied for work. (XV: 79-81)

[86]Mark testified that he was not at first aware of Estrella's move to the house on Avenue 112, that he had apparently moved on the invitation of the others. Mark testified he informed Estrella that he was not happy with his living at the new place as it was crowded and told him that he wanted him to move back with Robledo but that Estrella never did. (XV: 78-81)

(VII: 74) Despite the fact that Estrella assured Mark not to worry as he was not going to sign on with the Union, Mark's attitude toward him changed, especially when Mark observed him associating with Salazar. For example, on some of the occasions when Mark saw them together, he did not extend any greeting and did not converse with Estrella as he had when he was living with his cousin.

B. Analysis and Conclusions of Law

The General Counsel has made out a prima facie case. While there is no evidence that the Company had direct knowledge of Estrella's Union sympathies,[87] I credit Estrella that Mark's attitude toward him changed for the worse after he became associated with the pro-Union workers living at the house on Avenue 112. It is an unfair labor practice to discriminate against an agricultural employee because of his association with union supporters. Classen Mushrooms, Inc. (1986) 12 ALRB No. 13, ALJD, p. 31

But Respondent was able to show that Estrella was laid off at a time when the cotton irrigation was coming to an end. Although milo prep was still going on, there was not enough to

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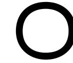
[87]While Robledo may have been told that Estrella had signed an authorization card, there is no evidence that he turned this information over to Company representatives. On the contrary, it is likely that Estrella being his cousin, he would have wanted to keep this news away from Respondent.



sustain the full work complement that had existed up to then. I credit Mark's testimony on this point. It was only logical that Ceballos, the irrigator, rather than Estrella, his helper who had just started work 2 months earlier, would be the one retained. Though Mark's animus has been repeatedly shown, it is also true that some of the workers kept on at this time were friends of Estrella who lived together with him at the house on Avenue 112. In fact, Estrella testified he became aware that milo prep was still going on because his co-workers from the house were still employed in that capacity.

As to the melons, I have already found, as in the case of Ismael, Salazar, and Rodriguez, that the number of Ranch employees used in the melons in 1984 was below that of other years, and that there was no evidence that pro-Company Ranch workers were hired for melon work or that Respondent deliberately conspired to keep pro-Union Ranch employees from working in the melons.

As to the refusal to rehire allegation, whenever it was that Estrella applied for work during the cotton season - he was very vague about the date, testifying that it occurred in October or November - the cotton picking had already begun, and there is no evidence of any vacancies. But the General Counsel argues that Respondent's discriminatory motive is shown by the fact that Mark had previously promised Estrella that he would show him how to operate a picker so he could work in the cotton harvest. (G.C.'s Post Hearing Brief, p. 102)

Mark's earlier statement that he would teach Estrella how to operate a cotton machine and his failure to do so is a slim foundation on which to base a conclusion of discrimination. This is especially true in view of the fact that Mark had nothing to do with the hiring of the cotton pickers as that was done by Eric and Earl, and neither of them was approached at this time by Estrella. Moreover, drivers were usually selected according to whether they had been capable drivers in the past and had stayed on to finish the season; and there is no evidence that Estrella had ever operated one of these machines for Respondent. Further, there is no evidence that Mark trained the other individuals in the cotton machines he promised to, all of whom were Company supporters.

It is also impossible to determine whether Estrella asked Earl for work at a time when any was available since he again was so imprecise as to the 1985 date. As the pre-irrigation and planting of the cotton usually begins in March, it is possible, as Earl testified, that Estrella asked him to work around that time. But there is no reasonable basis on which I can conclude that work was available at that moment. If anything, it would appear that the positions were already filled as Estrella himself testified that he observed workers getting ready to irrigate the ground to plant cotton.

I recommend that these allegations be dismissed.

O O

XII. The Layoff of Pablo Ceballos and Raul Orozco

A. The Facts

1. Work History - Ceballos

Pablo Ceballos first came to work for Respondent in April or May of 1975 and worked there virtually without interruption until his layoff in November, 1984. He was principally an irrigator. The only times that he didn't work were when he was picked up by the INS in November of 1983 returning in February, 1984, those times when he went to visit Mexico (with Company permission), and on those occasions, of course, when rain made it impossible to work. His yearly schedule was usually something like this: in January - April he would irrigate cotton and milo; when the irrigation for these crops slowed, he would clean up the reservoir. In April, he would irrigate for the planting of cotton. Cotton fields were irrigated from May until around September 15. Milo fields were irrigated in May or June for planting, and this irrigation lasted until the end of October. When the milo was over, Ceballos would cut wheat or would be sent over to the melons. He worked in the melons every year except 1984. Following the melons Ceballos would be assigned to a cotton picker and worked in the cotton harvest from November - December, sometimes into January. Ceballos testified he performed these duties from 1977 into 1983.[88] (IX: 76-81, 96; X:4)

[88]Earl testified that he worked no more than half those years as a cotton picker. (XII: 45-46) I credit Earl who testified with certainty on this point. Ceballos was much more hesitant and unsure. (IX: 80)

Ceballos also testified that just prior to his layoff he had been irrigating when he was taken off that duty and told to cut weeds in a cotton field, which he did for 2 weeks. He also cut morning glories in the cotton. On November 17 he was laid off.

2. Union Activities - Ceballos

Ceballos was a strong Union supporter who attended meetings, signed an authorization card and the Petition (G.C. 17), wore a Union button throughout the work day for about 2 months, likely to have been June-July, and was observed doing so at close range by Mark. (X: 11, 14-16)

The Company was aware of his Union sympathies as evidenced by Mark's anti-union statements directed at him, which I have previously credited as having been made. It will be recalled that Mark told Ceballos that he knew the Rochas were behind the Union activity and that the ranch would be sold or the work force reduced if the workers voted for the Union. (X: 23) On another occasion, Mark accused Ceballos of attending Union meetings ever since he started hanging out with the Rochas. (X: 24-26) Mark told him in August that he knew that he had signed a Union card and that it would be bad for him if the Union came in, as his father would sell the ranch. Finally, Mark acknowledged that he was aware that Juan and Ceballos were good friends and that he saw

Ceballos at the Rochas' house with some frequency during June - August, 1984. (XV: 167-169)

3. Work History - Orozco

Raul Orozco began working for Respondent in 1977, was off a year, returned at the end of 1978 or early 79 and worked almost continuously thereafter until his layoff in November of 1984. He would only be off work when it rained (sometimes causing a delay of from 1-2 weeks) or for vacation. In December and January he would pick up what the cotton machines had scattered, would haul bales, and repair water leaks.[89] (He did not drive a cotton picker) From February - May or June, he would do irrigation prep and irrigation for the wheat. He would also irrigate for the planting of cotton during this time until September or October and would also irrigate milo between June and July - October or November. In October he would also work in the melon harvest picking, which he did for all the years except 1984. It is not clear how long the picking took each year but in 1982 it was for 2-3 weeks. (VIII: 101-102, 105, 107-112; IX: 8)

4. Union Activity - Orozco

Orozco signed an authorization card and the Petition. (IX: 8) (G.C. 17) He also had conversations with Mark about the Union. Mark asked him if anyone had requested that he sign a

[89]Eric added that he also tromped cotton. (XIV: 25-26, 28)

Union card and if he had been invited to a Union meeting. Orozco said he hadn't. On another occasion, Mark, referring to the Petition, commented that it wasn't worth anything, that Respondent didn't want the Union, and that if it came in, he would sell the ranch. Mark asked him if besides the Petition, he had also signed an authorization card; Orozco admitted signing one.[90]

5. The Layoff

Around November 17 Mark and Earl came to the house on Avenue 112 where Ceballos and Orozco resided. Earl told Ceballos that there was no more irrigation work for him or Orozco until next year. (X: 45-46, 50; XV: 96-101, 152) He also told Orozco that there was no more spray work and that he was also being laid off. (He had been spraying Johnson grass for 2-3 weeks. Prior to this, he had irrigated milo fields.) Ceballos asked why he was being left without any work when he usually operated a cotton picking machine around that time,[91] and Earl responded that their crew was complete and they didn't need anyone else.

Later that evening Ceballos and Orozco went over to Earl's house and asked for work. Earl told them to wait 2 or 3 weeks and if there was any work, maybe he would call.[92] He never did. (X: 47-48; IX: 25-27)

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[90] Though his memory failed him from time to time and he sometimes appeared confused, the general tone of the testimony conveyed the truth. I credit Orozco that Mark made the above statements.

[91] ceballos testified that he observed mechanical cotton pickers operating. (X: 50)

[92] Earl denied making this statement. (XI: 97-100)

Mark testified that the 1984 cotton irrigation stopped in early October and that the milo stopped early in September. As the work slowed, Orozco was assigned spraying duties until that job ran out,[93] and he was then laid off. Mark also testified that Orozco had been laid off the fall of the previous year, 1983, at the end of the irrigation season, also because of a lack of work.[94] (XV: 92-96)

6. The Alleged Refusal to Rehire

Mark testified that from the time of their layoff in mid-November until they vacated Company housing in late January neither Ceballos nor Orozco ever asked for work. (XV: 110)

Earl testified that 4-6 weeks after the layoff, Ceballos asked for his job back. Earl told Ceballos that there was no work but to come back in March or April when irrigation started up again. Ceballos never asked for work again. Earl could not recall Orozco ever asking for rehire.[95] (XI: 97-100)

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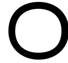
[93]Earl testified that any further spraying would not be effective because any cold spell or frost around that time meant that the foliage would be killed.

[94]Company records indicate that Orozco was off work during the week of October 7, 1983 and did not return to work until March of 1984. G.C. 2) However, Orozco claims that he had asked Mark for permission to take a vacation around this time promising to return when irrigation began again. (IX: 6-8)

[95]Orozco testified that he never asked anyone from the Company for work following his layoff because he had been told that if he were needed, he would be called back to work. (IX: 33)



B. Analysis and Conclusions of Law

The General Counsel has again made out a prima facie case. But when the burden shifted, the Respondent successfully showed that Ceballos and Orozco were laid off because of a lack of work and not their Union activities. There does not seem to be a dispute that the irrigation work came to an end and the work that followed--spraying and cutting weeds--were temporary assignments to stave off layoff for a little longer. Thus, the General Counsel is forced to argue not that there was irrigation, spray or weed work available at the time of the layoff that should have gone to Ceballos and Orozco but that at the time of their layoffs, both alleged discriminatees should have been placed in the cotton harvest, an operation that had commenced slightly earlier.

First the General Counsel argues that several new drivers were selected for the cotton picking machines in 1984 even though they had no prior experience[96] and that this work should have gone to Ceballos. But the Company presented credible evidence, largely through Earl, that its criteria for the selection of drivers was that the individual had been a capable driver in the

[96]The following new drivers were chosen in 1984: Pablo Hernandez, Dionicio Hernandez, Rudy or Rudolfo Garcia, Filimon Espinosa, Ruben Martinez, Miguel Luna, and possibly, Jose Escobedo. Some of these worked in other aspects of the cotton harvest, as well, e.g., tromping cotton, which was not uncommon. (XII: 33-43) (G.C. 2)

past and had stayed on to finish the season. If these conditions were met, preference would be extended to that employee for rehire, Orozco had had no experience as a driver before. Ceballos did, but Ceballos, after starting the 1983 season as a driver, got picked up by the INS early on (November) and did not return until the following year. Thus, though it was through no fault of his own, he was unable to fulfill one of the Company's requirements for rehire to that position.

Though the application of this rule to Ceballos is harsh, especially since he was innocent of any wrongdoing on his part in missing the greater part of the 1983-84 cotton harvest, it is understandable that Respondent would want to assure itself of a continuous work force throughout this season with respect to the skilled position of cotton harvester.[97] Thus, General Counsel's analogy to the Respondent's toleration of melon shed workers who left in the middle of the season but were later rehired for the same work (G.C.'s Post Hearing Brief, p. 116) is not well taken since different levels of skill and apparently, different Company rules are involved.[98] The General Counsel would have been on

[97]The fact that Ceballos was not selected for the 1984 season because he had not completed the 1983 season was not punishment as the General Counsel suggests (G.C.'s Post Hearing Brief, p. 117) but rather the Company's enforcement of a reasonable work rule designed to protect it against employees leaving in mid-season.

[98]There was no evidence to suggest that Respondent's rehiring standards with respect to melon shed workers was the same as that for cotton pickers.

much firmer ground had he been able to show that Respondent's rehiring policy towards the cotton pickers had been inconsistently applied, e.g., other cotton pickers had not finished the preceding year, yet were rehired for this position the following season anyway.

Ordinarily, the mere fact that Ceballos did not meet the Companys criteria for rehire of cotton pickers may not have been the end of the matter as discrimination could still have been the motivating force behind that decision. What is strange here is that despite the fact that the cotton picking season was underway (Orozco had testified that he observed new people driving some of the cotton pickers (IX: 27-28)), there is no evidence that prior to its commencement Ceballos ever asked for cotton picking work or questioned the fact that he was not offered the opportunity to perform in that capacity at its commencement.[99]

The General Counsel points to the fact that Respondent laid off Ceballos and Orozco while retaining other Ranch workers more junior, some of whom first came to work sometime during 1984. From this the General Counsel would have me infer that Ceballos and Orozco must have been laid off because of their Union activity. (General Counsel's Post Hearing Brief, p. 114)

This argument, which has been urged upon me by General Counsel in other parts of this case, as well, is based upon the

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[99]The General Counsel did not establish the practice by which previously employed cotton pickers came to be selected again for the next season or specifically how in the past Ceballos would have been notified about the start-up date. Was there a recall

assumption that Respondent's operation was governed according to strict rules of seniority, including the right to bump others from existing positions based on that seniority, even though those positions may have been in other job classifications and other crops. Ceballos, as has been shown, had worked as a cotton picker but not for the entirety of the 1983-84 season, and there is no evidence that he worked in any other part of the cotton harvest operation. Orozco worked in the cotton harvest (never as a driver) but not at all during the 1983-84 season.

The General Counsel has shown that at the time of Ceballos[1] and Orozco's layoff, some of Respondent's employees who were junior to them stayed on in various aspects of the cotton harvest. But the General Counsel has not shown that there were any vacancies in that harvest to which Ceballos and Orozco could have been assigned at the precise moment in time when they were asking for work or that those jobs went instead to new hires at that moment.[100] The employees listed in Attachment B of General

(Footnote 99 Continued)

system by which Respondent informed workers of the start-up date and assumed they would report for work at that time? Or was it the worker who usually had to be the one who expressed interest in returning to this operation? It is not clear whether Ceballos was still irrigating or cutting weeds at the time the cotton pickers were commencing work. As the start of that operation was no secret, quaere why Ceballos did not request to be a driver at that time. One is left with the impression that he may have been content to remain in his then existing position.

[100]The Company records show a slight decrease in the number working in this operation between the week ending November 16 and the week ending November 23. Thereafter, there is no evidence of increased hiring. (G.C. 2)

Counsel's Post Hearing Brief (p. 114) were indeed junior to Ceballos and Orozco. But they were not hired at the same time as Ceballos and Orozco were let go but rather at various times throughout the summer and early fall of 1984 and in earlier years. None was hired later than September 12, 1984 (Miguel Luna).

In addition, I note that Ceballos and Orozco were laid off around November 17, a considerable time after Mark's anti-union remarks were made to Ceballos in early June and early July and more than 3 months after he asked him if he had signed an authorization card. Furthermore, if the Company were so anxious to get rid of them, why not terminate them at the end of their irrigation work rather than keep them on to spray and cut weeds.

I recommend that the allegations concerning Ceballos and Orozco be dismissed.

XIII. <u>The Layoff of Alfredo Alvarez</u>

A. <u>The Facts</u>

Alfredo Alvarez first worked for Respondent from February of 1980 to September of 1981 (G.C. 26). He didn't work there against until July of 1984 at which time he performed irrigation prep work, irrigation of cotton fields, and weed spraying. (XV: 83-84)

In October of 1984 while spraying weeds, a tractor rolled back on his foot. Unable to work, he went on workers' compensation. Respondent never received any notice that Alvarez was able to resume his duties. (XV: 84-85)

Alvarez was one of those living in the area around the cattle pens who was later moved with the others to the Avenue 112 house. During the time he was hurt, he continued to occupy this Company housing until December of 1984 when Mark personally delivered to him a "Notice to Quit Premises." (XV: 85-86)

Thereafter, in mid-January of 1985 the Company received a letter addressed to Alvarez from the Workers' Compensation Department of the State, and Mark took it over to the Company housing to give it to him. But Ceballos informed Mark that Alvarez was no longer living there and had gone to Mexico (XV: 85) Respondent never heard from Alvarez again.

B. Analysis and Conclusions of Law

There is no prima facie case here. Alvarez was not laid off, was not terminated, and never informed the Company that he was able to and interested in returning to work. He did not testify at the hearing, never filed a charge, and has not been seen on the Company premises since December of 1984. All that the General Counsel can muster in support of the proposition that Alvarez was discriminated against was his living and associating with the group of Union supporters at the house around the cattle pens and later at Avenue 112 and the fact that he was subsequently served with an eviction notice.

The General Counsel did not rebut Respondent's evidence that it never laid off or terminated Alvarez. Thus, there was no showing that he was improperly discharged and/or laid off due to

any concerted and Union activities as alleged in Paragraph 16 of the First Amended Complaint. Nor could the General Counsel show that Alvarez was treated differently from other workers in the same situation.[101]

As to the eviction, there was no evidence to demonstrate, as in the case of the others, infra, that this action was the result of improper motive.

I recommend that the allegation with respect to Alvarez be dismissed.

XIV. The Layoff of Francisco Prieto

A. The Facts

Francisco Prieto first began working for Respondent in April of 1983. (G.C. 26) In 1984 he came to work in the spring or summer and irrigated cotton and milo. He was laid off in September of 1984. (XV: 87)

His Union activities consisted of signing the Petition (G.C. 17). He also lived with the group by the cattle pens who later moved to the house of Avenue 112, a few weeks before his layoff. (XV: 87-88)

According to Mark, Prieto had a drinking problem which had begun to interfere with his work, especially towards the end of the summer. Mark spoke to him about it at that time and told him he couldn't put up with it much longer. Mark testified that a

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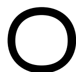
[101]Alvarez was allowed to stay on Company property at least 3 months (including the 30 day notice period contained in the eviction papers) after he was injured and no longer working for Respondent. The General Counsel could not show (despite the examples contained



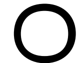
little later, following another drinking incident, he told him that he was going to have to terminate his employment and that Prieto agreed that this was probably for the best for all concerned. He left the Company housing shortly thereafter and has not been heard from since. He did not file a charge and did not testify at the hearing. (XV: 88-91)

B. Analysis and Conclusions of Law

The General Counsel failed to show that Prieto's departure from the Company was occasioned by any discriminatory motive. "An administrative board must accept as true the intended meaning, of uncontradicted and unimpeached evidence.--[W]hen a party testifies to favorable facts, and any contradictory evidence is within the ability of the opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it." Martori Brothers Distributors v. Agricultural Labor Relations Board, supra. (1981) 29 Cal.3d 721, 728. I credit Mark that Prieto had a drinking problem which affected his work and that both he and Mark agreed that a severance of the

(Footnote 101 Continued)

in his Post-Hearing Brief at p. 122) that requesting Alvarez to vacate the premises after being allowed to remain there for this long a period was discriminatory under the Act. It may have been unwise to evict a worker who was still on workers' compensation, but such action in the context of this case does not prove that it was done to retaliate against him for his supposed pro-Union associations.



employment relationship would be in the mutual interest of both sides.[102]

XV. The Allegations of Unlawful Evictions

A. The Facts

Richard testified that Company housing was available to employees that had worked for him for several years and were currently on a job. There was no charge for rent, electricity or water; the employee paid the gas. According to Richard, once that job was over and it didn't look as if there were any more work for that employee for a month or two, the employee would be asked to vacate the premises if he/she had not already left.[103] (XVI: 9-12)

Both Rochas lived in the same Company house on Road 176 during 1984. Ismael, Santos, and Orozco lived in a remodeled

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[102]The General Counsel argues that Mark's testimony should be discredited because Company records show that Prieto did not have to be sent home at least once a week because he was intoxicated. (G.C.'s Post Hearing Brief, p. 120). A fair reading of the record shows that Mark was saying that Prieto showed up for work either intoxicated or with a hangover once a week. And I do not read the record to reflect that Mark told Prieto to go home each and every week since February of 1984. (XV: 89) Furthermore, just because Mark may have requested Prieto to go home doesn't mean that he actually did go home, as he could have talked Mark out of it. In fact, there is no record evidence that Prieto actually did go home; only that he was asked to.

[103]Mark testified that the necessity to actually deliver a formal "30 day Notice of Termination" (G.C. 20) had never occurred before as the laid off employee usually left shortly after the event. (XV: 101-110)

garage near the cattle pens. There was also a trailer close by where Salazar and Rodriguez lived and a one room house next to it occupied by Ceballos, Prieto, Alvarez and a Jesus Gonzalez, a nephew of Ceballos. (Ill: 52-53, 62-63, 101-102)

Mark testified that the Company became concerned when the employees living in the cattle pen area would have parties and make noise because the cattle would get scared and break out of the pens. There was an especially serious incident one evening when the workers gathered to celebrate "Cinco de Mayo" day. Haiden Decker, a cowboy who lived in Company housing close to the pens and within 100 feet of the house, trailer, and garage area, testified that around 11:00 at night he heard several gun shots, went outside to investigate and observed 12-15 people having a party at the house closest to him and one of those persons shooting a gun. This house was only about 50 feet from the pens where the cattle were, and the next morning Decker found about 100 feet of fence torn and several of the cattle outside of their pens. (XII: 110-113, 116-118)

Richard testified that when he heard about what had happened at the cattle pins, he told Mark to exercise more control; and when it happened again, he decided to move the workers out of that area to other Company housing further

away.[104] (XVI: 12-14) That decision was made a short time after the cattle incident, but the notice to vacate the premises wasn't served until around August 9. (Resp's 2) The workers were ultimately moved around August 27 or 28 (the same day that Ismael, Salazar, and Rodriguez were laid off) to a house on Road 184 and Avenue 112. The same rental arrangements prevailed as before, and the Company provided a pickup to haul the workers' furniture over to the new house. (I: 118-120; XV: 24-32, 202-203; III: 87-88)

None of the laid off workers were told to immediately vacate those premises, only that they could not continue to occupy Company housing for an unlimited period of time. This included Ismael, Santos, Salazar, Rodriguez, and Juan. In fact, they were not asked to leave until October 3 (plus 30 days) and Juan's was later extended (when he had not yet left) to mid-December. (G.C. 20) (III: 88-89, 121-122; V: 116; VI: 124-126; XV: 62, 67-69: XVI: 9-10) In fact, according to Mark, Ismael,[105] Santos, Salazar, and Juan did not finally vacate the premises until around the end of January. (XV: 101-110)

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[104] Richard testified that there had been some prior incidents at the cattle pens, one involving Porfirio Barajas somewhere between 1978 and 1980 and the other one involving Lupe Carvajal in the same period. (XVI: 46-47). Mark testified that there was an incident a short time before the Cinco de Mayo party and another one a short time later involving the collision of two motorcycles not far from the pens. In the latter incident, the cattle broke an inside gate but did not get outside the pens. (XV: 164-166)

[105] Ismael testified he was never asked to leave and only chose to do so on his own. (III: 88-89, 121-122)

A somewhat similar situation came to pass with respect to Ceballos, Orozco, Estrella, and Alvarez. They were not formally asked to vacate until mid-January, 1985.[106] (G.C. 20) Earl and Mark testified that they asked Ceballos and Orozco to vacate the premises as they had another group, Ismael Toledo and his family, they wanted to move in there. Earl testified that Toledo's family had shared the trailer with another person, Jesus Alvarado, that the living accommodations were too small for this size group, and that in October or November, he learned that Toledo and Alvarado had had a falling out. It was then that he decided to move the Toledos to the Ceballos/Orozco house. As to why he chose not to move just Alvarado to the Ceballos house, Earl testified that he wanted Alvarado to remain in the cattle area where he worked and was established. (XII: 65-69)

B. Analysis and Conclusions of Law

Respondent was able to show that it had a policy that employees would be asked to vacate Company housing when there was no longer any work for them and that it applied this policy in a reasonable manner to the alleged discriminatees giving them more than enough time to make other arrangements for housing. After

[106] According to Earl, Ceballos, Orozco, and Alvarez agreed to move earlier. However, several weeks later, on December 20, as they had not done so, Mark presented them plus Jose Estrella with an eviction notice giving them 30 days to vacate the premises. (G.C. 20) (I: 8-9) Alvarez, as has been mentioned, apparently left for Mexico before the expiration of the 30 days. (XV: 85-86)

all, Respondent, in the absence of any past practice to such effect, was not expected to allow laid off employees to remain in Company housing indefinitely.

It is also worthy of note that in none of the cases of any of the individuals alleged to have been unlawfully evicted have I found that they were unlawfully discriminated against in violation of sections 1153(a) and (c) of the Act. Thus, while I agree that Company provided housing was a term and condition of employment, I cannot infer, as General Counsel would have me, that the evictions were discriminatory on the basis that they stemmed from the alleged unlawful layoffs. (See G.C.'s Post Hearing Brief, p. 123-124)

The General Counsel also argues that Respondent could have eliminated the need to evict Ceballos and Orozco by leaving the Toledos where they were living and just moving Alvarado. The General Counsel suggests that there was no need to move the Toledo family into as large a living quarters as the vacated house. (G.C.'s Post Hearing Brief, p. 125). But the decision of which employees were going to be moved to which Company housing is, in the absence of discrimination, exactly the kind of decision management is allowed to make at its own discretion.

In my view, the General Counsel has not made out the requisite showing of discrimination here,[107] and I recommend that the allegations concerning unlawful evictions be dismissed.

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[107]The General Counsel did not show that Company supporters who were laid off were allowed to remain in Company housing for indefinite

XVI. REMEDY

Having found that Respondent violated sections 1153(a) and (c) of the Act by laying off Jose Garcia and refusing to rehire Jose Garcia and Manuel Montanez and by making threats and interrogating its employees, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

I recommend the dismissal of those portions of the Complaint in which the Respondent has been found not to have violated the Act. I recommend the dismissal of the allegation that Respondent violated the Act by promising to provide medical insurance if its employees did not bring in the Union on which little or no evidence was presented.

Upon the basis of the entire record, the findings of fact, and the conclusions of law, I hereby issue the following recommended:

(Footnote 107 Continued)

periods of time in contrast to the conditions imposed on Union supporters. The only evidence of supposed disparate treatment General Counsel could adduce was testimony that Company supporter Jesus Robledo was injured in mid-September, 1984, was off work for about a month, and was permitted to live in Company housing during that time even though he wasn't working. (I: 96) But Union supporters were allowed to stay on the property following their layoffs (or injuries in the case of Alvarez) at least that long. In any event, the Robledo case speaks to injured workers and says nothing about the availability or lack thereof of Company housing to laid off employees.

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ORDER

Pursuant to Labor Code section 1160.3, Respondent, E. W. Merritt Farms, its partners, officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the United Farm Workers of America or any labor organization by unlawfully discharging, laying off, refusing to rehire, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any terms or conditions of employment, except as authorized by section 1153(c) of the Act.

(b) Interrogating any agricultural employees about their union activities or sympathies.

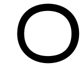
(c) Threatening any agricultural employee with loss of employment or any other change in terms and conditions of employment because he or she has engaged in union activity protected by section 1152 of the Act.

(d) Restraining its agricultural employees from speaking with Union supporters.

(e) 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 Jose Garcia and Manuel Montanez full reinstatement to their former of substantially equivalent



positions without prejudice to their seniority or other employment rights and privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of Jose Garcia's layoff and refusal to be rehired and Manual Montanez' refusal to be rehired.

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

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purposes set forth in this Order.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this Order, to all agricultural employees in its employ between July 25, 1984 and July 25, 1985.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 days, in conspicuous places on its property, the exact 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.

(f) Arrange for a representative 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 places(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 piece-rate employees in order to compensate them for time lost at the reading and question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

Dated: March 20, 1987

MARVIN J. BRENWER
Administrative Law Judge

NOTICE TO EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, E. W. Merritt Farms, 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 laying off Jose Garcia and refusing to rehire Jose Garcia and Manuel Montanez. 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, which restrains or coerces you or any other farm worker to do, or to refrain from doing, any of the things listed above.
WE WILL NOT interrogate our employees about their union activities or sympathies .
WE WILL NOT threaten our employees with loss of employment or any other change in terms and conditions of employment because he or she has engaged in union activity.
WE WILL NOT restrain our employees from speaking with Union supporters.
WE WILL NOT discriminate against, or suspend or discharge any agricultural worker in violation of the Act.
WE WILL offer Jose Garcia and Manuel Montanez reinstatement to their former or substantially equivalent jobs without prejudice to their seniority and other rights or privileges of employment, as though they had not been laid off or denied rehire.

Dated: E. W. MERRITT FARMS

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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)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