Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

T. T. MIYASAKA, INC., Respondent, and ANTONIO ROMO, Charging Party.	Case Nos. 89-CE-19-SAL 89-CE-19-1-SAL 89-CE-19-2-SAL 16 ALRB No. 16

DECISION AND ORDER

On October 23, 1990, Administrative Law Judge (ALJ) Barbara Moore issued the attached Decision in this matter. Thereafter, General Counsel timely filed exceptions to the ALJ's Decision along with a supporting brief, and Respondent filed a reply brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions. Accordingly, the Board will dismiss the complaint herein.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby

orders that the complaint herein be, and it hereby is, dismissed

DATED: December 20, 1990

BRUCE J. JANIGIAN, Chairman[1/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[1/]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.

CASE SUMMARY

T. T. Miyasaka, Inc.
(Antonio Romo)

16 ALRB No. 16
Case Nos. 89-CE-19 SAL
89-CE-19-1-SAL
89-CE-19-2-SAL

ALJ Decision

The complaint alleged that the Employer refused to rehire the Romo family for the 1989 strawberry harvesting season because Antonio Romo had engaged in protected concerted activities the previous season. The ALJ found no causal connection between the concerted activities she credited (complaining about late lunches and the absence of drinking cups in the fields during the 1988 harvest season, and supporting his son's effort to file a worker's compensation claim in July 1988) and the Employer's subsequent refusal to rehire the family. The ALJ found that the family was denied rehire for poor work habits and attitudes. She therefore recommended dismissal of the complaint.

Board Decision

The Board adopted the findings, conclusions and recommendations of the ALJ, and dismissed the complaint in its entirety.

* * *

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

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STATE OF CALIFORNIA AGRICULTURAL LABOR

RELATIONS BOARD

In the Matter of:	)	
	)	
T. T. MIYASAKA, INC.,	) Case Nos. 89-E-19-SAL	
	)	89-CE-19-1-SAL
	)	89-CE-19-2-SAL
Respondent	)	
and	)	
	)	
ANTONIO ROMO,	)	
	)	
Charging Party.	)	

Appearances:

William Lenkeit
Salinas Regional Office
Salinas, California
for the General Counsel

Andrew Church, Esq.
Abramson, Church & Stave
Salinas, California
for the Respondent

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge:

This case arises from a complaint[1] based on three, charges filed with the Agricultural Labor Relations Board (hereafter "ALRB" or "Board") by Mr. Antonio Romo against T.T. Miyasaka, Inc. (hereafter "Respondent," "Miyasaka," or "Company"), alleging that the Company refused to rehire Romo and his family because he engaged in protected concerted activity. All documents were timely filed and properly served, and the matter proceeded to hearing before me in Salinas, California, on May 1 and 2, 1990.

General Counsel and Respondent were represented by counsel. All parties were afforded full opportunity to participate in the hearing, and both General Counsel and Respondent filed post-hearing briefs.

Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments of the parties, I make the following findings of fact and conclusions of law.

I. JURISDICTION

Respondent is an agricultural employer, and the alleged discriminatees are agricultural employees within the meaning of sections 1140.4 (c) and 1140.4 (b), respectively, of the

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[1]General Counsel's Exhibit 1-D. Hereafter, General Counsel's exhibits will be identified as "GCX number." No other party introduced any exhibits.

[2]All references to the official hearing transcript will be cited as "volume: page."

Agricultural Labor Relations Act (hereafter "Act" or "ALRA").[3] The following persons are supervisors within the meaning of section 1140.4 (j) of the Act: T.T. Miyasaka, Ray Kusamoto, Alberto Penilla, Jose Luis Renteria and Jose Campos.

II. THE ALLEGED UNFAIR LABOR PRACTICES

General Counsel alleges that Mr. Romo and his family were denied rehire at the beginning of Respondent's 1989 [4] season because Antonio[5] had supported his son Agustin's effort to file a worker's compensation claim in July 1988 and, that same season, had complained about certain working conditions.

Respondent admits it refused to rehire the Romo family, but denies that it was for those reasons; however, its asserted reasons have varied. They will be discussed infra.

III. COMPANY OPERATIONS

Respondent grows and harvests strawberries for another Miyasaka enterprise, Well Pict, Inc., (hereafter "Well Pict") which then ships the strawberries. Alberto Penilla supervises the ten crew foremen at Miyasaka. Ray Kusamoto is in charge of quality control for both Respondent and Well Pict. Quality was of paramount importance to Mr. Miyasaka; consequently, twice every day, Well Pict sent its quality control officers to Respondent's fields to check the work. (II:4.)

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

[4]All dates herein are 1989 unless otherwise specified.

[5]Henceforth, for simplicity's sake, I will use the given name of each member of the Romo family.

There was no written disciplinary system at Miyasaka. Although the Company did not have a strict seniority system, its practice was to hire workers who had previously worked there.

IV. THE ROMP FAMILY'S WORK HISTORY.

The family had a long-term work history with Respondent. Antonio started work in 1965 and, from 1974 through 1988, worked there every season. His son Agustin worked from 1974 until July 20, 1988, when he was injured on the job. Another son, Ramiro, worked there every season from 1984 until the end of the 1988 season. (I:77.) Irene, Antonio's daughter, also worked at the Company, but her work history was not described.

The family always worked as a unit. They worked for the following foremen: in 1986, Manuel Molina; in 1987, Jose Luis Renteria; and in 1988, Jose ("Pepe") Campos. They worked through the end of the 1988 picking season[6] but were not rehired when they applied for work the following season.

V. THE APPLICATION FOR WORK AND REFUSAL TO REH1RE.

At the beginning of the 1989 season, in approximately the first week of April, Antonio and various members of his family applied for work with Respondent. Early on, Ramiro spoke to Penilla who said he was not in charge of crew assignments and they should talk to each foreman. (I:80-81.) I credit Ramiro's

[6]At the Prehearing Conference, Respondent contended that the family had left early without finishing the season, and both Penilla and Campos so testified. Subsequently, however, Respondent acknowledged that the family had completed the season.

testimony that since he began work at Miyasaka in 1984, Penilla had always assigned the family to a crew.

The family sought work from their foremen for the immediately preceding three years as well as five other foremen. Molina agreed to hire them, but when they appeared for work, he said he did not have instructions to hire anyone and could not let them work. They protested, but he simply repeated he could not hire anyone without orders.

Various other foremen told them they could not be hired without Penilla's approval. When they spoke to Penilla a second time, he was irritated and told them, "I told you not to look me up. I don't want to see you." (I:86.)

Ultimately, according to Antonio and Ramiro, Foreman Campos told them that Penilla had said if it were up to him, he would hire the family but that there were orders from "the boss."[7] (I:50-51;88-89.) Thereupon, Antonio went to speak to

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[7]This conflicts with Penilla's testimony that he made the decision not to rehire the family. The evidence as to when the decision was made is also conflicting. Penilla testified he made his decision in 1989. (I:15.) His declaration of May 24, 1989, (GCX 1) is internally inconsistent and both contradicts and corroborates his testimony. On page 2, he seems to say he told Campos in approximately July or August 1988, when Antonio asked for work for "another daughter," not to rehire Antonio. On page 3, he declared it was not until the end of 1988 that he made the decision. On page 4, he stated that when the family applied for rehire in 1989, he advised the foremen not to rehire them. Campos' testimony at one point suggests he was told not to rehire them at the end of the 1988 season. (I:40-41.) I find that Penilla made the decision, but the evidence as to timing is inconclusive. There is no more reason to rely on one statement rather than another. Any of the times stated is logical, and it is even plausible that Penilla considered the decision more than once. I decline to draw an adverse inference because I do not believe they were being evasive but were simply imprecise, and

Mr. Miyasaka, but the secretary told him Miyasaka was not there.

Antonio was leaving when a co-worker told him that Miyasaka was upstairs. Antonio returned to the office and confronted the secretary. He insisted on speaking to Miyasaka, so she went upstairs and returned with the message that Miyasaka did not want to speak with him. (I: 51-52;88.) At that point, Antonio went to the ALRB Salinas office and filed the instant charges. VI. RESPONDENT'S REASONS FOR REFUSING TO HIRE THE ROMPS.

As noted previously, Respondent's asserted reasons for not rehiring the Romo family have not been consistent. At the Prehearing Conference, it cited:

1. Absenteeism;

2. Problems with the quantity and quality of work;

3. Leaving work prior to the end of the 1988 (and possibly 1987) season(s);

4. No work was available.

Later, Respondent admitted that the family had not failed to complete the season(s) and that their absenteeism was no worse than that of other employees, but contended the family was chronically late. The only evidence produced on this point was Penilla's very general statement that they were "always late."

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the discrepancies were not pursued.

[8]In any event, Penilla testified that his decision not to rehire the family was not based on their asserted failure to finish the season.

None of their immediate foremen testified they were late, nor is there any evidence they so informed Penilla or that Penilla had any personal knowledge of their attendance. Therefore, I do not credit Penilla.

As to the assertion that there was no work available when the Romos applied, only two[9] of the eight foremen with whom the Romos spoke said they could not hire them for this reason. Further, Penilla never gave lack of work as a reason for his decision. Moreover, Respondent's payroll records for the weeks ending April 8 and April 15, 1989,[10] show a substantial increase in the number of workers.[11]

The final reason asserted by Respondent is that the quality and quantity of the family's work was unacceptable. Mr. Penilla testified that since 1986 he had to move the family to a new crew each year because the foremen did not want them because of the poor quality of their work and because Antonio was difficult to supervise because he would not follow orders.[12]

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[9] Jose Luis Renteria and Adrian Lopez.

[10] GCX 4 and 5 respectively.

[11] Exclusive of individuals whose rate of pay is comparable to, or greater than, that of crew foremen, payroll records show that for the week of April 8, Respondent had 137 employees, which increased to 154 employees in the week of April 15.

[12] Penilla identified Humberto Gonzalez (also known as Humberto Lopez), Jose Renteria and Jose Campos as the foremen who complained. (1:6.) Penilla at one point stated that the family worked for Gonzalez in 1986; but Respondent acknowledges that they worked for Manuel Molina that year. (Respondent's Brief, pp.2-3.) It will be recalled that Molina offered the family work when they returned in 1989.

(I:6, 14-15.) According to Penilla, the foremen complained to him probably once or twice per week; so much so that he personally told the family they had to improve. (I:16.)

Foreman Campos testified that in the 4 or 5 seasons that the Romos worked for him, they "always" failed to meet the required standards of quality and that Antonio would "complain a lot" about being given directions. (I:36-39.) He stated he corrected them virtually every day, and their performance would improve for a few hours but then lapse again. Sometimes he was so frustrated by their behavior, he said, that he did not bother to correct them but simply complained to Penilla in an effort to have them removed from his crew. (I:37.)

Foreman Renteria at first corroborated that Antonio did not follow direction well but later admitted that generally the family did follow his direction. (II:9.) He did condemn the quality of the work performed by Antonio and his daughter saying they "picked bad strawberries" and packed improperly. According to him, their poor work occurred every day, and he warned them about it at least once a week for the entire season. (I:9, 11-13.)-

Antonio, Agustin and Ramiro each denied that they were warned about the quality of their picking to any greater extent than were other workers. (I:52-53, 57-58, 63, 68-69, 74, 78, 90.) Two worker witnesses called by Respondent, Jose Mendoza and Hipolito Hernandez, testified only that the Romos were warned about the quality of their work about the same as the rest of the

workers. (I:18, 24.) Since these workers were called by Respondent and have no apparent reason to testify favorably for the Romos and incur the potential disfavor of their employer, I accord their testimony significant weight.

In view of the foregoing and Respondent's insistence on a high quality product, I do not credit the testimony of Renteria and Campos that the Romos almost constantly did poor work. Quality control inspectors from Well Pict came to the fields twice a day to ensure the product was up to its standards. Even if Campos and Renteria were inclined to tolerate poor performance by the Romos because Antonio was difficult to direct or because it was too much trouble to keep correcting them, I find it unlikely they would be able to do so in view of the inspectors.

Renteria also testified that when he gave the family direction, Antonio would become "kind of aggressive." (II:9.) His demeanor indicated that he meant Antonio was "a little" or "somewhat" rather than "very" aggressive.

This characterization is consistent with Mendoza's testimony that he never saw Antonio get upset or angry with Renteria. (II:18.) It is also consistent with Antonio's conduct regarding both the issue of rehire and his son's workers' compensation claim. In each instance, his immediate response was to confront the situation. He was direct and insistent, but not angry or combative.

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[13]See below for a description of the workers' compensation issue.

Based on the foregoing, I credit Campps and Renteria to the extent that Antonio was an assertive person who did not always follow direction and was inclined to do things his own way. I do not find any evidence, including their testimony, however, which indicates that he was insubordinate or a discipline problem.

Having examined the reasons asserted by Respondent for not rehiring the Romos, I turn now to the concerted activity which General Counsel contends was the true basis for the Company's refusal to rehire the family. VII. ANTONIO'S CONCERTED ACTIVITY.

a. Complaints about working conditions.

The Romos worked in Jose Campos' crew for four or five years including 1988. Antonio testified that during the 1988 season, at the request of fellow workers, he complained to Campos that there were no cups for drinking water, that the bathroom was dirty and had no toilet paper and that the workers.were not getting lunch on time. (I:55.)

He did not testify what, if any, response Campos made to his complaints. Nor is there any evidence he told Campos he was speaking on behalf of other workers as well as himself.

Campos denied that Antonio ever made such complaints. He testified he always made sure the crew had lunch no more than a minute or two late, and he insisted he always had two or three tanks of drinking water and was always well-supplied with drinking cups and toilet paper. (I:34-36.)

Polito Hernandez Campos,[14] a co-worker with the Romos in Campos' crew in 1988, was called by Respondent. He testified he never heard the Romos complain about lunch being late and that, so far as he knew, there was always toilet paper in the bathroom and that drinking cups and water were always available. (II:24.)

Although Antonio did not testify that he made complaints other than to Campos, Renteria testified that the Romos[15] complained about the lack of drinking cups on one occasion whereupon Renteria contacted his supervisor who immediately brought additional cups. (I:10.) He denied the Romos told him they were complaining on behalf of other workers.

Renteria never specifically answered whether Antonio complained about late lunches. Instead, he simply explained that sometimes the crew would vote to have lunch late in order to finish picking the "block" in which it was working before quitting. (II:9-10.)

Respondent called Jose Mendoza, who worked with the Romos[16] in Renteria's crew, and he acknowledged that "at times" he heard the Romos complain about lunch periods being late. He

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[14] Mr. Hernandez is distantly related to foreman Jose Campos, I found Mr. Hernandez a credible witness and have no reason to conclude that the relationship rendered his testimony biased.

[15]The questions to Renteria were phrased in terms of "the Romos." Absent more specific testimony, I do not take his responses to mean that all of them complained, and there is no way to be sure who did although probably it was Antonio since he was usually the one who spoke up about things.

[16]See footnote 15, supra.

testified he never heard the family complain about a lack of toilet paper or drinking cups and was never aware of any shortage of toilet paper. (II:18.)

Based on the foregoing, I find that Antonio complained to Renteria about late lunch on one or more occasions and about drinking cups on one occasion. The fact that Mendoza and Hernandez were not aware of the alleged problems or complaints does not, of course, establish that these events never happened. However, I do not credit Antonio's testimony as to the other asserted complaints including his testimony that he spoke to other workers who authorized him to make such complaints.

The fact that he never told General Counsel about these alleged incidents throughout the entire time the charges were being investigated and other preparations for trial, including the Prehearing Conference, were being made causes me to believe they were manufactured at the last minute. The cursory and conclusionary nature of his testimony reinforces that belief.

b. Agustin's Workers' Compensation Claim.

As noted earlier, Agustin was injured on the job in July 1988. His doctor gave him a form to be signed by Respondent which he brought to the Company office. Ms. Jolene Russo, the payroll clerk for both Respondent and Well Pict, instructed him to take it to Mr. Penilla. He did so, but Mr. Penilla told him he should take the form back to the office. He protested that Ms. Russo had just sent him there and asked Penilla if he would take the form to her and get it signed.

Penilla responded that Agustin should do it, that he (Penilla) was not the one who was ill. (I:71.) Agustin followed Penilla to try to continue talking to him, but Penilla got in his truck and left. (I:71-72.)

Agustin returned to the office and complained to Ms. Russo about being sent back and forth. He again asked her to sign the form, but she told him he was supposed to use a group insurance form. (I:72.) Agustin then asked if Mr. Miyasaka were there. He did not testify what, if any, response Ms. Russo made, but he left the form with her and went home upset because the situation had not been taken care of. (Id.)

He told his father what had happened, and his father went to see Penilla who said he did not know anything about the matter and not to bother him. (I:55-56.) Thereafter, Antonio and Agustin went to the office because Antonio expected Mr. Miyasaka would resolve the matter since he had been helpful to Antonio on other matters in the past.

They spoke to Ms. Russo who said the form had not been signed, that she did not think anyone was going to sign it, and that, if Antonio wanted to, he should fill out the group insurance form. (I:73.) They asked to speak to Mr. Miyasaka, but he was not there. So, they left.

The testimony of Antonio and Agustin is uncontradicted because Respondent did not call anyone to testify on this subject. I have no reason to doubt the Romos'account, and, accordingly, I credit their testimony.

ANALYSIS AND CONCLUSIONS

Generally, in order to prove a discriminatory refusal to rehire, the General Counsel must establish that: (1) the alleged discriminatee engaged in protected concerted activity, (2) Respondent knew of the activity, (3) the discriminatee applied for work at a time when work was available and (4) Respondent refused to hire the discriminatee because of her (his) protected activity. (Lawrence Scarrone (1981) 7 ALRB No.13; Prohoroff Poultry Farms (1979) 5 ALRB No.9.) Once General Counsel has established a prima facie case, Respondent has the burden of showing that its refusal to rehire was not for prohibited reasons.

I have found that Antonio and his family applied for rehire, that work was available, and they were refused rehire. I conclude that the refusal was not based on Antonio's complaints regarding lunch and drinking cups. There is no evidence Renteria was upset by them, and the family was hired the season after the complaints and worked that entire season. I find no causal connection.

Turning to the allegation that the family was not rehired because Antonio and Agustin pressed Agustin's workers' compensation claim, Respondent's argument that this Board has no jurisdiction misses the mark. The ALRB is not adjudicating Agustin's rights under workers' compensation law but his right under the ALRA to engage in concerted activity--an entirely different statutory scheme--and is not precluded from doing so by

section 132(a). The cases cited by Respondent are inapposite.

Respondent's second argument, that their actions were not concerted activity, is worthy of examination in view of the narrower interpretation of this term developed by the National Labor Relations Board (hereafter "NLRB" or "national board") in Meyers Industries, Inc. (hereafter Meyers II), adopted by this 18 Board in Gourmet Farms, Inc. In Meyers II, the NLRB reaffirmed an earlier decision[19] wherein it overturned the Alleluia Cushion Co., Inc. (hereafter Alleluia)[20] line of cases which had expanded the circumstances under which actions by individual employees would be considered concerted.

Following Meyers II, the NLRB reversed its previous position and, under current law, the filing of a workers' compensation claim by an individual is not concerted activity. (American Commercial Lines, Inc. et al. (hereafter ACL) (1988) 291 NLRB No. 143.) There is no doubt that had Agustin alone presented his claim he would not have been engaged in concerted activity,[21] and his discharge on that ground would not be

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[17](1986) 281 NLRB 882, enf'd. sub nom Prill v. NLRB (B.C. Cir. 1987) 835 F.2d 1481 [127 LKRM 2415], cert. den. (1988) 487 U.S. 1205 [128 LRRM 2664].

[18](1984) 10 ALRB No. 41.

[19]Meyers Industries, Inc. (hereafter Meyers I) (1984) 268 NLRB 493, remanded subnom Prill v. NLRB (D.C. Cir. 1985) 755 F. 2d 941, cert. den. (1985) 106 S.Ct. 313.

[20](1975) 221 NLRB 999.

[21]There is no question but that, if concerted, it is protected activity because it undeniably relates to working conditions. The sole basis for the new NLRB rule is the change

prohibited by the ALRA. But he did not act alone, and it is his father's intervention which raises the interesting question.

It has long been the law that one or more employees who act to support a single co-employee in a matter which affects only the latter may nonetheless be engaged in concerted activity. For example, in Advance Carbon Products, Inc.,[22] an employee was engaged in concerted activity when he supported a fellow worker in the latter's racial discrimination claim. See also, YMCA of the Pikes Peak Region, Inc. (1988) 291 NLRB No. 141 (concerted activity found where one worker helped another protest his discharge; and Spartan Business Equipment, Inc. (1985) 274 NLRB No. 1487 (concerted activity where two employees protested separately, and, on one occasion jointly, that one of them was entitled to mileage reimbursement).

Thus, unless the familial relationship changes this rule, Antonio and Agustin were engaged in concerted activity. There is some legal authority that the relationship makes a difference. The issue is important because in California agriculture it is common for families to work together.

In Nash-DeCamp Co. v. Agricultural Labor Relations Board (hereafter Nash) (1983) 146 C.A.3d 92, the California Court of Appeal reversed this Board's decision which had held that a

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regarding individual employees' conduct wrought by Meyers II.

[22](1972) 198 NLRB 741 [81 LRRM 1418], enf'd. (9th Cir. 1974) 489 F.2d 732 [85 LRRM 2384].

[23]Nash-DeCamp Company (1982) 8 ALRB No. 5.

husband's complaint to his foreman that he and his wife had been underpaid, as well as his discussion with his wife in the foreman's presence about the foreman's refusal to correct the error, were concerted activity. The Court's decision, however, is internally inconsistent. At various points, it characterizes the employee, Mr. Alvarado, as acting on behalf of both himself and his wife, while at other times it views him as acting alone.[24]

These inconsistencies make it impossible to clearly distinguish dicta from holding although the Court's basic sentiment is clear. It characterized Alvarado's complaint as "personal" and stated that "the mere addition of his wife...did not change the personal character of his effort." (p.lll) Consequently, it found no concerted activity.

The Court relied entirely on Court of Appeal decisions and did not acknowledge that the NLRB has declined to follow the course set by various courts whose decisions contain language relied on by the Nash court.

For example, in Blaw-Knox Foundry & Mill Machinery, Inc. (hereafter Blaw-Knox),[25] the NLRB found concerted activity where an employee complained to a supervisor on behalf of his

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[24]For example, the Court stated, "[w]e proceed on the basis that Alvarado was acting only on behalf of himself and his wife." (p.107.) Elsewhere, it refers to Alvarado raising his wife's claim only "incidentally" and, at another point, characterized him as speaking "again in the singular." (pp. 107 and 111, respectively.)

[25](1980) 247 NLRB 333.

cousin, also an employee, who had complained to him that the supervisor had sexually harassed her. The NLRB rejected the employer's argument that it was not concerted activity and characterized the argument as reflecting "confusion over the potential immaterial effect of what may be personal motivation of employees for engaging in concerted activity, e.g. familial relationship." (p.348.)

On appeal, the Fourth Circuit Court of Appeal, in language similar to that in Nash, found no concerted activity and ruled the employee's actions were purely personal. Subsequently, in the case of Independent Stations Co. (hereafter Independent) (1987) 284 NLRB 394, which, was decided after Meyers II, the full NLRB upheld the Administrative Law Judge's (ALJ's) decision wherein the ALJ relied on Blaw-Knox and noted the NLRB's refusal

to adhere to the"Fourth Circuit's viev in subsequent cases.

In Greenwood Trucking, Inc. (1987) 283 NLRB 789, the national board found concerted activity where an employee inquired into, and complained about, paychecks issued to him and his wife (also an employee) which bounced. Although the NLRB also characterized the husband's complaint as reflecting a matter of "joint and mutual concern to all the drivers" (p.793) because other employees had complained when their paychecks bounced, its language reflects that this was an additional reason for its

[26]In Independent, however, the activity was more clearly concerted than in Nash because the employee complained of favoritism both as it affected his girlfriend and also other employees.

conclusion and it would have found concerted activity even in the absence of the other factor.

Finally, Wells Dairy, Inc. d/b/a Wells Blue Bunny (1987) 287 NLRB 827, although it does not cite Nash, shows the NLRB's disagreement with the approach in Nash. It found concerted activity and opined, "[u]nder the [NLRA], two is always enough, and there is no requirement that those who join in a common expression of concern act in a larger number." (p. 831.)

This Board has not indicated an intent to abandon the NLRB's approach. Therefore, based on the foregoing, I find that Antonio's conversation with Penilla on behalf of Agustin and the complaint they jointly made to Ms. Russo were concerted activity. The mere fact that the objective of both actions was to further a matter which would directly benefit Agustin only is not determinative.

I also find the requisite employer knowledge. In Meyers I, the NLRB decided that the requirement of employer knowledge meant the employer had to know of the concerted nature of the protected activity. Although Meyers II did not reiterate that standard, it is clear that the NLRB was reaffirming its

[27]The NLRB's decision was modified on appeal where the court did not reach the question of concerted activity because it found union activity present. (NLRB v. Wells Dairy, Inc. d/b/a Wells Blue Bunny (8th Cir. 1989) 865 F.2d 175.) The NLRB's prouncement that two is always enough may be overstated to the extent it suggests that the objective is irrelevant. (Joanna Cotton Mills Co. v. NLRB (4th Cir. 1949) 176 F.2d 749. Nonetheless, the various decisions taken together make the general view of the NLRB apparent.

prior decision. Moreover, cases since Meyers II have followed this rule with little discussion.[28] Here, it was clear to Penilla that Antonio was acting on behalf of Agustin-and that the two of them were acting in concert when they jointly complained to Russo.

There remains the question of causal connection. Neither the responses of Penilla and Russo to Antonio and Agustin, nor Mr. Miyasaka's refusal to talk to Antonio are sufficient to satisfy this element. The most that can be said of the former two is that they were less than helpful, and, despite the fact that Mr. Miyasaka had been helpful in the past, there is no evidence that his failure to speak with Antonio meant he was hostile to Agustin's claim. His refusal could have been for any number of reasons.

The timing of Penilla's decision not to rehire is potentialiy significant, although not determinative. But the evidence on that point is contradictory. I have already indicated I do not believe an adverse inference is warranted.

Other factors generally looked to in determining causality are whether the employer had a reason for its adverse action and whether it was communicated to the alleged discriminatee and whether an employer gives inconsistent or

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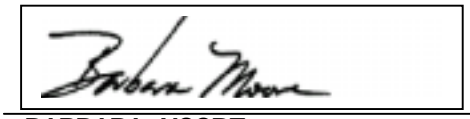
[28]See, for example, JML Transport (1984) 272 NLRB 545; Consumers Power Company (hereafter Consumers Power) (1986) 282 NLRB 131.

shifting reasons for its action.[29] Here, Respondent gave a variety of reasons which it later abandoned. This supports an adverse inference that its true reason was unlawful. The reasons it ultimately relied on were unacceptable work performance and quality of work, and while I did not credit the testimony that Antonio and his daughter constantly performed poor work, I did find that the foremen considered him less than cooperative in following directions.

While this is not a very strong reason, the concerted activity is weak, none of management's responses demonstrates that Agustin's claim was greeted with hostility, and Miyasaka's refusal to see Antonio is of no probative value. Although the shifting reasons are suspicious, based on the entire record, I am simply not persuaded that Antonio, and consequently his family, was denied rehire because he and Agustin pressed Agustin's claim. Accordingly, I recommend the complaint be dismissed.

DATED: October 23, 1990



BARBARA MOORE
Administrative Law Judge

[29]While it is true that an employer may fire an employee for a good reason, a bad reason or no reason, it is also true that experience shows that there is usually some reason. Consequently, the absence of a reason or failure to tell a worker why she was fired can support an inference that the true reason was unlawful. The same logic applies to refusals to rehire.