Huron, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D & H FARMS, A Sole Proprietorship, Respondent , and INDEPENDENT UNION OF AGRICULTURAL WORKERS, #2344 INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, Charging Party.	Case No. 90-CE-26-VI 18 ALRB No. 12 (December 3, 1992)

DECISION AND ORDER

On May 26, 1992, Administrative Law Judge (ALJ) Arie Schoorl issued a decision in which he found that the respondent, D & H Farms, a sole proprietorship (Respondent or D & H), unlawfully discriminated against Marcelino Padilla (Padilla) by refusing to rehire him because his son, Martin Padilla, filed an unfair labor practice charge against Respondent.[1]

Respondent timely filed exceptions to the ALJ's decision, along with a supporting brief, and the General Counsel filed a brief in response. The Agricultural Labor Relations

[1] Section 1153, subdivision (d) of the Agricultural Labor Relations Act (ALRA or Act) makes it unlawful for an agricultural employer "to discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part." The Board has held that it is unlawful to discriminate against a worker because of the protected activity of a relative. (Visalia Citrus Packers (1984) 10 ALRB No. 44; Lightning Farms (1986) 12 ALRB No. 7.) While Respondent excepts to the findings of the ALJ, it does not dispute that the allegations, if true, would constitute a violation of section 1153, subdivision (d).

Board (ALRB or Board) has considered the record and the attached decision of the ALJ in light of the exceptions and briefs filed by the parties and affirms the ALJ's findings of fact, unless otherwise noted, but overrules the finding of a violation. As explained below, the Board finds that the General Counsel failed to establish a prima facie case that the refusal to rehire Padilla was motivated by his son's protected activity.[2]

FACTUAL SUMMARY

Padilla worked for Respondent as a tractor driver, mostly on the night shift, from June or July 1987 until he injured his back on April 11, 1988. Padilla was rehired as a tractor driver on December 2, 1988, but stopped working after 20 to 25 minutes because his back began hurting. Padilla went home and called Foreman Paul Martinez and told him that he could not continue because of his back. Martinez wrote a memo the next day relating that Padilla quit working due to discomfort in his back. At hearing, Martinez testified that Padilla first said that he did not like night work and did not mention his back until the end of their conversation.

[2] Martin Padilla filed his unfair labor practice charge on September 22, 1988, alleging that Respondent laid him off and refused to rehire him because of his support for the United Farm Workers union. In early November of 1989, the parties reached an agreement settling the charge. The terms of the agreement, which was approved by the Regional Director on November 13, 1989, were not made part of the record, except that the agreement did not include any admission of liability.

Ranch Supervisor Joe Halkum, who did the hiring and firing for Respondent, testified that Martinez told him that Padilla quit because he did not like night work and was uncomfortable in the tractor. He insisted that Martinez said nothing about back pain. Halkum testified that he did not rehire Padilla because Padilla's quitting put him in a pinch since it was vital that the work Padilla was assigned be done before the rainy season began. The ALJ found that Padilla stopped working on December 2, 1988, due to recurring back pain and that Martinez and Halkum were aware of that fact.

Padilla testified that/ after receiving further medical treatment, he received another medical release, with a release date of October 5, 1989. He further testified that he delivered the medical release to Respondent's office on October 6. Padilla also stated that he went to Respondent's ranch in late October of 1989, and again later in the winter of 1989-90, seeking to be rehired. Respondent's witnesses did not recall seeing Padilla at the ranch between December 2, 1988 and March 22, 1990, a date on which all agree that Padilla appeared at the ranch seeking to be rehired.[3] Padilla also testified that he made several phone calls to Respondent's office to see

[3] Respondent denies that Padilla provided the medical release dated October 5, 1989 until his appearance on March 22, 1990, relying in part on testimony that the only such release in Padilla's personnel file is one date-stamped March 22, 1990.

if there were any job openings.[4] For the most part, the ALJ credited Padilla's recounting of his attempts to be rehired, including his presentation of a medical release on October 6, 1989.

Padilla testified that on the way home from Respondent's ranch on March 22, 1990, he pulled up at an intersection next to Foreman Jack Shiyomura, who was sitting in his truck. Padilla stated that he asked about work and that Shiyomura replied that Padilla should talk to his son Martin because Martin signed an agreement whereby neither would be rehired. Padilla's brother-in-law testified that he overheard the conversation and essentially corroborated Padilla's rendition. On April 23, 1990, Padilla and his son drove to Shiyomura's house, where Padilla told Shiyomura that Martin had told him the settlement did not include him. According to Padilla, Shiyomura replied that Padilla shouldn't lie and that Martin's agreement prevented Padilla from working for Respondent.

Shiyomura did not recall having any conversation with Padilla at an intersection, but did recall the April 23 conversation at his home. His version is somewhat different in that he denied making a statement that Padilla would not be rehired because he was included in his son's settlement.

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[4] The record reflects that Respondent hired two tractor drivers on October 7, 1989, one on November 20, 1989, and one on December 6, 1989.

Instead, Shiyomura insisted that be merely asked the following questions: "Didn't you work something out with the company? Haven't you talked to your son?" The ALJ credited Padilla as to the existence and content of the two conversations with Shiyomura.

DISCUSSION

To establish a prima facie case of discriminatory failure to rehire, the General Counsel must provide sufficient evidence to show that the affected employee engaged in protected activity[5], that the employer had knowledge of such activity, that the employee applied for work at a time when work was available, and that the adverse action taken against the employee was motivated, at least in part, by the protected activity. (National Labor Relations Board v. Transportation Management Corporation (1983) 462 U.S. 393 [103 S.Ct. 2469];_ Prohoroff Poultry Farms (1979) 5 ALRB No. 9.) Here, as is often true, there is no dispute that the elements of protected activity and knowledge have been met and the case is focussed on the sufficiency of the evidence with regard to unlawful motive.[6]

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[5] In this case, as explained above, the protected activity was not engaged in by the alleged discriminatee, but instead by his son.

[6] As noted above, the ALJ credited Padilla's testimony that he made numerous attempts at being rehired between October 6, 1989 and March 22, 1990. In light of the discussion below, it is not necessary to address Respondent's exceptions to these findings.

In concluding that the General Counsel successfully provided evidence that raised an inference that the failure to rehire Padilla was due to his son's protected activity, the ALJ relied on two findings. First, the ALJ relied on his finding that Respondent was aware that Padilla left the job due to recurring back trouble to conclude that Respondent's claim that Padilla quit because he did not like night work was pretextual. Second, the ALJ credited Padilla's testimony that Shiyomura stated that he was not rehired because he was included in his son's settlement. In the ALJ's view, this established a direct link between the refusal to rehire Padilla and his son's protected activity. For the purpose of resolving this matter, we need only address Respondent's exceptions which relate to the ALJ's conclusion that Respondent's actions toward Padilla were motivated by Martin's protected activity.

Respondent argues that the ALJ erred by concluding that Padilla was rehired on December 2, 1988 only because of a threatening letter from his workers' compensation attorney. While we agree with the ALJ that the threatening letter probably had some effect on Respondent's willingness to rehire Padilla in 1988, we question why Respondent would not have been similarly influenced in 1989 and 1990 if that was its sole motivation in rehiring Padilla in 1988. Since Padilla claims he was reinjured on the job and the ALJ so found, Respondent presumably would have been subject to the same prohibitions against

discrimination due to Padilla's workers' compensation claim. In other words, unlike the ALJ, we view the rehiring in 1988 as evidence that supports Respondent's claim that it harbored no animus against Padilla due to his son's filing of an unfair labor practice charge.

Respondent asserts that the record provides no basis for concluding that Halkum was aware that Padilla left the job due to recurring back pain rather than a general dislike of the work. This is based on Halkum's testimony that Martinez only told him that Padilla was uncomfortable in the tractor and on Martinez' opinion at the hearing that Padilla quit primarily because he did not like night work. We affirm the ALJ's determination that Respondent was aware that Padilla stopped working due to recurring back trouble.[7] Like the ALJ, we put great weight on Martinez' contemporaneous memo which cites only back discomfort as the reason Padilla stopped working. However, as explained below, we do not ascribe great significance to this finding.

In most cases, as the ALJ noted, where it is found that a respondent's purported justification for an adverse action is false, the Board may draw an inference that the justification is pretextual and that the action was instead motivated by unlawful animus. (The Garin Company (1985) 11 ALRB

[7] In so concluding, we do not rely, as did the ALJ, on the drawing of an adverse inference due to Respondent's failure to ask Martinez what he told Halkum.

No. 18; Baird Neece Packing Corp. (1988) 14 ALRB No. 16.) The record in this case, however, does not warrant such an inference.

The finding that Respondent knew that Padilla stopped working due to recurrent back problems does not necessarily mean that Respondent was instead motivated by Martin Padilla's protected activity when it later refused to rehire Padilla. Halkum's testimony concerning the need to have the work completed before rain could delay it indefinitely credibly explains why Respondent was disinclined to rehire Padilla. Thus, we find that Respondent was upset with Padilla for "quitting" the job so soon after his rehire. Respondent's awareness that it was Padilla's back that forced him to stop working does not change the fact that Respondent would be disturbed by the ensuing risk that rain would come before the tractor work could be completed. Therefore, our finding that Padilla did not quit due to a dislike for night work does not warrant an inference that Respondent's claim to the contrary was a pretext to hide an unlawful discriminatory motive.

Lastly, we turn to the other finding upon which the ALJ concluded that an inference of unlawful motive was successfully raised. This involves the comments attributed to Shiyomura linking Padilla with his son's settlement of an unfair labor practice charge. Respondent insists that Shiyomura never stated that Padilla was not rehired because of his son's

settlement. Instead, Respondent argues that Shiyomura's only comment was during the encounter at his house, and that Shiyomura simply asked if Padilla had worked something out with the company.

Even if we assume that Shiyomura made the statements attributed to him by Padilla, it is not clear that they establish a connection between Martin's settlement and the failure to rehire Padilla. The record establishes that the settlement did not include Padilla and, therefore, Shiyomura's statement was not true. There is no evidence in the record explaining the source of Shiyomura's erroneous impression, nor evidence of the circumstances surrounding Martin's unfair labor practice charge or settlement. In addition, there is no evidence that Shiyomura had any authority or input in regard to hiring decisions such that his mistaken perception could have affected Padilla's rehiring. Instead, the record reflects that it was Halkum who made such decisions and there is no evidence that he was motivated by any real or perceived connection to Martin Padilla's protected activity.

Therefore, we are unpersuaded that Shiyomura's comments are of significant value in establishing a connection between the refusal to rehire Padilla and his son's charge and/or settlement. A different result might obtain if the comments more directly reflected animus towards Padilla due to his son's protected activity or if the comments had come from

Halkum.

In sum, we find that the record evidence, including the comments attributed to Shiyomura and Respondent's knowledge that Padilla "quit" on December 2, 1988 due to recurring back pain, is insufficient to establish a prima facie case that the failure to rehire Padilla was in retaliation for the protected activity of his son.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint in Case No. 90-CE-26-VI is DISMISSED.

DATED: December 3, 1992

BRUCE J. JANIGIAN, Chairman[8]

IVONNE RAMOS RICHARDSON, Member

LINDA A. PRICK, Member

[8] 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

D & H FARMS, A Sole Proprietorship
(IUAW, §2344 IBPAT, AFL-CIO)

18 ALRB Ho. 12
Case No. 90-CE-26-VI

Background

This case involves allegations, found meritorious by the ALJ, that D & H Farms, A Sole Proprietorship (Respondent) discriminatorily refused to rehire tractor driver Marcelino Padilla because his son Martin had filed an unfair labor practice charge against Respondent. After receiving a medical release after an earlier back injury, Padilla was rehired on December 2, 1988, which was after the filing of his son's charge on September 22, 1988, but stopped working after 20-25 minutes due to recurring back pain. The instant case involves Respondent's refusal to rehire him after he received a subsequent medical release in October 1989.

The ALJ's Decision

The ALJ credited Padilla's testimony that he stopped working on December 2, 1988 because of his back and rejected Respondent's assertion that Padilla quit because he did not like the work and was uncomfortable in the tractor. The ALJ thus rejected Respondent's assertion that it did not rehire Padilla because he put Respondent in a pinch by quitting at a time when it was critical to finish the work before the rainy season began. Since he found Respondent's proffered justification to be unsupported by the evidence, the ALJ concluded that it was pretextual, and thus raised an inference that the failure to rehire Padilla was motivated by his son's protected activity. The ALJ found that an unlawful motive was also supported by testimony from Padilla that supervisor Jack Shiyomura told him in March and April 1990 that he would not be rehired because he was included in his son's settlement of the unfair labor practice charge. Crediting Padilla's testimony as to numerous attempts to be rehired between October 6, 1989 and March 22, 1990, and finding that Respondent hired some tractor drivers during that time, the ALJ concluded that the General Counsel made the required showing that Padilla applied for work at a time when work was available.

The Board's Decision

The Board reversed the finding of a violation, holding that the evidence was insufficient to establish a prima facie case. First, the Board disagreed with the ALJ that the rehiring of Padilla on December 2, 1988 does not undermine the finding of unlawful animus because the hiring was due only to threats from Padilla's workers' compensation attorney. The Board questioned why Respondent would not have been similarly motivated after Padilla received his second medical release in October 1989. Thus, the Board regarded the rehiring in 1988 as support for

Case Summary: D & H Farms, A Sole Proprietorship Case No.: 90-CE-26-VI

Respondent's claim that it harbored no animus against Padilla due to his son's protected activity.

While the Board agreed with the ALJ that Respondent was aware that Padilla stopped working on December 2, 1988 due to back pain, it did not regard this as sufficient to conclude that Respondent's claim that Padilla quit due to a dislike of night work was a pretext to hide animus based on the protected activity of Padilla's son. In the Board's view, Respondent's awareness of Padilla's back trouble does not change the fact that Respondent would be disturbed with Padilla for his inability to complete his assigned work, thus creating the risk that rain would come before the work was completed.

The Board also did not ascribe much significance to the comments attributed to Shiyomura because they reflect nothing more than an erroneous impression, the source of which is not established in the record. The Board also relied on the fact that there was no evidence that Shiyomura had any authority or input into hiring decisions such that his mistaken perception could have affected Padilla's rehiring. The record reflected no such comments or perceptions on the part of the individual who did make the hiring decisions.

Having concluded that the evidence presented was insufficient to warrant an inference that the failure to rehire Padilla was due to animus based on the protected activity of his son, the Board found that the General Counsel failed to establish a prima facie case.

* * *

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: D & H FARMS, a Sole Proprietorship, Respondent, and INDEPENDENT UNION OF AGRICULTURAL WORKERS, #2344, INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, Charging Party.	)	Case No. 90-CE-26-VI

Appearances:

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Before: Arie Schoorl
Administrative Law Judge

May 26, 1992

DECISION OF ADMINISTRATIVE LAW JUDGE

This case was heard before me on March 10 and 11, 1992, in Visalia, California. The complaint issued on August 1, 1991, based on a charge (90-CE-26-VI) filed by the Independent Union of Agricultural Workers #2344, International Brotherhood of Painters and Allied Trades, AFL-CIO (hereinafter called the IUAW) and duly served on D & H Farms, a sole proprietorship, (hereinafter called the Respondent) on April 2, 1990, alleging that Respondent had committed a violation of the Agricultural Labor Relations Act (hereinafter called the Act). Respondent filed an answer on August 12, 1991, denying any such violation.

The General Counsel and Respondent were represented at the hearing; the Charging Party was not. General Counsel and Respondent filed timely briefs after the close of the hearing. Upon the entire record including my observation of the witnesses, and after considering the post-hearing briefs submitted by the General Counsel and the Respondent, I make the following findings of fact.

I. Jurisdiction

Respondent has admitted in its answer and I find that Respondent is an agricultural employer within the meaning of section 1140.4(c) of the Act, that the IUAW is a labor organization within the meaning of section 1140(f) of the Act, and that Marcelino Padilla and Martin Padilla are agricultural employees within the meaning of section 1140.4(b) of the Act.

II. The Alleged Unfair Labor Practice

General Counsel has alleged in the complaint that Respondent has refused to rehire Marcelino Padilla from October 6, 1989, to the present because of his son's, Martin Padilla's, utilization of the processes of the Board, a section 1153(d) violation of the Act.

III. Background

D & H Farms, a sole proprietorship, is an agricultural employer located near Huron, California. During the time Marcelino Padilla worked for Respondent, he operated tractors and caterpillars, preparing the land and beds for onions, lettuce, melons, cotton and tomatoes.

IV. The Alleged Discrimination Because of Martin Padilla's Resort to Board Processes

Marcelino Padilla began to work as a tractor driver for Respondent in June or July 1987. He worked on the night shift in 1987 and 1988 and occasionally on the day shift in 1988. He injured his back on April 11, 1988, in the course of such employment and was disabled from that date until November 4, 1988. On September 22, 1988, his son, Martin Padilla, filed an unfair labor practice charge (88-CE-28-VI) against Respondent with the ALRB alleging that Respondent had discriminatorily laid off and refused to rehire him because of his support of the United Farm Workers union.

On or about October 17, 1988, Respondent received a letter from David Hernandez, an attorney who was handling Marcelino's worker's compensation claim. In the letter,

Mr. Hernandez advised Respondent that it was against the law to discriminate against an injured worker and that a suit might be filed against Respondent with the Workers' Compensation Appeals Board for wrongful termination. Hernandez concluded the letter by informing Respondent that if he did not hear from Respondent within ten days, further action would be taken against Respondent.

On November 4, Padilla returned to Respondent's business office and delivered a medical release from his treating physician. After observing that there was no release date on the form, Joe Halkum, ranch supervisor, telephoned Mr. Hernandez. In response to Halkum's request, Hernandez informed Padilla over the telephone of the need for him to obtain a release date.

Padilla understood the problem and returned on November 8 with the medical release properly dated. He delivered it to the Spanish-speaking secretary in Respondent's office who told him that Respondent would contact him if there was work.

On December 2, 1988, Paul Martinez, Respondent's foreman, contacted Padilla by telephone and informed him of a tractor job opening. Padilla reported to work at 5 o'clock that evening. Halkum and Martinez gave instructions as to the tractor work to be done that night. Martinez drove Padilla to the tractor and testified that Padilla commented to him that he did not like night work. In his testimony Padilla denied

making the remark. After driving the tractor for 20 to 25 minutes, Padilla stopped because his back was hurting. He left work and telephoned Martinez and advised him that he had to quit because the tractor brakes and levers were too hard and his back was hurting so much. Martinez wrote a memo to the effect that Padilla had said he could not continue to drive the tractor due to the discomfort in his back. At the hearing Martinez testified that Padilla at first told him the reason for leaving work was because he did not like night work and then toward the end of the conversation mentioned his back.

According to Halkum's testimony, Martinez informed him that Padilla had quit because he did not like night work and that he felt uncomfortable in the caterpillar. Halkum informed the payroll department in a memo that Padilla had quit but made no mention of back trouble or Padilla's alleged dislike of night work. (See Exhibit 6.)

Halkum testified that Padilla's quitting had put him "in a pinch", as the fields had to be disked before the December rains and thus he decided not to rehire Padilla. Halkum testified that he did not understand whether the discomfort experienced by Padilla was due to his back or the driver's seat. Padilla applied for disability compensation from the Employment Development Department (hereafter referred to as EDD). Padilla testified that the agency had advised him that Respondent had informed them that he had quit.

On February 6, 1989, Sophie, an employee of EDD, telephoned Respondent and left a message for Joe Halkum. Yvonne Pewett, a payroll clerk, in the office noted it down. It read "Seems he quit us because: (1) the tractor was real old (2) we made him work nights (3) it was real foggy and the brakes did not work on the tractor." (See Exhibit 9.). The next day Halkum returned the call. Halkum testified that the questions Sophie had posed and he had answered were reflected in the memo but did not testify to what his answers were.

In March 1989, Padilla returned to Respondent's business office and spoke with Jack Shiyomura, one of Respondent's foremen. Padilla asked Shiyomura why he could not receive unemployment benefits and why Respondent had informed EDD that he had quit. Shiyomura testified that he had told Padilla that Respondent had said no such thing but rather EDD had advised Respondent that it was Padilla who had informed them that he had quit. A couple of days later Padilla returned with the same complaint. Shiyomura suggested that Padilla work something out with EDD.

On October 5, 1989, Padilla received a medical release from his doctor and, on the following day, delivered it to Respondent's office and inquired about employment. The Spanish-speaking secretary[1] told him that she did not know anything about employment but if an opening occurred she would

[1]In his testimony Padilla referred to the Spanish-speaking secretary as such but at times as the Mexican lady.

notify him. She had a photocopy of the release made and gave either the original or the copy to Padilla.

Respondent hired two tractor drivers on October 7, 1989, rehired a tractor driver on November 20, 1989, and hired an additional tractor driver on December 6, 1989.

In the latter part of October 1989, Marcelino and his son, Martin Padilla, were driving back from an errand in the nearby town of Huron when Marcelino suggested that they swing by Respondent's ranch and inquire about tractor work. There they encountered foreman Jack Shiyomura. Marcelino asked Shiyomura whether there was any tractor work available. Shiyomura asked whether Marcelino was still on disability, and the latter responded in the negative and added that he had a letter from his doctor and had already taken it to Respondent's office. Marcelino told Shiyomura that he understood that Respondent was hiring tractor drivers at that time.[2] Shiyomura replied in the affirmative but added that Respondent could not let those new hires go as so to make room for him.[3]

Later in the winter of 1989-90, Marcelino went to Respondent's shop seeking employment. With the permission of a

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[2]Padilla's son, Martin, had learned about the hiring at the EDD office and had passed the information along to his father.

[3]In November 1989 Martin Padilla and Respondent reached an agreement of the former's unfair labor practice charge within which it was stated that the settlement did not constitute an admission by Respondent that it had engaged in any unfair labor practice charges.

Spanish-speaking employee of Respondent's, he was filling one of the tires on his pickup when Joe Halkum arrived.

At Padilla's request, the Spanish-speaking employee asked Halkum in English whether any tractor work was available. Halkum told Padilla through the Spanish-speaking employee that he did not want to see Padilla there again, least of all putting air into his tires. As Padilla was leaving he encountered Respondent's owner Mike Dresick and asked for tractor work. Mike told him to talk to Joe Halkum. Thereupon Padilla left.

Padilla testified that during the winter of 1989-90 he telephoned Respondent's office two or three times to inquire about tractor work. Each time, the Spanish-speaking secretary said that there was no opening in tractor work. In February, Padilla consulted a union official, Armando Martinez, about the difficulty he was having in obtaining employment with Respondent. Martinez advised him to go to Respondent's ranch, with a witness, and ask for tractor work.

On March 22, 1990, accompanied by his son, Arturo Padilla, and his brother-in-law, Antonio Rojas, Marcelino went to Respondent's shop to inquire about employment as a tractor driver. Padilla asked Juan Mendez, a shop employee, to call Paul Martinez on a car radio. Halkum arrived at just that moment and told Mendez not to call anybody. Halkum testified that he ordered Padilla to leave the shop area since it was dangerous and proceed to the office. Mendez testified that he

had his head down concentrating on his welding work and did not notice where Padilla went when he left.

Respondent presented evidence to demonstrate that Padilla went to the office on this March 22 date and delivered a medical release form dated October 5, 1989. Marcelino Padilla and his son-in-law, Antonio Rojas, both testified that Padilla did not go to the office on March 22 and that no one mentioned that Padilla should go to the office. According to their testimony, Halkum told Padilla that he did not want him there and to leave. According to Halkum's testimony he advised Padilla to leave the shop area because it was dangerous and to proceed to the office.[4]

The Padillas and Rojas left and en route home encountered foreman Jack Shiyomura seated in his pickup at an intersection. Padilla seated in his pickup asked Shiyomura about tractor work. Shiyomura replied that Padilla should consult with his son, Martin, and his lawyers because in accordance with his son's agreement in settling his ALRB case neither his son, Martin, nor he, Padilla, could return to work for Respondent. Padilla retorted that he did not know what Shiyomura was talking about. The conversation ended and all left in their respective vehicles.

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[4]A sensible explanation of this conflict in the evidence is that Padilla did go to the office on this date in March 1990 and delivered either the original or the photocopy of the release (whichever one the Spanish speaking secretary gave him on October 6, 1989.)

A few days later Padilla asked Martin whether there was an agreement whereby neither he nor Martin could return to work for Respondent. Martin said that he had only signed for himself and there was nothing in the agreement about his father.

On April 23, Padilla and his son, Arturo, drove to Shiyomura's residence. Padilla explained to Shiyomura that he had talked to his son, Martin, about his son's settlement and Shiyomura's assertion that it ruled out the rehiring of either his son, Martin, or himself. Padilla went on to say that his son denied the existence of such provisions. Shiyomura replied that Martin had lied and those provisions were in the agreement.

In his testimony, Shiyomura denied that the conversation in the intersection took place. He admitted the conversation at his residence but denied that he mentioned anything about Padilla being included in Martin Padilla's settlement agreement. However, he did testify that in response to a question by Padilla about why Respondent would not give him a job, he, Shiyomura answered,* "Didn't you work something out with the company? You haven't talked to your son?"[6]

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[5]RT. II: 11-12.

[6]Rosario Shiyomura testified that she overheard the conversation between her husband Jack Shiyomura and Padilla and her husband only told Padilla to go to the office as he could not help him. In light of Padilla's credible testimony and Shiyomura's admitting in his testimony to a more extensive conversation, I discredit her testimony in this respect.

ANALYSIS AND CONCLUSION

General Counsel alleges that Respondent violated section 1153(d) of the Labor Code by refusing to rehire Marcelino Padilla because his son filed a charge against Respondent with the ALRB. A violation of Labor Code section 1153(d) occurs when an employer discriminates against an employee for resorting to the ALRB for redress. (McCarthy Farming Co. Inc. (1982) 8 ALRB No. 78; Kirschenman Enterprises Inc. (1986) 12 ALRB No. 2.)

In the instant case, the alleged discrimination was not against an employee who had resorted to Board processes but against the employee's father. The Board has held that a violation occurs when an employer retaliated against an activist by discriminating against a relative. (Visalia Citrus Packers (1984) 10 ALRB No. 44.)

In order to establish a prima facie case of discrimination, General Counsel is obliged to demonstrate that the employee, in the instant case the son, Martin Padilla, was engaged in protected activity, utilizing the Board process, that the employer had knowledge of such activity and that there was a causal link between the protected activity and the employer's action. (Lawrence Scarrone (1981) 7 ALRB No. 13.)

Because direct evidence is seldom available to establish such a causal connection, circumstantial evidence must be utilized. For example, the timing of the discharge or

a refusal to rehire and its coincidence with the protected activity can be a critical factor.

The son of the alleged discriminatee engaged in a protected activity when he sought redress from the ALRB. He filed an unfair labor practice charge with the ALRB on September 22, 1988. Respondent had knowledge of such a filing as it was served with a copy thereof.

At first glance it would appear that there was no connection between the timing of the refusal to rehire and the charge Martin filed with the ALRB. The charge was filed on September 22, 1988. Padilla had suffered a work accident on April 11, 1988, and was disabled from that date until November 4, 1988. Respondent rehired Padilla just one month later, thus supporting the inference that Respondent harbored no animus toward Padilla because of his son's actions.

There are, however, other circumstances which undercut that inference. Respondent had received a letter on or about October 16, 1988, from Padilla's worker's compensation lawyer threatening Respondent with legal action if it did not rehire Padilla. It is obvious that such a threat placed substantial pressure on Respondent's ranch superintendent, Joe Halkum, to rehire Padilla for the next tractor driver opening. Taking this pressure into consideration, the fact that Respondent rehired Padilla in December loses much of its inferential value.

Upon returning to work on December 2, 1989, Padilla worked less than an hour, quit because of back discomfort and remained disabled until October 1989.

General Counsel contends that once Padilla recovered, he immediately applied for work on October 6, 1989, and several times thereafter, but each time Respondent failed to rehire him. Foreman Martinez and ranch superintendent Halkum testified that the reason Padilla quit tractor work was because he did not like night work. Halkum testified that because Padilla had quit for such a reason he decided not to rehire him.

However, Padilla credibly testified that he quit work because his back was hurting and he informed Martinez of that fact by telephone that same evening. Moreover, Padilla credibly testified that he did not have an aversion to night work nor did he mention anything about day or night work either to Martinez or Halkum. Furthermore, Martinez wrote a memorandum to the effect that Padilla quit due to back discomfort. There is no mention in the memo about any preference for day or night work. It is interesting to note that during the time that Padilla had previously worked for Respondent he did mostly night work and occasional day work.[7]

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[7]Padilla requested his physician to give him a medical release so he could return to work in November 1988. He testified that the reason he did so was because he was not receiving sufficient funds from disability. It is evident that the recurrence of his back symptoms was a result of Padilla not having recovered enough to return to tractor work. Because of

(continued...)

The aforementioned memorandum by Martinez supports Padilla's testimony and contradicts Martinez' and Halkum's version of the events.

Moreover, the evidence indicates that both Martinez and Halkum knew that it was the recurrence of Padilla's back symptoms which caused him to quit. Although Martinez downplayed Padilla's back trouble in his testimony, he specifically mentioned it in his memorandum. Therefore, Martinez knew that the reason Padilla quit was due to his back condition.

Martinez did not testify in reference to what he had told Halkum about Padilla's leaving the job or that he had shown Halkum the memorandum. Moreover, the fact that Paul Martinez did not testify about what he had said to Halkum about Padilla's decision to quit either verbally or by showing him the memo indicates that his testimony in that respect would have been adverse to Respondent's allegations. Thus, an inference can be made that Martinez did inform Halkum about the importance of Padilla's recurrent back trouble in his decision to quit. Moreover, Martinez' knowledge of Padilla's back condition can be imputed to Halkum, his superior.[8]

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[7](...continued)
his financial needs, Padilla was not in a. position to be selective about work shifts.

[8]Respondent further argues that Halkum had reason to assume that Padilla's back condition had nothing to do with his decision to quit. Respondent points out that since Padilla had not filed a report of injury or reinjury it was logical for

(continued...)

Therefore, I find that Padilla quit because of his back condition and Respondent had knowledge thereof.

In the Garin case, The Garin Company (1985) 11 ALRB No. 18, the Board stated that having found that the employer's proffered reason for discharge was false it is entitled to infer that in fact the motive the employer desires to conceal--an unlawful motive--was the true motive.

Having concluded that Padilla quit work due to his back trouble, it follows that Respondent's assignment of Padilla's quitting--due to his dislike of night work--as the cause for its refusal to rehire was pretextual and that Respondent refused to rehire him because his son had resorted to Board processes.[9]

The fact that Respondent, despite Padilla's repeated requests for work, never informed him that it had decided not to rehire him because he had quit due to his dislike of night work further indicates that that was not the real reason for its refusal to rehire him, but a pretext.

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[8](...continued)
Halkum to make such an assumption. However it was not logical for Halkum to assume that because Padilla had failed to file a report of injury that the back condition did not figure in his decision to quit. Padilla experienced a recurrence of his back symptoms obviously brought about by his effort to drive the tractor. So there was no new accident or injury to report and therefore no reason for him to file a report or for Halkum to make such an assumption.

[9]There being no non-pretextual justification for the refusal to rehire, the General Counsel has satisfied its burden of proof, and there is no need to engage in a dual motive analysis. (Baird Neece Packing Corporation (1988) 14 ALRB No. 16, fn. 1; The Garin Company, supra.

Shiyomura's conversations with Padilla further demonstrate that Respondent refused to rehire Padilla because his son had resorted to Board processes and not because of Respondent's proffered reason.

Shiyomura's denial of ever speaking with Padilla about his son's settlement with the ALRB is not credible. Padilla and his brother-in-law, Antonio Rojas, credibly testified that Shiyomura told Padilla during the intersection encounter that the reason Respondent would not rehire Padilla was due to a provision to that effect in his son's ALRB settlement. Padilla's son, Martin, credibly testified that his father came to his house soon afterwards and queried him concerning the contents of his ALRB settlement.

Moreover, Shiyomura in his testimony in effect admitted there was a connection between Respondent's refusal to rehire Padilla and his son's settlement. In answer to Padilla's query about why Respondent would not give him a job, Shiyomura admitted that he asked, "Didn't you work something out with the company?" and "Haven't you talked to your son?"[20]

In light of the foregoing, I find that Respondent violated section 1153(d) of the Act in refusing to rehire Marcelino Padilla on or after October 6, 1989, because his son, Martin Padilla, had sought redress from the Agricultural Labor Relations Board.

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[20]Thus Shiyomura's own testimony supports Padilla's version of the conversation at Shiyomura's residence.

REMEDY

In order for Padilla to be entitled to backpay for Respondent's refusal to rehire, General Counsel must demonstrate that the alleged discriminatee made a proper application, that work was available at the time application was made and that Respondent's policy was to rehire former employees. (Rigi Agricultural Services, Inc. (1983) 9 ALRB No. 31.)[11]

Padilla credibly testified that he went to Respondent's office on October 6, 1989 the day after he received his medical release from his physician and delivered it to the Spanish-speaking Mexican secretary in Respondent's office. I credit Padilla's testimony on this point since I found him to be a reliable witness who made a sincere effort to tell the truth as he remembered it. And there are other reasons to credit him on this point. Padilla realized that in order to return to work he had to present a medical release from his doctor. It is very difficult to believe that he would have contacted Respondent on various occasions seeking employment on and after October 6, 1989, if he had not brought the medical release to Respondent's office on the latter date.

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[11]Respondent's policy was to rehire former employees as evidenced by its conduct in this instance by rehiring Padilla in December 1988, by its Spanish-speaking secretary telling him that he would be contacted once there was an opening, and by its accepting his medical release as an indication he would be rehired.

Let us review the evidence about Padilla's alleged numerous communications with Respondent about tractor employment between October 6, 1989, and March 22, 1990.

Padilla and his son, Martin, credibly testified that Padilla conversed with foreman Shiyomura about openings for tractor drivers in the latter part of October 1989. Martin corroborated his father's testimony in respect to the October 1989 encounter with Shiyomura and the subsequent conversation in detail.[12]

Padilla credibly testified that during the winter of 1989-1990 he visited Respondent's ranch and asked Halkum for employment and that the latter had ordered him off the ranch.

Padilla credibly testified that he made two to three telephone calls to Respondent's office between October 1989 and March 1990 and inquired about tractor employment. Respondent presented no evidence to rebut that claim.

Respondent failed to call the Spanish-speaking Mexican secretary who could have testified whether Padilla had delivered to her his medical release form on October 6, 1989, or whether Padilla had made those two or three telephone calls between October 1989 and March 1990. Respondent offered no explanation for not doing so. Consequently, an inference can be made that her testimony would have confirmed the fact that

[12]Both father and son testified that Marcelino told Shiyomura on this occasion that he was no longer disabled and had already delivered the medical release to the office.

Padilla had delivered the medical release on October 6, 1989, and had made such telephone calls.[13]

In his testimony, Halkum denied seeing Padilla between December 1988 and March 1990, let alone ordering him to stop filling his pickup tires with air and asking him to leave the ranch premises. In his testimony, Shiyomura denied that Padilla and his son, Martin, conversed with him in the latter part of October 1989 about tractor job openings for Padilla.

It is not necessary to determine whether Shiyomura and Halkum falsely testified or simply could not recall these incidents. However, I conclude that the two episodes did take place as credibly testified to by Padilla and his son, Martin.

Respondent presented no evidence other than the medical release form stamped "MAR 22 1990" that Padilla did not take a

[13]In general, adverse inferences are permitted when a party fails to produce evidence or witnesses within their control. In the Garin case, supra, the Board held that no adverse inference could be made because the "missing witness", a tractor driver for Respondent, was not under the control of Respondent or even available to it since he had been fired along with the alleged discriminatee before the hearing. In the instant case, the facts differ. The Spanish-speaking secretary had been in the employ of Respondent at least from November 1988 through the winter of 1989-90. Padilla's uncontradicted testimony was that he spoke to her on several occasions during that period. Respondent failed to present any evidence that she was no longer in its employ and. thus an assumption can be made that she continued to be employed by Respondent during the time of the hearing of the instant case. An important factor in the application of the "missing witness" rule is whether the missing witness would provide the only proof (other than the alleged discriminatee's) on a particular issue—in this case the alleged telephone calls and the delivery of the medical release. As Respondent failed to present a satisfactory excuse for failing to call the Spanish speaking secretary, I find that she was available and under its control.

medical release form to Respondent's office on October 6, 1989. An inference could be made that this was the first time Padilla had delivered such a release. However, such an inference is weakened by the fact that Respondent did not present the Spanish-speaking Mexican secretary to whom Padilla testified he had delivered the release. The inference is further weakened by the fact that Padilla had an extra copy made of the medical release when he delivered the original on October 6, 1989, and it was the extra copy or the original that he delivered to the office on March 22, 1990.

I conclude that Padilla made timely applications for work, that there were openings at the time of his application on October 6, 1989, and that Respondent has a policy of rehiring former employees. Therefore, Marcelino Padilla is entitled to be reimbursed by Respondent for all losses of pay and other economic losses he has suffered as a result of Respondent's discriminatory refusal to rehire him on and after October 7, 1989.

ORDER

Pursuant to Labor Code section 1160.3, Respondents D ft H Farms, its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to rehire or otherwise discriminating against, any agricultural employee or his or her relatives with regard to hire or tenure of employment or any term or condition

of employment because he or she has filed charges with the Agricultural Labor Relations Board.

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

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

(a) Offer Marcelino Padilla full reinstatement to his former or to substantially equivalent position, without prejudice to his seniority and other employment rights and privileges, and make him whole for all losses of pay and other economic losses he has suffered as a result of Respondent's refusal to rehire, the amounts to be computed in accordance with established Board precedents, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms, (1988) 14 ALRB No. 5.

(b) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay 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 from October 6, 1989 to October 5, 1990.

(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) Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of the next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates, inform the Regional Director of when the present peak season began and when it is anticipated to end, in addition to informing the Regional Director of the anticipated dates of the next peak season.

(g) 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

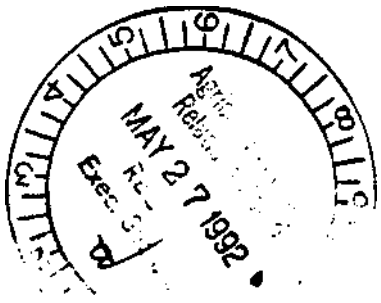
management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to compensate them for the time lost at the reading and question-and-answer period.

(h) 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: May 26, 1992

Arie Schoorl

ARIE SCHOORL
Administrative Law Judge



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NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board by the Independent Union of Agricultural Workers and Armando Martinez, the General Counsel of the ALRB issued a complaint which alleged that we, D & H Farms, a sole proprietorship, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by refusing to rehire Marcelino Padilla from October 7, 1989, and thereafter because his son, Martin Padilla, filed an unfair labor practice charge with the Board. 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 you to know that the Agricultural Labor Relations Act is a law that give you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, and 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 you have these rights, we promise that:

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

WE WILL NOT refuse to rehire or otherwise discriminate against any agricultural employee because he or she or his or her relatives have filed a charge with the ALRB, or otherwise participated in ALRB procedures.

WE WILL reimburse Marcelino Padilla for all losses of pay and other economic losses he has suffered as a result of our discrimination against him plus interest and in addition offer

him immediate and full reinstatement to his former or substantially equivalent position.

DATED:

D & H FARMS, a sole proprietorship.

By: _____
(Representative) (Title)

If you have questions about your rights as a farm worker 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. 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