Turlock, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CONAGRA TURKEY COMPANY, A Division of Conagra Poultry Company, a Delaware Corporation, Respondent , and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 91-CE-44-VI 18 ALRB No. 14 (December 14, 1992)

DECISION AND ORDER

On September 14, 1992, Administrative Law Judge (ALJ) Arie Schoorl issued the attached decision in which he found that Conagra Turkey Company (Respondent) violated section 1153, subdivisions (a), (c), and (d) of the Agricultural Labor Relations Act (Act)[1] by disciplining three employees for engaging in conduct which was protected by the Act. Respondent disciplined the three individuals for allegedly harassing fellow employees while urging them to join, support, or accept the assistance of the United Farm Workers of America, AFL-CIO.

Respondent timely filed exceptions to the ALJ's decision, along with a supporting brief, and the General Counsel

[1] The Act is codified at Labor Code section 1140 et seq. The independent violation of section 1153, subdivision (a) (interference with protected activity) and the violations of subdivisions (c) (discrimination for engaging in protected activity) and (d) (discrimination for filing charges or giving testimony) provide for identical remedies in this case and are in that sense cumulative.

filed a brief in response. The Agricultural Labor Relations 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[2] and conclusions of law and adopts his recommended order.[3]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Conagra Turkey Company, its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing any

[2] In affirming the ALJ's decision, we do not rely on the drawing of adverse inferences from Respondent's failure to call two of the complaining employees as witnesses. Our review of relevant case law reflects that it is improper to draw such an inference where, as here, the witnesses were equally available to both parties. (See, e.g., Smith v. Covell (1980) 100 Cal.App.3d 947 [161 Cal.Rptr. 377]; Neumann v. Bishop (1976) 59 Cal.App.3d 451 [130 Cal.Rptr. 786].) As the evidence is sufficient to support the ALJ's findings without resort to such inferences, there is no prejudicial error.

[3] This decision should not be read to discourage agricultural employers from enforcing policies against harassment or employees from complaining about such conduct. Here, however, the conduct at issue did not exceed the bounds of activity protected by the Act and therefore could not lawfully be the basis for disciplinary action. The ALJ correctly concluded that the complaining employees were not threatened or coerced because of their reluctance to engage in union activities. We also note that, in the absence of significant disruption of the workplace, mere yelling or raising one's voice does not cause otherwise protected conduct to lose such protection. (Dallas Morning News (1987) 285 NLRB 807; Chelsea Laboratories. Inc. (1986) 282 NLRB 500.)

agricultural employee in the exercise of the rights guaranteed by Labor Code section 1152 by issuing disciplinary notices or taking other disciplinary action on the basis of conduct protected under section 1152.

(b) Issuing disciplinary notices or taking disciplinary action or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she engaged in activity protected by Labor Code section 1152.

2. Take the following affirmative actions designed to effectuate the policies of the Act.

(a) Expunge from its personnel records all notations concerning the disciplinary actions taken against Dale Shipman, Ted Villalba and Rita Rodriguez, which have been found to be unlawful in this Decision.

(b) 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 purpose set forth in this Order.

(c) Upon request of the Regional Director, mail copies of the attached Notice, in all appropriate languages, to all agricultural employees in its employ between May 2, 1991 and May 2, 1992.

(d) Post copies of the attached Notice in all appropriate languages, for sixty (60) days, 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.

(e) To facilitate compliance with paragraphs (d) and (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 next 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.

(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, a 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 non-hourly wage employees in order to compensate them for the time lost at the reading and question-and-answer period.

(g) Notify the Regional Director in writing,

within thirty (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: December 14, 1992

BRUCE J. JANIGIAN, Chairman[4]

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

[4] 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.

CONAGRA TURKEY COMPANY 18 ALRB No. 14
Case No.: 91-CE-44-VI

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties had an opportunity to present evidence, the Agricultural Labor Relations Board (ALRB) has found that we, Conagra Turkey Company, have violated the rights of our workers to engage in conversations about union and/or concerted activities by unlawfully disciplining employees for doing so. The Board has also found that we violated the rights of workers to engage in union and/or concerted activities by unlawfully discriminating against them for engaging in such activities. The ALRB has ordered us not to interfere with, restrain or coerce you, our employees, in the exercise of rights guaranteed by the Agricultural Labor Relations Act (ALRA) or discriminate against any employees because he or she has engaged in union and/or concerted activities or has filed a charge with the ALRB. The Board's decision is not intended to discourage employees from complaining about harassment or employers from enforcing policies against harassment. In this case, however, employees were disciplined for harassing others when in fact they were engaging in union or other activities protected by the ALRA.

The Board has directed us to post and publish this Notice.

The Agricultural Labor Relations Act is the law that gives you and all other farm workers in California these rights:

1. To organize themselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation;
4. To bargain with your employer about your wages and working conditions through a bargaining representative 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.

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 discipline or otherwise discriminate against any agricultural employee because he or she has engaged in union or concerted activities or has filed a charge with the ALRB.

WE WILL NOT interfere with, restrain or coerce agricultural employees in the exercise of their rights to talk to each other about union and/or concerted activities.

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, #A
Visalia, California 93291

Telephone No.: (209) 627-0995

DATED:

CONAGRA TURKEY COMPANY

By: _____
Representative

_____
Title

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

CONAGRA TURKEY COMPANY
(UFW)

18 ALRB No. 14
Case No. 91-CE-44-VI

Background

This matter involves allegations that Conagra Turkey Company (Respondent) violated section 1153, subdivisions (a), (c), and (d) of the Agricultural Labor Relations Act (ALRA) by disciplining three employees for engaging in conduct which was protected by the Act. Respondent disciplined the three individuals for allegedly harassing fellow employees while urging them to join, support, or accept the assistance of, the United Farm Workers of America, AFL-CIO.

The ALJ's Decision

The ALJ first analyzed the case as an independent violation of ALRA section 1153, subdivision (a) (interference with protected activity). Under such an analysis, the General Counsel must first show that the employees were engaging in protected activity. The burden then shifts to the employer to demonstrate that it's action was based on a good faith belief that misconduct occurred. Even if the employer meets that burden, the General Counsel may still prevail by showing that no misconduct actually occurred. Having first found that protected activity was involved in the conversations on which the discipline of the three individuals was based, the ALJ then examined and rejected Respondent's claim that it had a good faith belief that misconduct occurred. In so concluding, the ALJ found that the conversations involved typical arguments used to persuade fellow employees to support the union and credited testimony that no threats of job loss or yelling took place. The ALJ also relied on two other factors. One, Respondent undertook no investigation of the complaints against the three individuals nor gave them an opportunity to give their side of the story before imposing discipline and, two, Respondent invoked a work rule which was on its face less appropriate and more severe than the rule which it applied previously in similar circumstances.

Relying on the findings underlying his conclusion that Respondent did not have a good faith belief that misconduct actually occurred, the ALJ found the evidence sufficient to also establish that the disciplinary action was discriminatory, in violation of section 1153, subdivisions (c) and (d).

The Board's Decision

The Board affirmed the findings and conclusions of the ALJ, with the minor exception that it did not rely on the drawing of adverse inferences for the failure of Respondent to call as witnesses two of the employees who complained of harassment. The

Board's review of case law reflected that such inferences are improper when witnesses are equally available to both parties. The Board also stated that its decision should not be read to discourage policies against harassment, but that here the conduct at issue could not lawfully be the subject of disciplinary action because it did not exceed the bounds of activity protected by the ALRA. Additionally, the Board noted that applicable precedent holds that, in the absence of substantial disruption of the workplace, mere yelling or raising one's voice does not cause otherwise protected conduct to lose such protection.

* * *

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: CONAGRA TURKEY COMPANY, A Division of Conagra Poultry Company, a Delaware Corporation, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 91-CE-44-VI

Appearances:

Richard B. Galtman
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Efren Barajas
United Farm Workers of
America, AFL-CIO
3645 Mitchell Road
Ceres, CA 95307

Stephanie Bullock
Visalia ALRB Regional Office
711 North Court Street, Ste. H
Visalia, CA 93291-3636

Before: Arie Schoorl
Administrative Law Judge

DECISION OF ADMINISTRATIVE LAW JUDGE

This case was heard before me on June 15 and 16, 1992, in Visalia, California. The complaint issued on March 26, 1992, based on a charge (91-CE-44-VI) filed by the United Farm Workers of America, AFL-CIO (hereinafter called the UFW) and duly served on ConAgra, a Division of ConAgra Poultry Company, a Delaware corporation (Hereinafter called Respondent), on May 16, 1991, alleged that Respondent had committed violations of the Agricultural Relations Act (hereinafter called the Act). Respondent filed an answer on April 7, 1992.

The General Counsel, the Respondent and the Charging Party were represented at the hearing. 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 UFW is a labor organization within the meaning of section 1140(f) of the Act, and that Dale Shipman, Ted Villalba and Rita Rodriguez are agricultural employees within the meaning of section 1140.4(b) of the Act.

II. The Alleged Unfair Labor Practice

General Counsel has alleged that Respondent interfered with, restrained and coerced employees Dale Shipman, Ted Villalba and Rita Rodriguez in the exercise of their rights to engage in union activities as guaranteed by section 1153(a) of the Act. General Counsel further alleges that Respondent discriminated against these same three employees due to their union activities and their utilizing Board processes by issuing them disciplinary notices and thus violated section 1153(c) and (d) of the Act.

III. Background

ConAgra Turkey Company is engaged in the business of raising turkeys at its establishment in Fresno, California. It has a processing plant in Turlock, California, where its personnel manager John Kjeldgaard's office is located. Approximately 35 to 40 employees work in one building at the Fresno site. There are three separate departments: a general laborer area with 14 to 15 employees, a poult (definition = baby turkey) service area with 20 employees and a quality control area with one employee. In addition there are three delivery employees.

IV. Facts

Dale Shipman has worked as a maintenance mechanic for Respondent since June 1988. Since 1990 he has been very active in union activities, passing out UFW leaflets, wearing UFW buttons every day at work, and since April 1991 as a member of the UFW negotiating team.[1]

[1]Hatchery manager Peralta testified that Shipman was "really involved" with the union before and after the date of the disciplinary notice May 2, 1991.

Ted Villalba has worked as a general laborer for Respondent since the summer of 1989. He has been active in union activities gathering signatures for a UFW election petition, handing out UFW meeting notices, wearing a UFW button daily at work, informing coworkers of their rights, and participating in 4 to 5 negotiating sessions.

Rita Rodriguez has worked as a general laborer for Respondent since October 1989. She has been active in union activities, wearing a UFW button daily at work, carrying a flag on her automobile, passing out UFW meeting notices and survey papers, and gathering signatures for the UFW election petition.

In their testimony, Respondent's supervisors admitted knowledge of Shipman's, Villalba's, and Rodriguez' union activities (as described above) preceding the disciplinary action of May 2, 1991.

In the Summer of 1990, an ALRB election was held at Respondent's in which its employees selected the United Farm Workers of America as their exclusive bargaining representative. In June 1991, Respondent and the UFW commenced collective bargaining negotiations which continued for one year. In June of this year, the employees filed for a decertification election and an election was held one week later. The ALRB has not yet determined the results of that election.

Charges were served upon and filed against Respondent by or on behalf of Dale Shipman: Charge No. 90-CE-55-VI, filed on July 27, 1990 and dismissed on September 28, 1990; Charge No.

91-CE-37-VI, filed on April 26, 1991 and withdrawn on May 20, 1991, Charge No. 91-CE-39-VI, filed on April 30, 1991 and withdrawn on May 20, 1991.

Charges were served upon and filed against Respondent by or on behalf of Rita Rodriguez: Charge No. 90-CE-83-VI, filed on September 24, 1990, and dismissed on October 22, 1990; Charge No. 90-CE-84-VI, filed on the same date, September 24, 1990, and dismissed on January 11, 1991.

A charge was served upon and filed against Respondent by or on behalf of Ted Villalba: Charge No. 91-CE-ll-VI, filed on March 25, 1991 and withdrawn on May 20, 1991.[2]

Henry Peralta has been the hatchery manager at Respondent's since August 27, 1990. Barbara Anderson has been employed by Respondent since 1981 and for the last 7 years has worked as an assistant to Henry Peralta and his predecessor(s).

Peralta testified that when he began to work at Respondent's in 1990 he had conversations with management, including Barbara Anderson, about the UFW. He could not remember the details but he did recall saying to Anderson, "How did this all get started?"

On April 29, 1991, four employees - Amelia Flores, Catalina Castro, Margie Contreras and Margarita Covarrubias came to Anderson individually and reported that they had each

[2] General Counsel and Respondent stipulated that such charges had been filed and dismissed or withdrawn on such dates.

been harassed by one or more of three fellow employees, namely Dale Shipman, Ted Villalba and Rita Rodriguez.[3]

Amelia Flores complained to Barbara Anderson that Rita Rodriguez had called her at home by telephone and told her that she, Rodriguez, wanted to send an ALRB representative to her home to explain her rights to her with respect to Respondent's obligation to pay her back wages for having laid her off. Flores told Anderson that she had informed Rodriguez that she did not want to be called at home. Peralta testified that Flores had told him that she felt she had been harassed.[4]

On the same day, Margarita Covarrubias complained to Anderson that Villalba had told her that she would be replaced by other workers. Covarrubias told Peralta that she felt she had been harassed by Villalba because she was a non-union supporter.

On the same day, Catalina Castro complained to her that Dale, Shipman and Ted Villalba had yelled at her a few days earlier on Respondent's premises. Castro testified that during a

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[3]In her testimony Castro confirmed the use of the word "harass" in her complaint. Flores confirmed such use in her declaration. Contreras denied using the word harass in her complaint to Anderson but signed a declaration to the contrary. In respect to Covarrubias, there was neither confirmation nor denial since she did not testify and her declaration was not offered in evidence. Peralta testified that the word "harass" was used loosely at Respondent's.

[4] Rodriguez' testimony substantiates Anderson's testimony and the declaration of Amelia Flores and so I find that the telephone conversation occurred as described. Moreover the actual facts coincide with the information Respondent had at its disposal when it decided to take disciplinary action. In the declaration that Flores signed at the time she complained to Anderson she asserted that she felt she had been harassed at work, but gave no details.

work break Shipman had said to her how could she expect them to help her.[5] When she did not respond, Shipman shouted "You don't have any guts."

Castro further testified that upon returning to her work site Villalba approached and told her, "Join the union and to sign and sue the company". Castro added that she replied to Villalba, "I don't want to get involved", and he yelled, "If you don't join the union, you'll lose your job". She replied that she did not want to join, and Villalba left her work place.

Castro further testified that Villalba was yelling at other employees, so she went to Anderson and reported what had happened and added that Shipman and Villalba had harassed her because she did not belong to the union and that she could not work and could not feel free working. Peralta testified Castro had told him on May 5 that Shipman and Villalba had yelled at her because she did not support the union and that they were always after her to join the union.

Villalba testified that he had not harassed, threatened or yelled at any of his coworkers at any time. He further testified that he recalled talking to Castro in the steam room about Zacky employees making applications for work at Respondent's and that she had responded "yes", and told him not to yell. Villalba testified that he was concerned about these

[5]Since Dale Shipman was a member of the UFW negotiating committee and very active in the union and Castro, in reporting the incident, claimed that Shipman along with Villalba were harassing her because she did not support the union, it can be assumed that the "them" in Shipman's comment refers to the union.

applicants because, "Where were they going to put them?" Villalba added that there was considerable noise in the steam room, that at times the employees wore earplugs, and that at times it was necessary to yell to make oneself understood.

In his testimony, Dale Shipman denied yelling at, harassing, threatening or forcing his opinion on any fellow employees at any time while working at Respondent's. He further testified that he recalled a conversation with Catalina Castro in April 1991 in which he asked her whether she would like to speak to a board agent of the ALRB. He added that he thought she might be entitled to back pay for her layoff as, "I kind of tied in the layoffs with the new applicants that I was seeing." He did not recall whether she responded and, if she had, what she had said.[6]

On April 29, Margie Contreras went to Barbara Anderson with a complaint against Ted Villalba and Dale Shipman. Contreras told her that Villalba had asked her to sign a paper but she replied that she didn't want to have anything to do with it. She walked away from Villalba, and he yelled at her "You'll be sorry". The next day, when Shipman followed her to her car on Respondent's premises and said that he and Ted Villalba wanted to come to her house to talk to her about the union, she told him

[6]With respect to Covarrubia's and Castro's complaints, I do not make a finding of fact as to what actually occurred. I do however, find that Respondent had the information reported to it by Covarrubias and Castro at its disposal when it decided to take disciplinary action. The nature of this information is important in deciding whether Respondent had a good faith belief in misconduct by Villalba and Shipman.

that her answer was "no". Shipman told her to think about it, and she replied that her answer was still "no", that she didn't want any part of it.

Peralta testified that Contreras told him essentially the same thing she had told Anderson except both Shipman and Villalba had followed her to the car on the second day.[7]

Anderson testified that all four employees had complained of harassment, utilizing that word in their complaints. She notified Peralta of the four complaints and showed him the declarations of the four complainants. He instructed her to contact John Kjeldgaard, Respondent's personnel manager, at Respondent's place of business in Turlock, California. Peralta testified that the four complaining employees were quiet and hard working, and thus, upon being informed of the details of their complaints, he considered them legitimate and instructed Anderson to proceed with disciplinary action.

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[7]I find that Contreras' encounters with Villalba and Shipman occurred substantially as Contreras recounted them. Anderson's testimony and Contreras' testimony and declaration substantially coincide. Moreover, the actual facts coincide with the information Respondent had at its disposal when it decided to take disciplinary action.

[8]It is not clear from the evidence whether Peralta actually talked to the four complainants or just read their declarations before instructing Anderson to contact Kjeldgaard. Peralta testified that he had talked to them before Kjeldgaard was contacted. Anderson testified that she observed Peralta conversing with the four complainants but she did not specify whether it was before they contacted Kjeldgaard or on May 2, the day the disciplinary warnings were given to Shipman, Villalba and Rodriguez. Margie Contreras testified specifically that she had not spoken to Peralta after she had spoken to Anderson. Castro testified that she could not remember whether she had conversed

(continued...)

Anderson contacted Kjeldgaard by telephone and told him that four employees had come to her office and complained that they had been harassed. She testified that she had told Kjeldgaard "what the complaints were about". Complying with his instructions, she sent him by FAX the statements of the four complainants.

Peralta talked to John Kjeldgaard the same day and related to him the nature of the complaints,[9] that the employees felt they had been harassed and that he would send Kjeldgaard the declarations. Kjeldgaard replied that he would proceed to write up status reports on the three employees and send them to Peralta who was then to read them to the three employees.

On May 2, 1991, Kjeldgaard sent the employee status language by FAX and told Anderson by telephone to have Peralta read these reports to Shipman, Villalba and Rodriguez without further comment. All three reports contained the same language:

> "Some individuals have reported to Management that they are being harassed by you while on Company premises. Please be advised that harassment of any type is strictly prohibited by Company Work Rules of Conduct (#5). This is a warning and if such incidents continue, you will be subject to further disciplinary action up to and including termination. Rule Violation #5 states: 'No employee shall harass, any other person while on Company property or attempt to do these things. D'"[10]

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[8](...continued)
with Peralta about her complaint. Flores and Covarrubias were not called upon to testify.

[9]Peralta testified that he told Kjeldgaard what was going on and what the people had complained about.

[10]"D" signifies dismissal.

Respondent left out the words of Rule 5 which come after "harass"; to wit "scuffle with, fight with or batter" and made no notification on the employee status report of the deletion.

Peralta called each of the three employees individually into his office and read each their report.

Shipman reacted by asking who it was he had harassed and what had he done. Peralta responded that such information was confidential. Shipman testified that Peralta warned him verbally that if he harassed any more employees he would be subject to additional disciplinary action including possible termination. Shipman asked for a copy of his status report and received it. Peralta requested that Shipman sign the report but he refused to do so because, according to his testimony, he had not received an explanation.

According to Villalba, at the time of the reading Peralta asked him whether he recalled harassing or saying" something bad to someone in the last 24 hours. Villalba answered in the negative. Villalba testified that Peralta told him that if it happened again he would be dismissed. Villalba refused Peralta's request to sign the report because, according to his testimony, he did not know what it was about.

After the reading of the report Rodriguez asked who it was she had harassed. Peralta responded that such information was confidential. She testified that either Peralta or Anderson told her that if any such incident occurred again she would be subject to further discipline, including termination. Rodriguez

refused to sign the status report because, as she told Peralta and Anderson, she did not know what it was about.

Respondent admitted that this was the first time since 1984 that Rule 5 had been utilized in a disciplinary action. During that entire period Respondent had used Rule 13 to discipline employees in similar incidents. In 1988 or 1989, an employee, Debbie Brown, was disciplined under Rule 13 for having used abusive or profane language in a confrontation with a coworker. In a recent case, employee Ron Hess had been disciplined under Rule 13 for having used abusive language in a diatribe against Dale Shipman whom he had accused of being responsible for his being suspended. Rule 13 reads:

> No employee should use profane, abusive, threatening or provocative language towards fellow workers, supervisors or officials of the Company nor shall any employee harass or created (sic) an intimidation, hostile or offensive working environment by such conduct. C.S.D.

"C" stands for "counseling".[11] "S" stands for "suspension" and "D" stands for "dismissal". In Rule 5 "C" and "D" stand for the same thing as in Rule 13; there is no "S" in Rule 5. The strict interpretation of Rule 5 would be that the discipline meted out for the second offense would have to be "dismissal" not suspension, however Peralta testified that Rule 5

[11]Peralta testified that counseling meant to bring the people in, talk to them, discuss the situation and put it in their file.

should not be interpreted that way, as a suspension could be utilized for a second offense.[12] [13]

ANALYSIS AND CONCLUSION

General Counsel alleges that Respondent violated sections 1153(a) of the Act by interfering, restraining and coercing Dale Shipman, Ted Villalba and Rita Rodriguez in the exercise of their rights under section 1152 of the Act. General Counsel further alleges that Respondent violated sections 1153(c) and (d) of the Labor Code by disciplining these three employees because they engaged in union activities and filed charges against Respondent with the ALRB.

A. The Section 1153(a) Violation

In the instant case, Respondent took disciplinary action against these employees for alleged misconduct while they were engaged in protected activities. The National Labor Relations Board has set forth the criteria whereby it is determined whether an employer's actions in such cases constitute an unfair labor practice.[14] First, the General Counsel must

[12]In response to a question when had management made such a determination, Peralta replied that he had consulted neither Kjeldgaard nor Barbara Anderson about it but had made the determination on his own at that moment.

[13]There was considerable testimony as to the effect of Respondent's disciplinary notices on the three employees' future union activities. However, that effect is not determinative of a violation. The test for a violation of section 1153(a) is the objective standard of whether the employer engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act, not the subjective feelings of the employees involved. (Nagata Brothers Farm (1979) 5 ALRB No. 39.) Therefore, I have not referred to any of this testimony in my decision.

[14]Co-Con, Inc. (1978) 238 NLRB 283.

prove that the employees were engaged in protected activities. The burden then shifts to the Respondent to demonstrate that it had a good faith belief that the employee had engaged in misconduct. Once the Respondent proves such belief, the General Counsel must show that no misconduct existed.

It is evident that Shipman, Villalba and Rodriguez were engaged in protected activities when they talked to the four employees about union and/or concerted activities. Therefore, Respondent has the burden of proving its good faith belief that the conduct of the three exceeded the parameters of the protections of section 1152 of the Act.[15]

In evaluating the various encounters between the pro-union employees and their coworkers, I find that Respondent had at its disposal the facts as reported to its supervisors by the four complainants as reflected in the testimony of Catalina Castro, Henry Peralta, and Barbara Anderson and in the declarations of Amelia Flores and Margie Contreras.

Turning to Rita Rodriguez' telephone conversation with Amelia Flores, it involved nothing more than one fellow worker informing another about her right to compensation for a layoff. When Flores replied that she was not interested and expressed concern about union people having access to her address and

[15]Respondent argues that it had a good faith belief that Shipman, Villalba and Rodriguez had engaged in misconduct since Flores, Castro, Contreras, and Covarrubias had all complained of "harassment" by the aforementioned three employees. Because an employee terms some conduct as harassment does not make it so. The standard is an objective one depending, not on the subjective feelings of the alleged victim, but on whether there is a reasonable basis for those feelings. (Kurz-Kasch, Inc. (1987) 286 NLRB 1343.)

telephone number, Rodriguez explained to her that the union people have a right to such knowledge and then asked for another coworker's number which Flores refused to furnish.[16]

Margarita Covarrubias had come to Barbara Anderson and complained to her that Ted Villalba had told her that employees would replace her. Peralta testified that Covarrubias had told him that Villalba had harassed her because she was a non-union supporter. Anderson testified that she believed that all four complainants had used the word "harass" when they came to her with their complaints.[17]

These conversations with Flores and Covarrubias on union matters and/or working conditions clearly do not constitute misconduct and are protected by section 1152 of the Act; and in both cases, Respondent had at its disposal facts which clearly indicated there was no misconduct. That being so, there can be no good faith belief on Respondent's part of any misconduct on the part of Rodriguez or Villalba in these two encounters. Nevertheless, Respondent processed these two complaints under

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[16]There was uncontroverted testimony at the hearing that Flores was working at Respondent's during the hearing and thus was available as a witness. An inference can be made that if Respondent had called Flores as a witness her testimony would have been unfavorable to Respondent's case. In general, adverse inferences are permitted where a party fails to produce evidence within it control. (The Garin Company (1984) 11 ALRB No. 18.)

[17]However, there is no evidence as to the details of such alleged harassment in respect to Covarrubias. Respondent failed to call her to testify. There was uncontroverted testimony that Covarrubias was working at Respondent's during the hearing and thus was available as a witness. Therefore, an inference can be made that her testimony would have been unfavorable to Respondent's case. Adverse inferences are permitted where a party fails to produce evidence or witnesses within its control. (The Garin Company, supra.)

Rule 5, as serious violations, warning Rodriguez and Villalba that if either engaged in such conduct again he or she would be dismissed.

Catalina Castro testified that, on the same morning, first Shipman and then Villalba had yelled at her about joining the union. Castro did not reply to Shipman, and she told Villalba that she did not want to get involved. Both Shipman and Villalba desisted and left.

The question is whether Respondent had a good faith belief in that Shipman and Villalba had committed acts of misconduct in these two encounters.

Shipman's, "How can you expect them to help you?" falls into the category of "protected activities", as it is equivalent to saying that she would not benefit from the union being her bargaining agent if she did not back it. According to Castro's testimony, Shipman then shouted to her, "You don't have any guts". His remark was obviously related to his previous statement about union assistance. According to Castro's testimony, a few minutes later Villalba shouted at her that if she did not join the union, she would lose her job.

We are here dealing with union activities -- union activists conversing with coworkers about the benefits of joining a union and the detriments of not joining. The words in themselves represent the normal arguments that prounion individuals use to persuade workers to join unions. There is no threat of violence, or coercion involved. One objectional aspect could be Villalba telling Castro that if she did not join the

union she would lose her job. However, Villalba credibly denied making the remark; furthermore, his comments about the job applicants could very well be tied in with the concept that the more union support the better chance current employees would be protected from replacements coming from Zacky Farms.

Castro testified that her coworker Margarita Covarrubias overheard the conversation between Villalba and her. There was uncontroverted testimony that Covarrubias was available as a witness, but Respondent failed to call her. I draw an inference that her testimony would have been unfavorable to Respondent's contentions with respect to the contents of the conversation between Villalba and Castro.

Another objectional aspect of the two encounters could be the yelling. However, both Shipman and Villalba credibly testified that they had not yelled at any other employee; and there was uncontroverted testimony that the noise level in the steam room was such that, at times; one had to raise one's voice.

More importantly, Respondent never asked either Shipman or Villalba their version of the two episodes before issuing them the disciplinary notices.[18] Nor is there any evidence that

[18]Villalba testified that when Peralta read the disciplinary notice to him that he had asked him whether he had remembered harassing or saying something bad to anybody in the last 24 hours and that he had answered in the negative. This does not constitute a adequate effort to obtain Villalba's version of what happened since it does not sufficiently identify the episodes with no mention of the places, surrounding circumstances etc. Moreover, the time period--"in the last 24 hours"--is incorrect; the alleged encounters had occurred 3 to 5 days before. Incidentally, Peralta made no mention of his inquiry in his testimony.

Respondent had gone to Castro's work place to investigate the noise level or interview witnesses about the two encounters.[19]

I therefore conclude that Respondent lacked a good faith belief that Shipman and Villalba had engaged in any misconduct in their conversations with Castro.

On two successive days, first Villalba and then Shipman accompanied Margie Contreras to Respondent's parking lot and conversed with her. Villalba asked her to sign a paper which Contreras rejected. As she walked away from him, he yelled, "You'll be sorry". Since she was walking away, he may well have needed to shout so as to be heard. The alleged threat, "You'll be sorry", by itself is ambiguous.[20] It is just as likely to have signified, not that she would be punished or retaliated against, but she would simply regret having missed an opportunity to support the union.

Shipman also asked Contreras whether he and Villalba could go to her house to talk to her about the union and she responded in the negative. He suggested that she think about it, and she replied that the answer was still "no", that she did not want any part of it.

These two conversations amount to nothing more than two pro-union employees trying to persuade a fellow employee to

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[19]The failure of an employer to carry out a full and fair investigation of an employee's alleged misconduct is evidence that the employer is not trying to find the truth of the matter but is attempting to find a plausible pretext to take action against the employee. (Sunnyside Nurseries, Inc. (1980) 6 ALRB No. 52.)

[20]There is no evidence that Contreras considered these words as a threat.

listen to information about the advantages of joining a union. There is no threat, coercion, insistence etc. present. I therefore find that Respondent lacked a good faith belief that Shipman and Villalba were guilty of misconduct when they conversed with Margie Contreras on the two occasions in question.

There is further evidence of a lack of good faith belief by Respondent in that it failed to investigate the complaints. Peralta should have seen the imperative need to do so since he testified that the word "harass" was used loosely at the plant. In particular, Respondent failed to confront the employees with the details of their alleged misconduct, so they could defend themselves against the accusations,[21] and have some indication of how they should comport themselves in the future to avoid additional accusations of "harassment." When they asked Peralta for details about their alleged violation of Rule 5, he refused saying that such information was confidential. In reality, that data was only confidential to the extent it would protect the complaining employees from retaliation from the three accused employees. Respondent could have provided a certain amount of information about the definition of harassment without revealing the identity of the complainants, such as, "It has to do with insistence in continuing to talk to certain

[21]It should be kept in mind that the calling in of the employees, the reading of the disciplinary notice etc. was for a first offense by the three employees. The procedure utilized appears to be a marked deviation from the first offense counseling as described by Peralta in his testimony: "We bring people in and we talk to them, discuss the situation and put it in their file."

employees who do not want to be approached by you to discuss the pros and cons of union membership," or something similar.

Besides, Respondent's failure to investigate the circumstances of each complaint, additional evidence of Respondent's lack of good faith belief is to be found in its failure to adhere to its own past practice of handling such verbal encounters under Rule 13 rather than the much more severe Rule 5, which deals with violent encounters such as scuffling, fighting and battery. This issue is discussed in more detail below in connection with the alleged 1153(c) and (d).

I can only conclude that Respondent seized on several minor complaints and exaggerated them to the extent that it could resort to Rule 5 and present warnings to the three employees in a manner likely to cause them to refrain from talking to their fellow employees about the union.

I find that intimidation of this sort has the reasonable tendency to interfere with and restrain employees in the exercise of their rights under section 1152 of the Act and I therefore conclude that Respondent violated section 1153(a) of the Act by interfering with, restraining and coercing employees Dale Shipman, Ted Villalba and Rita Rodriguez in the exercise of their rights as set forth in section 1152 of the Act.

B. Sections 1153(c) and (d) Violations

There remains the question whether Respondent violated sections 1153(c) and (d) of the Act.

In the instant case the three alleged discriminatees were active in union activities and each had filed unfair labor

practice charges against Respondent. Respondent's witnesses admitted Respondent's knowledge of such activities. Respondent knew that the discriminatees had filed charges because it had been served with copies.

General Counsel alleges that Respondent deviated from past practice in meting out such severe penalties to the three discriminatees. To evaluate the appropriateness of the punishment it is helpful to examine the text and the background of Rules 5 and 13. Since 1984, there have been several incidents in which employees have been disciplined under Rule 13, but none under Rule 5.

Both Rule 5 and Rule 13 contain the word harassment but Rule 5 deals with violence, i.e., "scuffle, fight or batter", while Rule 13 deals with words, i.e., "profane, abusive, threatening or provocative language towards fellow workers . . . nor shall any employee harass or created (sic) an intimidation, hostile or offensive working environment by such conduct. C. S. D."

We have already determined that the encounters with Amelia Flores and Margarita Covarrubias amounted only to a simple conversation and therefore neither would call for any kind of discipline.

The encounters with Castro and Contreras did involve some expressions like "You'll be sorry", "How can you expect us to help you?", "You don't have any guts", and "If you do not join the union you'll lose your job"; but there is no indication of harassment at the serious level required by Rule 5. Rule 13,

dealing with words, would have been the proper rule to invoke. Moreover, Respondent had handled previous cases of harassment dealing with words under Rule 13.

In fact, the employees involved in two previous cases - Hess and Brown - both used stronger language than the three alleged discriminatees; i.e., persistent abusive language in the case of Hess and abusive or profane language in the case of Brown. Yet both were disciplined under Rule 13. It was patently inconsistent for Respondent to discipline Shipman, Villalba and Rodriguez under the more severe Rule 5. Respondent, therefore, deviated from past practices by imposing discipline under Rule 5 rather than Rule 13.

Therefore, I draw an inference that Respondent so deviated from past practices in the cases of the three discriminatees because they had been active in union activities and had utilized the Board's processes.

In view of the foregoing, I find that Respondent has violated sections 1153(a), (c) and (d) of the Act.

ORDER

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

1. Cease and desist from:

(a) Issuing disciplinary notices or taking disciplinary action or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment

or any term of condition of employment because he or she engaged in concerted activity protected by the Act.

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

2. Expunge from its personnel records all notations concerning the disciplinary actions taken against Dale Shipman, Ted Villalba and Rita Rodriguez, which have been found to be discriminatory in this Decision.

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

(a) 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 purpose set forth in this Order.

(b) 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 May 2, 1991 and May 2, 1992.

(c) Post copies of the attached Notice in all appropriate languages, 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.

(d) 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 next 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.

(e) 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 of 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.

(f) 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 achieve

DATED: September 14, 1992

ARIE SCHOORL
Administrative Law Judge, ALRB

NOTICE OF EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the rights of our workers to engage in conversations about union and/or concerted activities by unlawfully disciplining employees for doing so. The Board has also found that we violated the rights of workers to engage in union and/or concerted activities by unlawfully discriminating against them in the application of our work rules. The ALRB has ordered us not to interfere with, restrain or coerce you, our employees, in the exercise of rights guaranteed by the Agricultural labor Relations Act or discriminate against any employees because he or she has engaged in union and/or concerted activities or has a charge with the ALRB.

We will do that the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join, or help unions;
3. To bargain as a group and choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect one another; and
5. 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 discipline or otherwise discriminate against Dale Shipman, Ted Villalba and Rita Rodriguez and any other agricultural employee because he or-she has engaged in union or concerted activities or has filed a charge with the ALRB.

WE WILL NOT interfere with, restrain or coerce agricultural employees in the exercise of their rights to talk to each other or to union representative about union and/or concerted activities.

DATED: CONAGRA TURKEY FARMS

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.