

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HARLAN RANCH COMPANY,)	Case Nos.	90-CE-31-VI 90-
a California Corporation,)		CE-31-1-VI
)		
Respondent,)		
)		
and)		
)		
)		
UNITED FARM WORKERS)	18 ALRB No. 8	
OF AMERICA, AFL-CIO,)	(October 5, 1992)	
)		
Charging Party.)		

DECISION AND ORDER

On April 21, 1992, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached Decision and Recommended Order in this matter. Thereafter, Respondent Harlan Ranch Company, a California Corporation, timely filed exceptions to the ALJ's Decision along with a supporting brief, and General Counsel filed an answering brief.

The Agricultural Labor Relations Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions,¹ and to issue the attached Order.

¹ As acknowledged by the ALJ, the discharge of Entelmo Santamaria presents a very close case. While we find that the General Counsel successfully established a prima facie case, the more difficult question is whether Santamaria was nevertheless discharged for poor work performance, as argued by Respondent. In our view, the evidence of poor work performance and its effect upon Respondent's motivation for discharging Santamaria is inconclusive. Since Respondent had the burden of demonstrating that it would have discharged Santamaria even in the absence of his protected activity, we affirm the ALJ's conclusion that the discharge was unlawful. (Wright Line, Inc. (1980) 250 NLRB 1083 [105 LRRM 1169] enf'd (1st Cir. 1981) 662 F.2d 899, cert. den.

(continued...)

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board hereby orders that Respondent Harlan Ranch Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off or otherwise discriminating against agricultural employees because of their participation in protected concerted activity;

(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 Entelmo Santamaria, Sergio Gonzales and Gabriel Valdovines immediate and full reinstatement to their former positions of employment, or if their former positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

(b) Make whole Entelmo Santamaria, Sergio Gonzales and Gabriel Valdovines for all losses of pay and other economic

¹(...continued)
(1982) 455 U.S. 989 (once it is established that protected conduct was a motivating factor in the adverse action taken by the employer, the burden shifts to the employer to demonstrate that it would have taken the action even in the absence of the protected activity).

losses they have suffered as a result of Respondent's unlawful discharge or layoff of them. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful acts. The award shall include interest thereon, computed in accordance with the Decision and Order in E. W. Merritt Farms (1988) 14 ALRB No. 5;

(c) Preserve and, upon request, make available to the Board and its agents for examination and 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;

(d) Sign the attached Notice to Agricultural Employees ("Notice") 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;

(e) 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 November 11, 1989, to November 11, 1990;

(f) Provide copies of the signed Notice to each employee hired by it during the twelve (12) months following the remedial Order;

(g) Post copies of the attached Notice in all

appropriate languages, for 60 days, in conspicuous places on its property, the exact period(s) and placets) 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;

(h) Arrange for 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;

(i) To facilitate compliance of paragraphs (g) and (h) above, upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have begun at the time the Regional Director requests peak season dates, Respondent will 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; and

(j) 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: October 5, 1992

BRUCE J. JANIGIAN, Chairman²

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

² It was The signatures of Board Members in all Board decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board members in order of their seniority.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, Harlan Ranch Company, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging Entelmo Santamaria and laying off Sergio Gonzales and Gabriel Valdovines for engaging in protected concerted activity, namely, protesting about wages, other benefits and mistreatment by their foreman John (Juan) Cruz.

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

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

1. To organize yourselves;
2. To form, join or help 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 which forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge, lay off or otherwise interfere with employees because they protest about wages, other benefits or mistreatment by a foreman.

WE WILL make Entelmo Santamaria, Sergio Gonzales and Gabriel Valdovines whole for any losses they suffered as a result of our unlawful acts.

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite H, Visalia, California 93291. The telephone number is (209) 627-0985.

DATED: HARLAN RANCH COMPANY, a California Corporation

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

Harlan Ranch Company
(UFW)

18 ALRB No. 8
Case Nos. 90-CE-31-VI
90-CE-31-1-VI

ALJ Decision

The complaint alleged that in November 1989 the Employer had discharged Entelmo Santamaria and laid off Sergio Gonzales and Gabriel Valdovines because of their protests about wages, their treatment by supervisor John (Juan) Cruz and other employment issues. The ALJ found that the workers' support for each other when they presented their grievances during meetings with management personnel constituted protected concerted activity, and that clearly management had knowledge of the activity.

The ALJ found the timing of the discharge and layoffs strongly suggested a connection between the employees' terminations and their complaints. All three men were let go at the same time, and the dismissals occurred less than three weeks after the workers confronted management with their grievances. Further, no employees had been laid off in 1988, the Employer's operations in 1988 and 1989 were about the same, and there was no showing that the ranch was in worse financial shape in 1989 than in 1988.

The ALJ rejected the Employer's claim that Valdovines was laid off for lack of work, since the work he was hired to do (assisting Greg Harlan in the cattle operation) was just beginning at the time he was laid off. The ALJ also rejected the Employer's claim that Gonzales was laid off primarily for lack of work, since Gonzales had performed a variety of jobs at the ranch including forklift driving during the harvest, which was just beginning at the time of the layoff. The ALJ concluded that General Counsel had shown a causal connection between Valdovines and Gonzales' protected concerted activity and their layoffs, and that the Employer had not presented evidence sufficient to rebut the prima facie case. She therefore concluded that Valdovines and Gonzales' layoff violated section 1153(a) of the Agricultural Labor Relations Act (ALRA or Act).

The ALJ believed the Employer had some concerns about Santamaria's work, but did not believe the Employer was truly dissatisfied since Santamaria received two pay raises in the month prior to his discharge. The ALJ concluded that the Employer may have had a mixed motive in discharging Santamaria, but in conjunction with the layoffs of Valdovines and Gonzales she was convinced that he would not have been discharged in the absence of his protected concerted activity. Thus, she concluded that his discharge violated section 1153(a) of the Act.

The ALJ also rejected the Employer's claim that the unfair labor practice charge upon which the complaint was based was untimely filed.

Board Decision

The Board affirmed the rulings, findings and conclusions of the ALJ and issued an Order requiring the Employer to reinstate the three employees with backpay and to take other specified actions to remedy its unfair labor practices.

* * *

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:)
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)
HARLAN RANCH COMPANY, a)
California Corporation)
)
Respondent,)
)
and)
)
)
UNITED FARM WORKERS OF)
AMERICA, AFL-CIO)
)
Charging Party.)

Case Nos. 90-CE-31-VI
90-CE-31-1-VI

Appearances;

Stephanie Bullock
Visalia, California
for the General Counsel

Sarah A. Wolfe
The Law Firm of Thomas E. Campagne
Fresno, California
for the Respondent

Before: Barbara D. Moore
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge: This case was heard by me on February 4, 5 and 6, 1992, in Visalia, California. It is based on a complaint issued after investigation of a charge (90-CE-31-VI), and an amendment thereto (90-CE-31-1-VI), filed by the United Farm Workers of America, AFL-CIO ("UFW" or "Union") with the Agricultural Labor Relations Board ("ALRB" or "Board"). The complaint ("Complaint") issued on June 3, 1991, and alleges that Harlan Ranch Company ("Harlan", "Company" or "Respondent"), discharged Entelmo Santamaria and laid off Sergio Gonzales and Gabriel Valdovines (also known as "Galvin Baldomino") because they protested about wages and other employment issues, and thereby violated section 1153(a) of the Agricultural Labor Relations Act ("ALRA" or "Act").¹

Respondent answered, admitting it had discharged and laid off the above named employees but denying it had violated the Act in any way. It also contended the case should be dismissed arguing no charge was filed within the six month limitation set forth in section 1160.2 of the Act. The parties agreed during the prehearing conference to argue this matter in their briefs.

This matter proceeded to hearing. I dispensed with the introduction of the so-called "official exhibits" since under the Board's new regulations all of these documents including the

¹All section references hereafter are to the California Labor Code unless otherwise stated.

Prehearing Conference Order are part of the record.² Both the General Counsel and Respondent were represented at hearing and had the opportunity to participate fully. The Charging Party neither appeared nor intervened. Both General Counsel and Respondent filed post-hearing briefs.

Upon the entire record,³ including my observation of the witnesses, and after careful consideration of the arguments and briefs submitted, I make the following findings of fact and conclusions of law.

I. THE TIMELINESS OF THE CHARGE

The initial charge was filed on May 2, 1990, which is within six months of the discharge and layoffs which admittedly occurred on November 11, 1989, but it mistakenly identifies the date as November 11, 1990. The second charge simply corrects the date to 1989, but it was filed on June 6, 1990, which is more than six months after the complained of conduct.

Respondent contends the mistaken date in the first charge renders the charge a nullity. Consequently, it argues, there is nothing for the second charge to amend or to relate back to in

²At hearing, the Prehearing Conference Order was amended as follows. On page 4, the second sentence in the second full paragraph was amended to reflect that Bray either directed Santamaria to change the tires on, or put mounted spare tires in, the trailer used to transport cattle, and Santamaria did not follow instructions and used the wrong size tires or wheels. On page 6, the second full paragraph was amended to reflect that Company records show that Mr. Gonzales was absent for about 6 weeks rather than that he was laid off for that time.

³Citations to the official hearing transcript will be denoted: "volume:page." There were no exhibits.

order to come within the six month timeline (Columbia Textile Services (hereafter "Columbia Textile) (1989) 293 NLRB 1034), and the second charge standing on its own is time barred. Respondent cites no legal authority to support its argument that the error voids the original charge, but simply argues that since the charge alleged an unlawful act on a date in the future, it is "nonsense," alleges nothing, and put Respondent on "notice of nothing." (Respondent's brief, p. 2.)⁴

I do not find this argument persuasive. It is obvious that the 1990 date was merely a mistake, just as it is clear that Respondent's brief originally was mistakenly dated 1991 rather than 1992. It is well established that a charge is not a pleading, and its function is not to apprise Respondent of the exact nature of the allegations against it. Rather, it serves only to initiate an investigation by the regional office to determine whether to issue a complaint. (NLRB v. Fant Milling Company (1959) 360 U.S. 301 [44 LRRM 2236; Duke Wilson Company (1986) 12 ALRB No. 19.) It is the complaint which notifies Respondent of the allegations against which it must defend.

As required by Title 8, California Code of Regulations, section 20213, the initial charge was accompanied by a supporting declaration. Therein, Mr. Entelmo Santamaria stated that his discharge and the layoffs occurred on November 11, 1989. I concur with General Counsel's position that the Board would

⁴Hereafter, citations to Respondent's and General Counsel's briefs will be denoted as "RB or GCB page number" respectively.

have been derelict in its duty had it refused to investigate the charge because of an obvious technical error. (GCB, p.39.)

II. JURISDICTION

The charges and pleadings were timely filed and properly served.⁵ At all times material, Respondent was an agricultural employer, the alleged discriminatees were agricultural employees, and the UFW was a labor organization within the meaning of sections 1140.4(c), 1140.4(b) and 1140.4(f), respectively.

Respondent admits that Floyd Harlan, Greg Harlan, Jack Bray and John (whom the workers call "Juan") Cruz were supervisors as defined in section 1140.4(j), and that Martin Montelongo was a labor consultant employed by Respondent who acted as its agent in serving as a liaison between the Company and its workers.

III: COMPANY OPERATIONS

Harlan Ranch Company is a California corporation with its office and principal place of business in Fresno. It's main operation is in Clovis, California, a town just outside Fresno, and It also has a cattle ranch in northern California near the town of Quincy. In 1989, the Company farmed citrus (oranges and lemons), kiwis and pistachios and raised beef cattle.⁶

The Clovis operation consisted of approximately 75 to 100

⁵The amended charge relates back to the first which was inarguably filed within six months of the alleged unlawful acts. (Columbia Textile).

⁶The Company owned about 1500 head of cattle which were kept in the north from approximately April 1 through November 15 at which time they would be trucked to Clovis for the winter. In the spring, they would be relocated to the north except for some 40 to 50 head which would remain in Clovis.

harvest workers and about 25 permanent year-round employees among whom were the three alleged discriminatees. The Company's operations and the number of permanent workers were about the same in 1988, 1989 and 1990. (I:12.) Because of a devastating freeze in December 1990, the Company did not harvest citrus⁷ from approximately December 22, 1990, through 1991. Not only were no harvest workers employed in 1991, but 8 to 10 steady workers were laid off. (Id.) By the time of the hearing in February 1992, the citrus crop was back to normal despite severe damage to about 5 to 10 percent of the trees. (I:10-11.)

The normal cycle of work at the Company, starting in October, begins with two weeks of harvesting kiwis and pistachios, followed by the harvest of Navel oranges which begins about the first of November and ends in April or May. Also during those winter months, the Company fertilizes and prunes the kiwi and pistachio. (I:8-9.)

In the spring, spraying, weeding and pesticide application occurs, and the harvest of Valencia oranges begins. That harvest continues until August or September, with a break of about 2 weeks in August. (Id.) Irrigation occurs from approximately April through November.

The cattle operation typically consists of moving the cattle from Quincy to Clovis in mid-November; vaccinating, branding and marking calves from November into early December; feeding hay over the winter, if necessary; and vaccinating again in the

⁷The freeze had no real effect on the kiwis and pistachios.

spring, at which time most of the cattle is trucked back to Quincy.

Additionally, maintenance of corrals and barns is an ongoing activity.⁸

The Company tried to make the best use of their general workers by transferring them to different jobs as operational needs dictated and as the skills of the employees allowed. Allowing workers to transfer was also a way to allow them to advance. (II:112; III:32-33.)

Valdovines, Santamaria and Gonzales were all transferred to positions of increased responsibility which carried the promise of higher pay or other benefits. Valdovines was given the chance to work in the northern California cattle operation where he would have a house.⁹ Gonzales was given responsibility for irrigating "La Loma" ("the hill") and promised a raise if he did a good job. Santamaria was transferred to the shop and also promised that wage increases would be in bigger increments (e.g. 25 cent increases rather than 10 or 15 cent increases).

IV: STRUCTURE OF THE COMPANY

Floyd Harlan is President of the Company and is primarily responsible for managing the business and financial aspects of the ranch. He is not involved in the day to day activities of the ranch, which are directed by his sons, Greg Harlan and Shawn

⁸As with the farming operations, the cycle in the cattle operation in 1989 was fairly typical and thus much like that in 1988 and 1990.

⁹He did so for a short while but was not satisfied with the working conditions and returned to Clovis.

Stevenson,¹⁰ but he is the ultimate authority and was consulted about the discharge and layoffs herein.¹¹ Further, although he typically does not become directly involved with the workers, he does give instructions to, and discuss operations with, supervisors. (I:13-15;II:103-104.)

Jack Bray, who has since retired, was the ranch superintendent in 1989 and had overall responsibility for supervising the entire workforce, both harvest workers and steady employees. Bray worked for the Company for 23 years.

John (Juan) Cruz was the ranch foreman and reported to Bray. Cruz assigned work to the permanent employees, oversaw the pruning and spraying, and coordinated the irrigation schedule with the irrigation foremen, one of whom was Ismael Quirarte. Sergio Gonzales irrigated during most of 1989¹² and was supervised by Cruz and Quirarte, and sometimes by Bray.

Cruz had little involvement with the cattle operation or the shop. The latter was under Bray's control and was managed by Jim Wood, the shop foreman. (III:4.) Santamaria was Wood's assistant. Greg Harlan was responsible for the cattle operation.

¹⁰Both men are vice-presidents, and they have similar responsibilities

¹¹ The supervisors could make recommendations about discharges and layoffs, but could not act on their own. Normally, Greg, Floyd, and Shawn would discuss such matters and reach an agreement as to what to do, but, again, Floyd Harlan was the ultimate decision maker. (I:15-16.) In this case, neither Greg nor Shawn was involved in the decision to dismiss the three workers.

¹²All dates hereafter are 1989 unless otherwise stated.

Gabriel Valdovines was hired primarily to work with the cattle, and was the only worker who assisted Greg and Shawn.

V. THE ALLEGED UNFAIR LABOR PRACTICES

Sergio Gonzales, Gabriel Valdovines and Entelmo Santamaria were all year-round permanent or steady workers, but all three men were let go on November 11, 1989, shortly after they and some other steady workers were involved in a dispute about wages and other benefits and perceived mistreatment by Cruz. Each of the three men later sought rehire, but none was rehired even though Valdovines and Gonzales ostensibly were laid off rather than discharged,¹³ and the Company hired a new worker in their classification (general ranch worker) just a month after the lay off.¹⁴ However, the new employee worked only from December 11, 1989, through February 3, 1990. (III:100-101.)

General Counsel alleges the three men were let go because of their participation in the dispute. It contends that the facts that no one was laid off in 1988 and that Respondent agrees there was no material change in operations between 1988 and 1989 supports its charge.

Respondent avers Mr. Santamaria was discharged because of poor work, and Mr. Valdovines and Mr. Gonzales were laid off

¹³Cruz testified that at some point, he did not say when, it was decided to convert the layoffs to terminations.

¹⁴There is no evidence whether the Company recalled permanent workers who were laid off or gave them hiring preference. Greg Harlan testified that harvest workers typically just show up at normal harvest time (I:13), but that testimony is of little help in determining the system regarding year-round workers.

primarily for lack of work but also because they were not very good workers. It did not explain why layoffs were needed in 1989 when none were necessary the year before, but denies the workers' complaints played any role in its decision to discharge and lay off the three men.

VI. THE DISPUTE OVER WAGES, BENEFITS AND CRUZ' CONDUCT

a. Santamaria's Wage Increase

During the payroll period of October 15-21, the steady workers received raises.¹⁵ Many workers, including Mr. Santamaria, complained about the raises to Mr. Cruz.¹⁶ Cruz told him to take it up with Floyd Harlan. Mr. Santamaria told Mr. Harlan he wanted \$6.00 per hour (a 25 cent increase on top of the 15 cents he had just received). Harlan agreed, and Santamaria's pay was increased the very next week. (I:89.)

Thereafter, according to Santamaria, Cruz acted as if he did not want anything to do with Santamaria and avoided talking to him. When Cruz handed Santamaria his first check with the increase, Cruz told Santamaria that he had received his raise, but they would see how many more checks he received.

(I:55) Santamaria was upset with Cruz not only because of his behavior

¹⁵The parties stipulated that during this week Mr. Santamaria's pay increased from \$5.60 to \$5.75 per hour. Mr. Cruz testified all the workers received a pay raise at the same time.

¹⁶Pedro Gonzales and Octaviano Gonzales complained as did a truck driver, Gregorio Gutierrez. (III:25-29) Octaviano asked if Cruz had anything to do with his receiving such a small raise, and Pedro told Cruz the raise wasn't worth anything, and the Company could shove the raise. (Id.)

and his not so veiled threat, but also because he felt that, as his foreman, Cruz should have helped him get his raise by speaking to Harlan on his behalf. Cruz did not deny the remark or that he shunned Santamaria after the incident.

The other workers continued to be upset about the amount of their raises, as well as the loss of medical coverage for families (which some witnesses referred to as "insurance"), and perceived mistreatment by Cruz, including how he handled requests for vacations. Dissatisfaction about these matters led about half of the steady workers to approach Greg Harlan to complain.¹⁷

b. The Events of October 21

The workers asked Ramon Gonzales to present their complaints because he spoke English well.¹⁸ At the end of the workday, Ramon told Greg the workers wanted to speak to Floyd Harlan about their problems. Greg assured them he would speak to his father about their concerns and would get back to them. (I:30-31, 101; II:10; II:161.) He acknowledged he understood Ramon was speaking on behalf of at least those workers present.

Harlan spoke to his father and to Martin Montelongo, a labor

¹⁷Estimates ranged from 7 to 15 men. From the testimony of different witness, I find the following individuals were present. Ramon Gonzales, Pedro Gonzales, Octaviano Gonzales, Miguel Chavez, Conrado Cantu, Rudolfo Carreon (also spelled "Cartione"), Jose Madrigal, Paz Estrada, Gerado Rodriguez, Martin Rodriguez and the three alleged discriminatees. (I:28-29, 99-100; II:10-11, 76-77.)

¹⁸Some witnesses recalled Pedro Gonzales also speaking on the workers' behalf. (I:55; II:161.)

consultant who had been hired previously by the Company to facilitate communications with the workers.¹⁹ It was decided they should meet with the workers at the beginning of the next workday, Monday, October 23, to discuss their concerns.

c. The Events of October 23

At the start of the workday, Juan Cruz gathered all of the steady workers (approximately 25 people) to meet with Greg Harlan and Martin Montelongo. Jack Bray and Ismael Quirarte were also present but did not actively participate.

With Montelongo acting as interpreter, Greg said that some workers had stated they were upset about various matters, and he wanted to listen to what problems there were and see if they could be resolved. (II:163-164.) Ramon Gonzales said the workers wanted to speak to Floyd Harlan, but Greg Harlan responded they could talk to him and Montelongo, and they would discuss matters with Floyd Harlan.

A general discussion ensued with various workers speaking, and Pedro Gonzales and Ramon Gonzales translating their remarks into English for Greg Harlan. Montelongo was also interpreting comments back and forth as well as talking directly to workers.

After a while, Montelongo announced he would talk to workers individually and write down their complaints. Only a few of the workers present made complaints to Montelongo. He testified he

¹⁸Montelongo had been coming to the ranch each week to talk to the permanent employees. He ceased working for the Company after the freeze in late 1990 because there were so few workers in 1991, and he was not employed by Harlan at the time he testified.

might well have made a list of these complaints and turned it in to the Company, but, if he had, he did not have a copy.

Although initially he remembered only Pedro Gonzales and Ramon Gonzales having spoken, Greg Harlan later recalled that Santamaria, Valdovines, Sergio Gonzales, Octaviano Gonzales, Rudolpho Carreon (also spelled "Cartione") and Jose Madrigal also spoke.²⁰ (Compare, II:165-166 with I:167.) I find that Paz Estrada and Gerardo Rodriguez also spoke. (I:45,107; II:31-32.)

Sergio Gonzales, Santamaria and Valdovines testified that Sergio's father, Octaviano, told Montelongo that workers were afraid that if they complained they would be branded as troublemakers and fired.²¹ Sergio and Valdovines testified

²⁰Montelongo testified that after the October 23 meeting, Ramon said he was upset because the other workers had left him to do all the speaking. Respondent argues this demonstrates that Ramon was the primary spokesperson, and thus it had no reason to take action against Santamaria, Valdovines and Sergio Gonzales rather than Ramon. (RB p.20.) There was no hearsay objection regarding what Ramon said, but in view of Greg Harlan's testimony, corroborated by the workers, that several workers spoke, I find Montelongo's testimony of minimal value. Respondent further argues that Santamaria, Valdovines and Sergio Gonzales were voicing individual concerns and that it was Ramon, Pedro and Octaviano Gonzales who spoke on behalf of the group of workers. RB p.19.) Nonetheless, it is clear that, even though individual workers may have argued about their own concerns, they were all supporting each other's efforts.

²¹They used a Spanish expression that was translated as being marked like bees (erroneously transcribed as "like these" (I:78; 11:32). At one point, the interpreter changed the translation to "black sheep" (I:105), but Mr. Valdovines explained the meaning of the expression, and "bees" is correct. He explained the expression referred to one being marked so that on another occasion he or she would stand out so that, in this instance, they could be singled out for firing. (II:32.) None of the Company witnesses testified that such a comment was made when they gave their accounts of what occurred, but none of them specifically denied it either. I credit the workers.

Octaviano specifically voiced concerns about retaliation because of their complaints about foreman Cruz. (I:105-106; II:32.) Montelongo tried to reassure them that before any of them would be fired, he or Cruz would be fired and that would not happen. (I:78, 106; II:32.)

Sergio, Santamaria and Valdovines all testified they complained about Cruz.²² Greg Harlan recalled that Pedro Gonzales did too. I credit that all four complained.²³ Montelongo did not remember specifically which workers criticized Cruz, but recalled that some did and that Cruz responded. I do not credit Cruz' testimony that he did not hear the workers' complaints about him.

When Montelongo had talked to all the workers who were willing to come forward, he and Greg Harlan said they would take the complaints to Floyd Harlan and try to resolve them. They specifically promised to review the raises.

²² Santamaria testified that by this date he had already received his increase to \$6.00 per hour, and his complaints were that Cruz had not spoken to Floyd Harlan on his behalf and Cruz' implied threat that Santamaria's tenure at the ranch might be limited. Valdovines' concern was that through Santamaria he had learned that Cruz had called him bad names. Sergio Gonzales' problem with Cruz was that he had told Sergio he would be getting a bigger raise than Sergio received and had not only refused to give him vacation, but had responded to his request with "bad language." (I:83-84,106-107; II:14-15,30,34-35.) I credit the workers as to Cruz' remarks, which Cruz did not deny making.

²³ Octaviano Gonzales, Sergio's father, previously had asked Cruz if he were responsible for Octaviano receiving only a small raise.

d. The Subsequent Meeting

Approximately a week or so later, another meeting with the same participants was held. Greg Harlan told the workers the Company had reviewed the raises and made adjustments which it thought were fair. He asked if the increases were okay, and, according to him, everyone nodded. (II:170-171.)

Gabe Valdovines testified on rebuttal that he did not think anyone responded when Greg Harlan asked if everything was okay and testified that although he was not satisfied, he did not speak up. (III:135.) Montelongo did not have the best memory (he was not even sure Greg Harlan was present), but he, too, believed there was no response to Harlan's remark. (II:69.)

Sergio Gonzales testified that not only was he not satisfied, but after the meeting he objected to the fact that he did not get an increase. Greg Harlan said he would check the computer and went to the office. He returned and told Sergio he had received more money than anyone else. Sergio explained to him that, if this were so, it was because he had worked weekends and holidays from April until October. Nothing else was said, and the matter was dropped. (III:130-131.)

I credit Valdovines and Montelongo over Harlan. I also credit Sergio. He generally had good recall, and his manner was sincere and credible. It is not surprising that more than two years after the incident he would remember something that was of specific importance to himself that others could have forgotten.

There is no indication of further communication between the

Company and the workers about the raises or the other matters the workers had brought up. Respondent seeks to minimize the dispute by arguing that the workers were always upset and complained about raises (RB pp.15-18), but it is apparent that the complaints were significant occurrences.

Although Cruz testified the workers always complained about their raises, he characterized the foregoing events as a "blow up" and indicated the situation was worse than usual. (III:24-25.) Further, in the evidence cited by Respondent, individual supervisors handled the issue; there is no indication of workers previously complaining as a group or the Company calling all its steady workers together to answer complaints.

Nothing else unusual occurred until November 11 when Juan Cruz told Mr. Santamaria he was fired and told Mr. Valdovines and Sergio Gonzales they were laid off. Each individual's situation will be discussed separately.

VII. ENTELMO SANTAMARIA

Mr. Santamaria began work at the Company in January of 1983. He was transferred to the shop in August 1987 where he worked as an assistant to Jim Wood, the shop manager, until he was discharged on November 11. (II:87.)

Mr. Wood was away from the Company during the time of the workers' complaints because he was on medical leave from September 8, 1989, until after Mr. Santamaria's termination. At some point, he returned to the Company and was still employed there at the time he testified. During Wood's absence,

Mr. Santamaria was supervised primarily by John Cruz. Even when Wood was not away, Cruz, as well as Jack Bray, Greg Harlan, Floyd Harlan, Shawn Stevenson and Ismael Quirarte, could set work priorities for Mr. Santamaria. (I:22; III:107-108.)

According to Bray, Cruz and Floyd Harlan, the impetus for firing Santamaria came from Bray.²⁴ (II:102-103,122,143; III:20.) Bray testified he decided to fire Santamaria just a few days before Santamaria was actually terminated.²⁵ (II:114-115.) The immediate cause for his' decision, he testified, was Santamaria's insubordination when Bray told him to put some spare tires into a cattle trailer.

Initially, Bray testified Santamaria not only argued Bray was wrong about the size tire Bray said to use, but Santamaria also ignored him and used the tires Santamaria thought were correct. When Bray discovered Santamaria had put the wrong size tires in the trailer, he insisted Santamaria come outside so he could prove the ones used by Santamaria were wrong. Santamaria refused to come out, shrugged his shoulders and walked away. Bray acknowledged that the correct tires were later put in the trailer, and that Santamaria might have been the person who put

²⁴Mr. Harlan credibly testified he simply approved Bray's recommendation with little discussion of the reasons for the discharge.

²⁵General Counsel argues the testimony of Cruz and Bray is inconsistent in that Cruz says they talked about termination all summer whereas Bray says they first discussed it a few days before the actual termination. (GCB p.25.) Cruz's testimony refers to them talking about the alleged continuing problems with Santamaria's work, not specifically his termination. (III:20.) I find no inconsistency.

them there. (II:142.)

Bray testified this incident reflected Santamaria's basic problem which was that he did not do what he was told but just shrugged off things. According to Bray, after this episode, "not only [he], but the ranch itself" had reached the "end of [their] rope." (II:113.) He did not explain what he meant by "the ranch itself."

There is no evidence he discussed this specific incident with Floyd Harlan or Jim Wood. However, he testified he discussed the matter extensively with Cruz to make sure he was not the only one having trouble with Santamaria. From this, I conclude that, despite Bray's testimony to the contrary, he had not fully decided to fire Santamaria until after his discussion with Cruz and that Cruz' input substantially influenced Bray's decision and likely was the determining factor. I so find in spite of Cruz' testimony that he merely concurred in Bray's decision.

Mr. Santamaria denied the incident occurred²⁶ although he acknowledged that Bray gave this same rationale for firing him to an Administrative Law Judge "ALJ" with the Unemployment Insurance Appeals Board in a telephonic hearing to determine if Mr.

²⁶He testified there was an episode involving changing tires rather than loading spares, but it was not close to the time he was fired, he was not the one who did the work, and the vehicle involved was not a cattle trailer. (I:63,66-68.) He also referred to an time he helped load tires on a trailer, but Bray was not present and had not told him to do the work. (III:106.)

Santamaria should receive unemployment benefits.²⁷

Mr. Bray could not recall any other specific incident when he had a problem with Mr. Santamaria but described generally other failings of Santamaria. In doing so, Bray tended to make broad statements and then retreat from them.

For example, he qualified his statement that Santamaria did not do what he was told by saying Santamaria never actually refused to do anything but would postpone things. Like Wood, he ultimately acknowledged there were only a few times when Santamaria did not have a proper reason for leaving one job to do another.²⁸ (II:118-120, 146-148.)

Similarly, he stated Santamaria would resist instructions and argue that he, not Bray, was the mechanic and act as if he knew more than the supervisors.²⁹ But later, he said that

²⁷He further testified that when he denied the incident and said he had been fired for union activity, the ALJ suggested a hearing where Mr. Bray would attend, and Bray said to just give Santamaria the benefits. Bray did not specifically rebut Santamaria's testimony but said only that he could not remember participating in the hearing. General Counsel attempted to obtain the UIAB records in this matter, but was informed by UIAB that such records are retained only for a short time and were no longer available. I credit Santamaria that Bray participated.

²⁸Also, when taken through the tire incident step by step rather than testifying in a narrative, he said the dispute about the size of the tires occurred at the time he saw the wrong size tires in the trailer and asked Santamaria about them. (II:116.) This, of course, means Santamaria did not ignore an instruction by Bray to use a specific size. I credit this version because I believe Bray was being more careful and thoughtful in his answers than in his narrative.

²⁹Wood also testified that Santamaria acted somewhat like a "know it all." (II:91.) Santamaria was asked only if he felt he knew more than Wood, and he said "no," he was Wood's assistant

Santamaria did not argue much with him. (II:113.) He also complained Santamaria would not tell him that he could not get to a job right away because there was more pressing work already waiting. Later, however, he acknowledged that Santamaria usually did inform him. (II:119-120;148.)

He testified he talked to Santamaria several times about these problems throughout the entire 2 years Santamaria was in the shop, but he could not recall any specific instance. Again, he later recanted and said the problems occurred mainly in 1989 and that he had talked to Santamaria 2 or 3 times that year about them.³⁰ (II:119-120,146-147.)

Mr. Santamaria testified he never decided on his own to put off work Bray asked him to do, and denied that Bray or anyone else ever told him he had postponed a task to do a less important one. He stated that if Jim Wood were not in the shop and a worker came in with something to be repaired, Santamaria had always been able to check with Bray or Cruz. I find it highly

and had no problem following his orders. (I:49,62) I believe Bray and Wood exaggerated the extent to which this was a problem as they did in the other instances noted, but I do not believe their testimony was a fabrication. However, after evaluating all the evidence, I conclude this was an annoyance, but was nothing new and not such an issue with them that it led to Santamaria's firing.

³⁰Bray also testified that a month or so before the tire incident, he had asked Cruz to speak to Santamaria because he (Bray) speaks very little Spanish and Santamaria's English is limited. This testimony causes me to doubt his testimony that he repeatedly had spoken to Santamaria about problems. According to Bray, Cruz did talk to Santamaria as he requested and reported to Bray that Santamaria was responsive, so Cruz thought the situation would improve. (II:122-123.)

unlikely he always checked with one of them and do not credit this statement.

He denied Bray ever told him that Bray, not Santamaria, set priorities, but stated he certainly understood that was the case. He also denied ever telling Bray his instructions were incorrect.³¹ (III:103-104,107.) He further denied ever telling Cruz that Bray did not know what was going on in the shop and he did not have to explain things to Bray. (III:113.)

Mr. Santamaria testified that Jack Bray did not tell him how to do his job, but did sometimes give him instructions in English, and he (Santamaria) would ask Cruz or Quirarte if he needed help in understanding the instructions. (I:51,62.) He testified that Cruz had never had a conversation with him about Bray being angry with Santamaria. (I:51.) He also testified he was not aware of any problem understanding Bray and had never been aware of Bray being angry with him. (I:54.)

Jim Wood was Santamaria's direct supervisor and was in the best position to observe his work. He was much less critical than Bray or Cruz who were more removed from the shop.

He characterized Santamaria as basically a good worker and said part of the problem might have been communication because Santamaria spoke only a little English, and he (Wood) spoke less

³¹In contrast to this testimony, Santamaria corroborated that he told Cruz that Wood was wrong about some things, and he (Santamaria) was right. According to Santamaria, Cruz replied that Wood was getting old and no longer knew his job. (III:113-114.)

Spanish.³² (II:79.) Like Bray, Wood had a tendency to make broad statements and then to moderate them as he thought about them or was asked to be more precise.

Also like Bray, he criticized Santamaria for abandoning work to do less important tasks.³³ First, he said this occurred once or twice a day; then, he said it was only 20% of the time, and, finally, he said he could only recall one specific instance when it really mattered.³⁴ (II:79-84, 89-90.)

Wood testified there were never any problems with the quality of Santamaria's work except for an instance involving

³²In approximately October 1988, Wood told Cruz that Santamaria was "bullheaded" and didn't seem to want to follow Wood's instructions. Wood candidly admitted he would get excited and speak loudly to Santamaria and understood his behavior caused Santamaria to believe Wood was angry at him. Wood was concerned and asked Cruz to tell Santamaria that he was not angry, but that they needed to be able to communicate better. (III:13.)

³³Wood, Cruz and Floyd Harlan testified Santamaria spent too much time chatting with co-workers and even with friends who did not work for the Company. (II:91-92,97-98; III:11,79-80, 108-109.) Santamaria testified contradictorily that he had two friends who would usually come by and that they came only once for about 5 minutes. (III:112.) I do not rely on Harlan's testimony. His testimony was vague and unconvincing. I had the distinct sense he was repeating what he had been told. I also had the sense that Wood and Cruz overstated the case, and that Santamaria understated it. However, the issue is how important was this element in the decision to fire Santamaria. Listening to Cruz and Wood, I am convinced it is a makeweight argument. To the extent it occurred, I was not convinced it was worse in 1989 than in the past, Wood's testimony to the contrary notwithstanding, nor did they convince me it was a serious consideration.

³⁴He told Santamaria to fix a spray rig, and the work was not finished when he returned. Santamaria's explanation was that a lot of little things had come up which had needed to be done. The spray rig was needed immediately, and Wood was not convinced that Santamaria had acted appropriately.

torquing an engine which occurred in March or April 1989. In that incident, Santamaria did the work incorrectly and initially refused to redo the job as Wood instructed saying it was not his fault, but eventually he did go back and fix it. (II:91.)

I note that even Cruz and Bray had little to say to impugn Santamaria's ability to do his job.³⁵ In fact, Bray testified that they put Santamaria in the shop because he was mechanically inclined.³⁶ (II:112.)

Wood acknowledged he never specifically warned Santamaria that there were problems, saying he did not believe that was his responsibility.³⁷ (II:85.) Bray testified he never even gave

³⁵Cruz referred to an incident involving a diesel engine which occurred while Wood was in the hospital in September 1989, but testified that although he teased Santamaria, he did not believe Santamaria had done anything wrong and told him so. Santamaria, however, believed Cruz did blame him and testified Cruz told him that it was because of this incident that he originally received only a 15 cent raise. (III:22-23,82-83,111.)

³⁶Floyd Harlan tried to paint Santamaria as less than a competent employee testifying that there were some jobs that had to be redone and that he would drive by and see Santamaria working on something and later observe that there were still problems with the item. He had no specific recall of any such situation and admitted that he did not know if any such instances involved Santamaria being at fault. I do not rely on his testimony in assessing whether there were problems with Santamaria's work since it is at odds with that of Wood who was in a much better position to know.

³⁷Santamaria, Gonzales and Valdovines all testified that the Company had a system of providing written warnings and that a worker could be fired on the third such warning. (I:27, 109; II:16.) Company personnel denied such a system was in place during the times material herein. (II:137,154, 171.)

I find it unnecessary to resolve the conflict since the system, if it existed, was not enforced. I do not credit the workers' testimony that Montelongo stated at the October 23 meeting that the system would henceforth be enforced. There was

verbal warnings in the sense of telling someone she or he would be fired if they did not improve. He believed in telling a worker if he were dissatisfied and trying to work with the individual and if things did not work out, he would just let the person go. (II:137.) His testimony sounded truthful.

John Cruz testified he never on his own told Santamaria there were problems with his work but did so only on behalf of Jack Bray and Jim Wood. He spoke to Santamaria 2 or 3 times at Bray's request. (III:5-6,16.)

One time was the incident described by Bray which occurred a month or so before Santamaria was fired, when Bray asked Cruz to talk to Santamaria. Cruz also described two other instances when Bray complained to him.

One was late in 1988 when Bray asked Cruz what he thought of Santamaria and told Cruz he found Santamaria stubborn, that is, he wanted to do things his own way, and Santamaria would joke when Bray gave him instructions or ignore him and act as if he didn't understand. (III:5-6, 78-79.) Santamaria overheard this conversation and said he knew Bray was angry but that Bray did not understand the shop. (III:6.)

Cruz testified that thereafter every 2 or 3 weeks Bray would tell Cruz that Santamaria was not doing as well as he should. Bray's testimony indicates the problem was not so pervasive, and I credit Bray.

no reason for him to raise the subject, and the statement does not fit the context of the rest of his remarks.

The second instance occurred in approximately August 1989, when Bray complained to Cruz that Santamaria was not taking work seriously and asked Cruz to impress upon him that he needed to change. Cruz talked to Santamaria who again complained that Bray didn't know what was going on in the shop, and he shouldn't have to explain everything to Bray. Cruz told him he had to follow Bray's instructions because Bray was the boss. (III:9-10.)

Cruz testified he also spoke to Santamaria at least three times because Jim Wood was upset but could recall only two instances specifically. Wood confirmed he asked Cruz to speak to Santamaria probably 3 times. (II:86-89.)

The first time was in October 1988, i.e. the incident when Wood asked Cruz to tell Santamaria that Wood was not angry with him. Cruz went into the shop, and Santamaria came up to him and said he knew Wood was upset. Santamaria added that Wood acted as if he thought Santamaria didn't know what he was doing and would scold him as if he were Wood's son. Santamaria said Wood was wrong, that he knew what he was doing. (III:13-14.)

There were no problems for three or four months, but in February 1989, Wood saw Cruz in the shop and told him Santamaria was still not following his instructions.³⁸ Cruz spoke to

³⁸A hearsay objection was interposed, and this statement was admitted to show why Cruz spoke to Santamaria not to establish that Santamaria was not following instructions. General Counsel was granted a standing objection on this point, so none of Cruz' testimony as to what Bray or Wood said about problems they had with Santamaria are admissible to establish the truth that those problems existed. Only Wood's and Bray's own testimony is admissible for that purpose.

Santamaria who complained that Wood was always upset about something, that they were getting along as well as possible and that he didn't understand a lot of what Wood said.³⁹ (II:16.) He also told Cruz he wanted to go back to his old job of driving a forklift, but Cruz told him he was needed in the shop and to "hang in and do the best could."⁴⁰ (Id.)

Mr. Santamaria acknowledged that twice he told Cruz he knew Wood was angry with him. Once was soon after he started working in the shop. Wood would yell and say things like, "get out of here, shit." Wood also called him "stupid." (Mr. Santamaria spoke these words in English. See, III:120.) At first, since he understood only a little English, he believed Wood was directing his bad language at him, but after working in the shop for a while, he observed that Wood often sounded upset and behaved the same way with the other workers. (III:113, 120.)

Santamaria acknowledged that he asked Cruz to send him back to his former job. A few weeks later, Cruz told him he had to work in the shop if he wanted to work at the Company. (I:50-51.) Santamaria stated he believed the problem he and Wood had was the language barrier, and that he generally did not have trouble

³⁹On cross-examination, Cruz became confused as to the dates of these conversations. (III:81,91,94.) Based on the evidence as a whole, I conclude they occurred in October 1988 and February 1989 as he testified to on direct examination. I so find primarily because he testified the February conversation occurred the same year Wood went to the hospital.

⁴⁰In view of the Company's policy of transferring workers to where they were most needed and could function well, I find that the various problems with Santamaria were not that severe or else the Company would have moved him to other work.

communicating with Greg Harlan who also gave him instructions although usually for small jobs. It will be recalled that Greg Harlan had some knowledge of Spanish.⁴¹ (I:52-53.)

Despite Wood's behavior, Santamaria testified he did not believe Wood caused him to be fired. Rather, he thought Cruz was responsible because he was upset that Santamaria had gone to Floyd Harlan and gotten an additional raise, because he and the other workers complained, and because Santamaria got involved in "matters of the union."⁴² (III:123-124.)

Santamaria's Termination

Cruz' version of the decision to terminate Santamaria differs from Bray's. According to Cruz, his input was limited to agreeing with Bray that Santamaria was very stubborn and frequently would not follow instructions. (III:20.) When Santamaria accused Cruz of being responsible for his being fired, Cruz denied it, and said Bray had talked to Floyd, they had called in Cruz, and he had merely agreed Santamaria should be terminated.

I have credited Bray's testimony that he discussed the

⁴¹Cruz testified he was not normally called on to translate for Wood and Santamaria and did so only when matters were complicated such as having to do something from a book, such as torquing an engine. (III:18.) Cruz also testified he would hear Santamaria talking on the phone to people about automotive parts, and usually he could tell them what they needed to know. (III:20.)

⁴²He did not explain the last remark, and there is no evidence of his or other workers' involvement in a union prior to his being fired. Nor is there any allegation he was fired for union activity.

firing extensively with Cruz because he wanted Cruz' input because if Bray were the only one having trouble with Santamaria, then perhaps it was not Santamaria but something relating to Bray. On the other hand, if others had problems too, then it was time to bring the problem to Floyd Harlan. (II:143.)

As noted above, the fact that Bray felt the need to discuss the firing extensively with Cruz causes me to believe Bray was not sure he was going to fire Santamaria at the time of the tire incident but was considering, it and Cruz' input was determinative. This fact also causes me to conclude that it is unlikely they had been discussing Santamaria all summer. If they had, it is highly unlikely Cruz would never have mentioned Wood's concerns or his own. And had he done so, Bray would not have needed to ascertain he was not the only one who had trouble with Santamaria.

Turning to the termination itself, because he speaks Spanish, Cruz was selected to tell Santamaria he was fired. On November 11, Cruz radioed Santamaria to come to the shop where he gave him the news.

According to Santamaria, he asked Cruz why he was being fired and if he had done something wrong. Cruz responded he had it "up to here" (indicating the top of his head) because Santamaria talked too much to all the workers. (I:23-24.) Cruz testified he could not recall saying anything like that. (III:30.) Given Cruz' failure to specifically deny the statement, I credit Santamaria, but I find the remark of little

probative value since it is not clear whether Cruz referred to Santamaria's "visiting" at the shop or meant he encouraging other workers to protest or what. There is no evidence of the latter, and none of the Company witnesses suggests the "visiting" was so serious that it was the main reason Santamaria was fired.

Santamaria told Cruz he wanted a written explanation of why he was being fired.⁴³ Cruz replied that he should turn in his keys, get his tools, and "get the hell out." (I:24-25.) Santamaria gave him his keys, and Cruz went to the shop.

Santamaria testified he then spoke to Bray in English and asked what he had done wrong. In order to demonstrate that he was able to do so, Santamaria gave this portion of his testimony in English. He said that Bray replied, "You're too much trouble" and that he also said Santamaria caused him (Bray), Cruz and Floyd a lot of problems. Santamaria then asked him for a written explanation, and Bray replied, "I don't know. I don't know. I don't speak Spanish." (I:26.) He testified Bray seemed to understand what he had said in English.⁴⁴ (I:54.)

Santamaria testified he went in to get his tools and two other workers Jorge Gomez and Gregorio Gutierrez were present. He pointed out to Cruz that there were witnesses, demanded that

⁴³There is no dispute that he asked for but never received a written explanation. (III:30,114-115,118-119.)

⁴⁴Bray acknowledged he was present when Cruz fired Santamaria but denied that he and Santamaria spoke. Cruz also recalled that Bray and Santamaria did not speak. (II:143; III:82.) I found none of the witnesses completely credible and am unable to credit one version over another.

Cruz repeat what he had said and vowed he would see Cruz in court. Cruz said nothing and Santamaria left. (I:26; III:114.) Neither of these men testified.

Cruz' version is somewhat different. According to him, when he told Santamaria he was fired, Santamaria accused Cruz of being responsible, saying Cruz had a grudge and had told Floyd that Santamaria had ruined an engine.⁴⁵ This refers to the diesel engine incident described above which Cruz said occurred "right before the blow up, when everybody wanted more money...." (III:24.)

Cruz replied he did not blame Santamaria for that incident, that there had been lots of "mishaps," and that he and Bray had talked to Santamaria, but he did not seem responsive. Santamaria said he would get even with Cruz, and Cruz told him to just leave. Cruz did not believe anyone other than Bray was nearby when the firing occurred. (III:21-22.)

Further Credibility Determinations

Despite the fact that both Bray and Wood tended to exaggerate somewhat, their testimony about the tires and engine torquing incidents sounded true, and I credit them despite Santamaria's denials. I also credit them and Cruz that Santamaria sometimes inappropriately changed work priorities, but

⁴⁵Santamaria denied being angry with Cruz when he was fired and said he was disappointed that Cruz was so "worked up," and he did not know why. But then he testified he thought Cruz caused him to be fired because he had asked for the raise to \$6.00 based on Cruz' comment that they would see how many such checks Santamaria would receive. (I:54-55.) I credit Cruz that Santamaria was angry and accused Cruz of being responsible.

I am convinced Bray and Cruz greatly overstated the situation and that it was only an occasional problem.

Jim Wood had the most opportunity to observe Santamaria. He seemed generally candid, and I find he best described Santamaria's work. Namely, he was basically a good worker, but there were sometimes problems. These problems, however, did not surface just before Santamaria was terminated but had surfaced periodically during his more than two years in the shop.

VIII. SERGIO GONZALES

Sergio Gonzales was a year-round, permanent employee. He was hired in May 1988 as a general ranch worker. He performed a variety of jobs including driving a forklift during the harvests until mid-April 1989 when he was assigned the regular task of irrigating an area of the ranch referred to as "La Loma" ("the hill") where he worked until mid-October when irrigation ceased for the winter.⁴⁶ Thereafter, he sprayed fertilizer in the cattle pastures until he was laid off on November 11. (I:95,122.)

On Saturday, November 11, Cruz told him work was very slow, and he was laying Sergio off for a few days.⁴⁷ Although he had

⁴⁶His uncle, Pedro Gonzales, had previously had the job, but he was needed elsewhere on the ranch so he suggested they let Sergio irrigate and trained him to do the work.

⁴⁷I do not find this testimony inconsistent with the fact that Sergio returned on Monday to ask either why he had been fired or whether he had been fired versus laid off (Sergio testified both ways) because he needed to give a reason in order to collect unemployment benefits and to know whether to look for another job. In view of Santamaria's termination, Sergio's query is understandable despite what Cruz had initially told him. Cruz

never been laid off before,⁴⁸ Sergio responded, "Fine." I credit Sergio rather than Cruz on this point since Sergio was quite credible whereas Cruz's testimony on various matters was inconsistent and exaggerated. (Compare, I:96 with III:48-50.)

According to Cruz, he and Bray had been discussing since early September that Sergio might be a layoff candidate. During the first week of November, they and Floyd Harlan discussed the fact that work was slowing down and talked about the quality of various employees' work. They did not feel Sergio was "putting out enough effort" and decided to lay him off.⁴⁹ (III:46-47.)

Greg Harlan testified he normally would have been included in the discussion of whether layoffs were needed and, if so, who would be laid off, but he was at the northern ranch for several days before November 11 and did not return until late that

replied Sergio should say he had been laid off. (I:97-98, 126-127.) At that time, according to Cruz, Sergio and Gabe had not been terminated. He did not say when that decision was made.

⁴⁸He had been on vacation from approximately December 24, 1988 until February 12, 1989. (I:97.)

⁴⁹Cruz testified that work typically slows down in November and December and if there are going to be layoffs, they occur during this time. Whether or not there are layoffs depends on how the ranch is doing financially. Floyd Harlan would decide if layoffs were necessary and inform the supervisors. (III:47-48.) There was no specific testimony as to the ranch's financial condition in 1989 versus 1988, but the fact that raises were given logically suggests the ranch was not doing poorly. Further, the evidence is that Bray and Cruz approached Floyd Harlan about getting rid of Santamaria, Sergio Gonzales and Valdovines rather than the other way around. It is clear Harlan relied heavily on his supervisors since he was busy with other matters and with regard to the events at issue simply followed their suggestions.

afternoon. (II:175,182-182.) He did not know in advance that Santamaria was going to be fired or that Sergio and Valdovines were going to be laid off. He found out when he contacted Cruz when he returned late on the day that happened.⁵⁰ (II:182,184.) His testimony belies that of Cruz and Bray that there had been ongoing discussions.

According to Bray, Sergio was laid off because irrigating had ceased for the winter, his work was not satisfactory, and the Company did not plan to have him irrigate the next season. He also testified that Sergio did not fit in well with another crew, but did not give any examples of this claim. (II:127,132.)

Bray testified he had firsthand knowledge of Sergio's work because Bray was often called in if there were problems on La Loma since he was one of the few people still on the ranch who had helped install the underground irrigation system used there. He cited an instance when he told Sergio to fix a leak, and the next day it was not fixed. (II:127-128.)

Sergio denied he ever refused to fix a leak pointed out to him or that he ever let a field go dry.⁵¹ (III:131-132.)

⁵⁰Cruz testified Greg was mistaken when he said that he and Cruz had talked at the ranch. Rather, Greg had called him that evening. The conversation was not described. (III:51.) I credit Harlan. I found him a sincere witness.

⁵¹My sense of Bray is that he exaggerated things in order to try to support Cruz and the Company, but generally tried not to be untruthful. However, I found Sergio a very good witness, and I credit his denial that he did not fail or refuse to fix a leak pointed out to him by Bray. Sergio struck me as neither careless nor resentful to authority. I just do not believe he would have ignored the instructions of such a high level supervisor as Bray.

He also denied he had trouble working with others saying he worked well in crews before being transferred to irrigate.⁵² (III:131.)

Bray and Cruz both charged that Sergio had neglected monitoring the emitters⁵³ in the irrigation line, but their testimony is inconsistent. Both showed the same tendency to exaggerate as they did when testifying about Santamaria.

Initially, Bray testified Sergio should have been able to find any emitters that were plugged without waiting for the trees to wilt from lack of water. (II:129.) Yet, elsewhere, he testified that the irrigator could not cover an entire field in one day, and that watching for wilt was one of the best ways to determine if an emitter were clogged because checking each emitter is an enormous task. (II:157) I credit the latter testimony because it was delivered in a spontaneous fashion as part of a general explanation on how the orchard was irrigated.

Bray testified that Sergio asked Cruz for help 2 or 3 times.

⁵²Sergio testified that right after the October 23 meeting when Sergio had complained about not getting vacation, Bray had offered him work at Bray's own ranch saying he was leaving Harlan because the Company had a lot of problems. According to Sergio, his uncle Pedro was present, however, his uncle did not testify. (I:99.) Bray denied that he had offered Sergio work at his ranch; he said he did virtually all the work himself. (II:134,139-140.) I credit Sergio because I found him a very good witness whereas Bray was more a mixed bag. Clearly, Bray would have reason to be embarrassed at trying to hire away a worker and had reason to avoid admitting doing so even absent wanting to avoid the implication that his assertions about Sergio's alleged poor work were untrue.

⁵³The emitters (initially translated incorrectly as "meters") are the points on the drip irrigation system which disperse the water.

Not only did he not say specifically that Sergio's requests were beyond what could be expected, he ultimately testified that he had never seen Sergio handle a problem with the emitters improperly and that lack of work was a bigger reason for letting Sergio go than the quality of his work. (II:131-132, 158.)

Cruz testified Sergio began complaining about one month after he started irrigating and asked for help "constantly" by which Cruz said he meant at least once a week. (III:41-42,44.) Cruz said Sergio complained that 90% of the emitters were clogged, but when Cruz investigated, he found only 6 or 7% were clogged. I note this is still more than the 1% or 2% Bray said should be expected. (Compare II:155-156 with III:41-42.)

Later, Cruz reduced his estimate and said he sent people to help Sergio 4 or 5 times during the summer and that a "few" times he did not because he had no one to spare or because he thought Sergio could handle things himself. (II:44-45.) Clearly, this means Sergio complained far less than every week from May to mid-October.

Sergio confirmed that he asked for help but stated he did so only 2 or 3 times and it was toward the beginning of the season when, as everyone agrees, the emitters are more likely to cause trouble because they have not been used over the winter. He realized there was a problem in early May because the trees were wilting.

Sergio testified Cruz never told him he was asking for help too often. Nor did Cruz ever say he was dissatisfied with

Sergio's work. (I:94-95, 122.) Cruz acknowledged he never told Sergio he was not doing a good job although he did tell Sergio that previously there had not been such a problem with emitters being clogged. He said he did not complain about Sergio's work because he hoped things would work out. (III:44-46.)

I find Gonzales asked for help relatively few times, that his requests were not excessive and that no one told him they were. Generally, Gonzales seemed a sincere witness.

IX. GABRIEL (GABE) VALDOVINES

Gabe Valdovines was hired in September or November 1988. He also was a permanent, full-time employee. He performed a wide variety of jobs when he was not attending to his primary work of tending the cattle, repairing fences, and building a section of fence (a project which was completed at some unidentified time prior to his layoff). (II:3-5,125,174.)

The cattle work was busiest in the winter when the cattle were brought down to Clovis from northern California. When Mr. Valdovines worked with the cattle and on the fences, he worked mainly under Greg Harlan, and when performing other tasks was supervised by Cruz or Ismael Quirarte.

Greg Harlan spent quite a bit of his time in the cattle operation and offered no negative observations about the quality of Valdovines' work.⁵⁴

Floyd Harlan believed Valdovines did a

⁵⁴Valdovines testified that both Greg and Floyd Harlan had said his work was fine. (II:8, 27-29.) Greg likely conveyed that impression since he acknowledged he probably thanked Valdovines when he assisted him. Since he was not at the ranch the day Valdovines was laid off, I do not credit the specific incident

satisfactory job on the fence repairs he did. (II:101.)

Both Bray and Cruz acknowledged they had little involvement in these operations and therefore little opportunity to observe Valdovines.⁵⁵ Bray even misidentified Valdovines as Sergio Gonzales. (II:125-126.)

There are a number of odd things about Valdovines' layoff. He was hired, according to Bray, to work with the cattle and had done so for a year. Yet, he was laid off because of a supposed lack of work just at the time of year the cattle were coming to Clovis. Further, it is not clear when the decision was made, and no one accepts responsibility for making it.

Cruz testified he, Bray and Harlan talked about possibly laying off Valdovines for a month or two, but did not decide to do so until the very day they actually laid him off. (III:61, 77-78.) But, elsewhere, he testified the decision to lay off Valdovines was made in early November at the same time they decided to lay off Sergio Gonzales. (III:86-87.)

described by Valdovines. (II:175-176.) Although Floyd Harlan said he doubted he complimented Valdovines because he was not the sort of person who tended to hand out compliments, the incident Valdovines described did not involve a gratuitous compliment. (II:29,101.) Valdovines¹ version sounded sincere.

⁵⁵Although Cruz had the opportunity to use Valdovines for pruning, weeding, and other tasks beginning in September, he acknowledged that Ismael Quirarte was assigning work to Valdovines and Cruz really did not know what Valdovines was doing because he (Cruz) did not get into the fields that often. He did recall telling Quirarte to have Valdovines put out poison for squirrels which is the work he was performing when he was laid off. (II:7; III:55, 61-63, 72.) Cruz believed Quirarte was using Valdovines about 80% of the time, and Greg was occasionally using him to mend fences. (III:73.)

Cruz, Bray and Floyd Harlan each denied deciding to lay off Valdovines. Harlan credibly testified he just approved a recommendation from one of the supervisors--he could not remember if it was Cruz or Bray. (II:102,106.)

Bray testified he did not have much to do with the decision because he had little to do with the cattle operation. He indicated it was mainly Cruz' decision as to both Valdovines and Gonzales, that he (Bray) was just "in on the discussion." (II:124-125, 132.)

Cruz testified that Bray and Harlan told him to lay off Valdovines. (III:60.) He said he did not know why Valdovines rather than some other person was picked for layoff, but then he admitted having given input into the decision in that he stated that Valdovines appeared to come to the shop too often. But then, he almost immediately backtracked and said that Valdovines probably had a legitimate reason to be there, but the problem was he stayed too long which Cruz deduced from the fact that he would drive by and would come back 15 or 20 minutes later and Valdovines would still be there. (III:74-76.) He acknowledged that Valdovines usually provided a reason for his being there when Cruz inquired.⁵⁶ (Id.)

Bray also testified that Sergio seemed to go to the shop too

⁵⁶Cruz testified he commented once to Valdovines that he seemed to come to the shop too much, and Valdovines replied that he would try not to do it so often. I do not consider Valdovines' response an admission. This is the type of response a worker would reasonably make to a supervisor without any intention to agree the observation was correct but simply to acknowledge the supervisor's authority.

often for supplies and to talk to Santamaria, but when pressed, he acknowledged there was no way he could be sure the trips were unnecessary. (II:133,153.) Bray had no other negative comments about Valdovines' work.

Floyd Harlan also observed that Valdovines seemed to spend too much time talking to other workers, but Harlan said he observed this when Valdovines was pruning with a crew. (II:105-106.) His testimony was very general, and the only crew member he could recall was Valdovines which is odd since no reason appears why he should remember only him. The fact that Harlan rarely involved himself with the workers casts further doubt on his testimony.

From listening to them, I am convinced Harlan and Bray were recounting what they had heard from Cruz, and I do not rely on their testimony. In any event, I was not persuaded that any of the three was truly concerned this was a serious matter. Their testimony sounded as if they were stretching to come up with something negative to say about him.

Valdovines denied stopping by the shop just to chat with Santamaria. When he was there, he talked to him about whatever it was that he needed. (II:40.) He also denied standing around talking to co-workers except during lunch or on break, and testified he did not lag behind in work. (III:135.) He also denied that Cruz or anyone else complained about his work. I credit his testimony.

The Layoff

On Saturday, November 11, Valdovines had finished work for the day. Cruz came over and told him he was laying him off because work was very slow, but Cruz did not say how long he would be laid off. (II:7.) Valdovines asked why he was being laid off since Floyd Harlan had told him he was a permanent worker. Cruz replied only that Floyd had told him to lay Valdovines off. Cruz then just walked away. (II:24.)

The next day, Sunday, Valdovines and Entelmo Santamaria went to the ranch to try to find Floyd Harlan. They had brought Ramon Gonzales, who spoke English well, to ask Harlan why they had been laid off. They found Harlan at the office, and Gonzales spoke to Harlan on their behalf. Harlan acknowledged he knew about the situation but indicated he did not want to talk about the subject and left. (II:7,26-27.)

X. THE REQUESTS FOR REHIRE

Sometime in 1990, Santamaria and Valdovines went to the Company office. They saw Floyd Harlan and said they wanted work and asked for an application. Harlan replied there was no work and no applications.⁵⁷ (I:34; II:16-17.)

⁵⁷Valdovines testified this conversation was in English. To demonstrate that he did not misunderstand Harlan's response, General Counsel stated in English the words Harlan testified he had said to Valdovines. She asked Valdovines to repeat, also in English, what she had just said. He repeated the essence of what she had said. (III:142-143.) Respondent's counsel then asked Valdovines to say in English the words he had testified Harlan had said on that occasion. Although by no means fluent, Valdovines again was able to give the essence of the statement. (III:144.)

Floyd Harlan recalled that Valdovines and Santamaria had asked him for work. He testified this occurred on a weekend when no one else was in the office, so he told them to come back during the week and talk to one of the supervisors. (II:102.)

I credit the workers as to their conversation with Floyd Harlan. Even though Floyd Harlan apparently only approved Bray's recommendation to terminate Santamaria, I find it unlikely he would have told Santamaria to return later rather than simply refuse to hire him since, after all, he had been fired.

After speaking to Floyd Harlan, Santamaria and Valdovines went to the shop because Santamaria wanted to say "hello" to Jim Wood. They saw Shawn Stevenson who greeted them. But then Cruz came over and spoke to Shawn who then came back to them and asked why they were there. They said they wanted work, and Shawn told them there was none available. They replied that Floyd had just told them that. Shawn then told them to leave the area immediately and if they wanted to talk to anyone to do it by the road. (I:35; II:17-18.)

I credit the workers as to the events at the shop. Cruz did not deny the incident, and Shawn Stevenson did not testify.

Sergio Gonzales testified he went to the ranch alone sometime in mid-1990 to seek work. He asked Shawn Stevenson for a job, but Shawn replied only, "Not here." (I:110.) As noted, Shawn Stevenson did not testify. I credit Gonzales.

XI. WORKERS WHO PARTICIPATED IN THE OCTOBER 23 MEETING

In addition to the three alleged discriminatees, Gabriel

Valdovines, Sergio Gonzales and Entelmo Santamaria, ten other workers were identified as having participated in the October 23 meeting. The parties stipulated to the tenure of these individuals with Respondent after this meeting based on the Company's payroll records. (III:95-98.)

Those records show that as of January 18, 1992, the date records were provided to General Counsel, six of the ten people were still working for Harlan. One of these was Ramon Gonzales who had acted as a spokesperson.⁵⁸

Pedro Gonzales and Octaviano Roberto Gonzales (Sergio's uncle and father) both left as of May 3, 1990. Roberto went on disability leave, and Pedro returned to his family in Mexico. (II:172-173.)

Rudolfo Carreon left the Company as of May 5, 1990, and Martin Rodriguez left as of September 22, 1991. The only worker who left work in 1989 was Conrado Cantu who left on December 16, 1989. There is no evidence why these individuals left.

As noted previously, the Company acknowledges that on December 11, 1989, it hired an individual named Phone Sorvang in the same classification as Valdovines and Sergio Gonzales and that he worked until February 3, 1990. There is no indication why he left the Company. (III:100-101.)

LEGAL ANALYSIS

In order to prove an allegation of discriminatory discharge

⁵⁸The others were: Jose Madrigal, Gerado Rodriguez, Guillermo Ortiz, Miguel Chavez, and Paz Estrada.

or layoff, the General Counsel must prove that the employer knew or believed that the alleged discriminatees engaged in protected concerted activity and discriminated against them because of their participation in that activity.⁵⁹ (Lawrence Scarrone (hereafter "Scarrone") (1981) 7 ALRB No. 13.) Once the General Counsel has established a prima facie case, the burden of proof then shifts to the employer to prove that the decision would have been the same even absent the protected activity. (NLRB v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857]; Wright Line (1980) 251 NLRB 1083 [105 LRRM 119], enf'd. NLRB v. Wright Line (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].)

There can be no doubt that wages, the other benefits, and the treatment of foreman Cruz about which the workers' complained come within the ambit of protected activity. Although Respondent characterizes the complaints as individual, it concedes they were made as part of a group effort to bring all the complaints to the attention of management for resolution.

Respondent cites no legal authority which would characterize

⁵⁹Where the allegation is an unlawful refusal to rehire or recall, General Counsel must prove there was work available when the employees applied for it and that it was the employer's practice to recall or rehire workers. (Anton Caratan & Son (1982) 8 ALRB No.83.) General Counsel has made no such allegation here and relies on the refusals to rehire as supporting evidence that although Respondent characterized its action regarding Valdovines and Gonzales as a layoff, it was not, but was instead a ploy to rid itself of these troublemakers. I find the refusals to rehire inconclusive since there was no evidence work was available or that the Company recalled laid off workers.

the workers' activity as anything but concerted activity, and I find the workers' support for one another when they presented their grievances in the October meetings constituted protected concerted activity.⁶⁰ Clearly, the element of knowledge is established since the complaints were made to management. Having found General Counsel has established the first two elements of its prima facie case, I turn to the issue of causal connection.

Other than Cruz' comment to Santamaria after the latter obtained his second raise in October, there is no direct evidence to connect the dismissals with the workers' complaints. As in most such cases, one must look to circumstantial evidence.

Timing is always a highly significant factor. Here, less than three weeks after the workers confronted management, three out of 25 year-round employees were dismissed.

Mr. Santamaria had worked for the Company for some 6 years. Valdovines and Gonzales had been there for less than two years but had never been laid off before. The timing strongly suggests a connection between their dismissal and their complaints.

In addition to the proximity of the dismissals to the protected activity, the fact that all three men were dismissed at the same time⁶¹ also tends to support General Counsel's case.

⁶⁰The complaints were inherently individual to some extent in that Respondent did not grant across the board wage increases, so the amount of the raises varied from one worker to the next. Similarly, several of the criticisms regarding Cruz' treatment involved issues specific to an individual.

⁶¹Cruz and Bray reasonably explained that it is easier to let someone go at the end of a pay period which explains why they were all dismissed on November 11, but does not explain why the

Work tends to taper off, not end abruptly -- at least not so abruptly as to necessitate the simultaneous dismissal of over 12% of the workforce⁶² where in the proceeding year no workers were laid off.

Although timing is a very significant factor in determining casual connection, it is not enough by itself. Departure from past practice, giving false or inconsistent reasons -- or no reason -- for adverse actions are also significant elements in establishing the request connection.

Typically, according to Respondent, Floyd Harlan would review the ranch's financial condition and inform the supervisors whether layoffs would be necessary. Employees' raises also depended on the ranch's financial condition.

The fact that no one was laid off in 1988, that operations in 1988 and 1989 were about the same, that there was no showing the ranch was in worse financial condition in 1989 than in 1988, and the fact that none of Respondent's witnesses testified that this normal triggering mechanism was a factor in 1989, all support General Counsel's prima facie case.⁶³

Additionally, although Cruz testified at one point that

need arose to dismiss them all in the very same week.

⁶²I note that the three dismissals constitute a reduction which is approximately a full % as large as the layoffs in 1991 when there was no citrus harvest at all, and thus attendant functions would have been greatly reduced or eliminated altogether. This fact makes the simultaneous dismissal seem very large.

⁶³The fact that raises were made in October also indicates the ranch's financial condition was not an issue.

Floyd Harlan suggested laying off Valdovines because there was not enough work, I have credited Floyd Harlan that he was only following Bray's and Cruz's suggestions regarding the layoffs and firing. The weight of the evidence indicates that Bray and Cruz came to him as opposed to the normal practice of him directing them to prepare for layoffs.

The considerations I have discussed apply to all three workers. I turn now to the elements which are specific to each.

Gabe Valdovines was hired specifically to work with the cattle. In November, the cattle were moved from Quincy to Clovis for the winter. Thus, even accepting that in September and October the ranch was using Valdovines in various jobs apart from the cattle operation (which Valdovines did not deny), the very work he was specifically hired to do was just beginning, and he was the only employee assisting Shawn and Greg with the cattle. These facts cast serious doubt on Respondent's assertion that he was laid off for lack of work.

Further, Cruz testified contradictorily that Valdovines was laid off because he observed there was no more work for him, that he and Bray told Quirarte what assignments to give Valdovines, and that he (Cruz) did not really know what Valdovines was doing because Quirarte was giving him his work assignments because Cruz was too busy to get out into the fields much. These contradictions also cast doubt on whether or not Cruz personally knew whether work was available for Valdovines and raise the likelihood that lack of work was not the true

reason he was laid off.

There is also the fact that although Greg Harlan would normally be consulted about layoffs, he was not in this instance. This is especially odd since he ran the cattle operation. If lack of work were the real issue, it is logical that Cruz and Bray would have checked with Greg.

Greg, the person who worked the most with Valdovines, had no negative comments about his work. Nor did Cruz or Bray who acknowledged they had very little to do with the cattle operation.⁶⁴

Cruz testified both that Floyd made the decision and that he was not sure who did. I have credited Harlan that he merely approved the suggestion from either Bray or Cruz, he could not remember which.⁶⁵

Cruz acknowledged he gave input which consisted of criticizing Valdovines' "visiting" at the shop. As noted previously, although Bray attempted to back up Cruz' criticism, ultimately he admitted he had no way of knowing whether the frequency of Valdovines' visits or their length were unreasonable. Bray also said he had little to do with deciding to lay off Valdovines, that it was mainly Cruz' decision. From the foregoing, I conclude Cruz was the person who suggested

⁶⁴The fact that Valdovines was offered the opportunity to transfer to Quincy where he would have worked with little supervision also indicates Respondent's confidence in his work.

⁶⁵I have discounted Harlan's testimony about Valdovines holding up work in the pruning crew and the implication that this was a motivating factor in Harlan's agreeing to the layoff.

laying off Valdovines.

This conclusion is reinforced by Greg Harlan's and Cruz's testimony regarding Greg being away when the decision to lay off Valdovines was made. It seemed to me that Greg was still upset that this had occurred, and I note it was Cruz he sought out to discuss what had happened.

Based on the foregoing, I find General Counsel has established a prima facie case. The burden of proof shifts to Respondent to prove that it did not lay off Valdovines because he engaged in protected concerted activity.

One of Respondent's defenses is that it had no reason to retaliate against Valdovines, Santamaria or Gonzales because they were not the only people to complain and, surely, if it were going to retaliate, it would have gotten rid of Ramon and Pedro whom it characterizes as the most visible complainants.

This argument cuts both ways.⁶⁶ As General Counsel notes, Respondent need not be so blatant that it retaliates against everyone who participated in protected activity before a

⁶⁶This is also true of Respondent's hiring of another general ranch worker a month after the dismissals herein. There is no showing that Respondent had a practice of recalling its permanent workers. (The only testimony concerned its harvest workers.) The individual worked for only two months. The time lag of one month can support both the view that there was work available or the contrary view that Respondent did not need the three men during this time. The possibility for manipulating the workload makes it impossible to tell which way the hiring of the additional worker cuts. For example, with Jim Wood on medical leave and Santamaria his only assistant, someone clearly had to do that job and whatever work that person had been doing had to be picked up by someone else. Yet, no one was hired until a month after the dismissals.

violation may be proven. Conversely, as Respondent argues, ten people in addition to the three alleged discriminates complained about wages, and the ten remained working for the Company.

The promptness with which the Company responded to the workers' complaints about the wages, and its willingness to review them and make adjustments argue against the Company later retaliating against its workforce to forestall future disturbances. Having just settled people down after the "blow up" it is reasonable to ask whether the Company would want to stir up new dissention.

I find the significant factor is not who complained about wages, but who complained about Cruz since, as discussed, infra, I find he was the primary force behind the layoffs and Santamaria's discharge. The only persons besides the three who were dismissed who publicly criticized Cruz was Sergio's father, Octaviano and his uncle Pedro.⁶⁷

Cruz's denial that he heard these complaints is disputed by even Respondent's own witness Montelongo. Pedro and Octaviano had worked for the Company longer than Sergio, and dismissing co-workers or relatives can send a powerful message. Respondent also defends by arguing there was no work for Valdovines. As discussed above, this rationale does not withstand scrutiny.

I have discounted the testimony about Valdovines disrupting

⁶⁷Although one other worker complained, he did so to Cruz privately. Ramon personally did not criticize Cruz, but only voiced complaints by others'.

work in the pruning crews by talking to other workers. The remaining defense is that Valdovines was laid off because of his "visiting" at the shop. Yet, no one cited this as an important factor, much less the deciding one. Further, Bray's and Cruz' testimony was not convincing, and I credited Valdovines that his trips to the shop were not excessive.

I find the significance of this criticism is that Cruz was the source.⁶⁸ Cruz' problem was not just that Valdovines chatted with Santamaria, but that Cruz saw a close association between the two. Santamaria had passed on to Valdovines the negative comments that Cruz made about the latter, and both men publicly complained about him in front of his bosses.

The fact that three out of five of those who criticized Cruz lost their jobs, that Cruz was the primary force in the dismissal of each, the departure from past practice regarding layoffs, and the failure of Respondent to establish that there was no work for Valdovines cause me to find that his layoff violated section 1153(a) of the Act.

Bray and Cruz testified that Sergio Gonzales was laid off primarily for lack of work. Although irrigation on "La Loma" had ceased for the winter, this hiatus in work occurred every year, but the irrigator was not usually laid off.

Indeed, Sergio was not laid off in mid-October when irrigation ceased. Instead, he was assigned additional work

⁶⁸Bray acknowledged he could not say this was a problem, and I have found he was merely trying to support Cruz when he initially testified on this point.

wherever he was needed. This is in keeping with the Company's policy of transferring workers and putting them where they were best suited.

Sergio had performed numerous jobs at the ranch, including driving a forklift, which is work that is in demand during the harvest which was just beginning about the time Sergio was laid off. No one had ever complained about his work as a forklift driver, so absent specific evidence that no work was available, the logical inference is that the Company would have had him work during the harvest.

Thus, even if I were not to credit Sergio's testimony that Cruz told him that he could return to his former job if the irrigation assignment did not work out, logically one would expect the Company to continue to use him in different positions. However, shortly after the complaints, Respondent stopped assigning him work claiming that work ran out, but no one gave any specifics to back up this assertion. In view of the variety of jobs he had performed and the fact that the harvest had just begun, Respondent's asseration is not convincing. As with Valdovines, there is no showing of a difference in the financial condition of the ranch in 1989 versus 1988 which would justify Sergio's layoff.

Although Respondent's witnesses testified that lack of work was the main reason for the layoff, they also contended Sergio was not a satisfactory worker. However, Bray and Cruz gave contradictory testimony about his performance as an irrigator,

and I found that Sergio's problems with the irrigation were not excessive. Thus, I do not credit the proffered reason that his work performance was the reason for his layoff. Even Respondent's witnesses testified lack of work was the determining factor.

General Counsel has presented sufficient evidence to show a casual connection, and Respondent has not presented the evidence necessary to rebut it. I find Gonzales' layoff violated section 1153(a).

The case of Mr. Santamaria is more complicated. I have found that Respondent had some concerns with his work, but they were not new, and Respondent's witnesses exaggerated them. The fact that in late October he received more than double his initial raise also leads me to believe that Respondent was not that dissatisfied with his work. Jim Wood, the person most able to observe Santamaria, testified he was basically a good worker.

As noted above, I believe Cruz substantially influenced the decision to terminate Santamaria. Santamaria's testimony demonstrates that Cruz was angered that he went to Floyd to ask for a raise. It is a logical inference that Cruz would also be upset with Santamaria's participation in the public criticism of him in the October 23 meeting, especially coming on the heels of his irritation about the raise.

Thus, both Santamaria's concerted activity and his individual protest appear to be a substantial part of Cruz'

reason for encouraging Bray to fire Santamaria.⁶⁹ This conclusion is buttressed by the fact that his discharge and the unlawful layoffs occurred at the same time.

Santamaria's case may well be one of mixed motive, and, standing alone, it might be a case where I would find his discharge suspicious but not be convinced it was unlawful. But in conjunction with the layoffs of Valdovines and Gonzales, I am persuaded it too violated section 1153(a)

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board hereby orders that Respondent Harlan Ranch Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off or otherwise discriminating against agricultural employees because of their participation in protected concerted activity;

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

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

(a) Offer Entelmo Santamaria, Sergio Gonzales and Gabriel Valdovines immediate and full reinstatement to their

⁶⁹I have considered Santamaria's accusation that Cruz fired him because he went to Floyd Harlan and because of the diesel engine incident. Cruz denied the latter, and, based on all the evidence, I conclude that Santamaria's complaints about Cruz in the October meetings was also a motivating factor.

former positions of employment, or if their former positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

(b) Make whole Entelmo Santamaria, Sergio Gonzales and Gabriel Valdovines for all losses of pay and other economic losses they have suffered as a result of Respondent's unlawful discharge or layoff of them. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful acts. The award shall include interest thereon, computed in accordance with the Decision and Order in E. W. Merritt Farms (1988) 14 ALRB No. 5;

(c) Preserve and, upon request, make available to the Board and its agents for examination and 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;

(d) Sign the attached Notice to Agricultural Employees ("Notice") 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;

(e) 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 November 11, 1989, to the date of mailing;

(f) Provide copies of the signed Notice to each employee hired by it during the twelve (12) months following the remedial order;

(g) 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;

(h) Arrange for 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;

(i) Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have begun at the time the Regional Director requests peak

season dates, Respondent will 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;

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

DATED: April 21, 1992



BARBARA D. MOORE
Administrative Law Judge