

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

M. CURTI & SONS,)	
)	
Respondent,)	Case No. 92-CE-4-VI
)	
and)	
)	
CONRADO DAVALOS,)	19 ALRB No. 18
)	(December 1, 1993)
<u>Charging Party.</u>)	

DECISION AND ORDER

On September 7, 1993, Administrative Law Judge (ALJ) James Wolpman issued the attached Decision and Recommended Order in this matter. Thereafter, M. Curti & Sons (Respondent) filed exceptions to the ALJ's decision 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, findings¹ and conclusions, and to issue the attached Order.

¹The ALJ found that Respondent was unaware that two to four weeks after Davalos' discharge, cows escaped from the same pen Respondent claims Davalos was discharged for failing to secure. The pusher who allowed the latter escape not only was not discharged, but there is no evidence that the incident was even investigated. Silva did not deny that he had reason to believe it had occurred but testified only that he did not recall the later escape. The testimony is unrebutted that in the second escape, the cows walked on Silva's lawn, and therefore would have caused the same kind of damage as when they walked on Silva's lawn in the January 6 escape. Silva did not inquire even though his lawn showed unmistakable evidence of the same kind of incident that had allegedly led to Davalos' discharge two to four weeks before. The disparate treatment of the two escapes further supports the prima facie case found by the ALJ.

(continued...)

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board hereby orders that Respondent M. Curti & Sons, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in Dairy Employees Union, Local 17, Christian Labor Association or any other labor organization by unlawfully discharging or in any other manner discriminating against agricultural employees in regard to hire or any other term or condition of employment, except as authorized by section 1153(c) of the Act;

(b) Discharging, or otherwise discriminating against any agricultural employee with regard to hire or tenure

¹

(...continued)

Though we agree with the ALJ that this case is an appropriate one in which to apply the small plant doctrine, we also find that Respondent's knowledge of Davalos' protected activity was established even without application of the doctrine. Given Respondent's small employee complement and Silva's close contact with the employees, once Respondent became aware an employee from Dairy No. 2 was trying to recruit employees from Dairy No. 1, it would have been reasonably clear who that employee was. Silva described to employee Melendrez exactly the union activities that only Davalos engaged in, i.e., a single Dairy No. 2 employee recruiting employees from Dairy No. 1. The two pushers were the only Dairy No. 2 employees who had occasion to have contact with Dairy No. 1 employees. Silva further described the activity as currently ongoing. Since Davalos had been the day shift pusher for over a month before Silva's reference to his ongoing union activity, it would have been reasonably apparent which of the two pushers was responsible even if Respondent knew only the shift of the employees reporting the recent activity.

of employment or any term or condition of employment because he or she has engaged in concerted activity protected by section 1152 of the Act;

(c) 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 Conrado Davalos immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges of employment;

(b) Make whole Conrado Davalos for all losses of pay and other economic losses he has suffered as a result of Respondent's unlawful discharge of him. 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 January 15, 1992, to January 15, 1993;

(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 signed 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) 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: December 1, 1993

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

a clear and unambiguous indication that the employees could not be a Rancho Harvesting crew. The L & C crew bosses declined to tell the Union the name of the Employer, leaving contact with the employees as the only means to determine if this was a crew that the Union had a right to take access to under its NA. Moreover, the declarations provide no indication of harassment of employees, nor of disruption of work.

While the Union had a duty to take access only where it had given notice, there is no indication that it deliberately or recklessly disregarded any clear notice that the employees worked for an employer for which no NA had been filed. The supporting declarations show that the access takers left as soon as it was disclosed to them that the crew's employer was not one it had filed an NA. Absent a pattern of repeated "accidental" visits to this employer or to other employers for which no NA had been filed, or other evidence of deliberate disregard for the Board's access regulations, the Ranch No. 1 criteria are not met.

Accordingly, we will dismiss the Motion to Deny Access because the Employer's declaratory support failed to establish a prima facie case under the standards set forth in Ranch No. 1. supra.¹

¹ Moreover, had the Employer succeeded in making a prima facie showing under Ranch No. 1, supra, access may be denied only after notice and hearing. (8 Cal.Code of Regs., sec. 20900(e) (5) (A).)

ORDER

It is hereby ordered that the Employer's Motion to Deny Access is dismissed.

DATED: December 17, 1993

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

M. Curti & Sons
(Conrado Davalos)

Case No. 92-CE-4-VI
19 ALRB No. 18

Background

From November, 1991 until his discharge on January 15, 1992, Conrado Davalos solicited employees to seek representation by Local 18, Dairy Employees, CLA. In the weeks preceding his discharge, Davalos, who was employed at Respondent's Dairy No. 2, solicited employees at Dairy No. 1. No employees at Dairy No. 2 other than Davalos and the other "cow pusher" had occasion to visit Dairy No. 1.

On January 6, 1992, cows escaped from an unsecured gate. Davalos would have been the last person to close it. A month prior to his discharge, Davalos had a minor accident driving his own car.

The day before Davalos' discharge Respondent told employees that Respondent would withdraw benefits if they selected a union and that Respondent was aware an employee from Dairy No. 2 was trying to get the employees at Dairy No. 1 interested in a union.

ALJ's Decision

The ALJ found Respondent discharged Davalos because of his union solicitation, and not because of the cow escape and the accident. The ALJ held that the timing of the decision to discharge Davalos, the same day that it threatened employees with loss of benefits if they selected a union, and circumstances showing Respondent's knowledge of Davalos' activities, established a nexus between Davalos' discharge and his union solicitation. The ALJ also invoked the small plant doctrine to infer employer knowledge of Davalos' union activities.

Board Decision

The Board affirmed, and added that Respondent's failure to inquire about another cow escape shortly after Davalos' discharge reinforced the determination of Respondent's unlawful motivation. The Board also held that employer knowledge of Davalos' protected activity was established even without application of the small plant doctrine.

* * *

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

* * *

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we, M. Curti & Sons, 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 Conrado Davalos. The Board has told us to post and publish this Notice.

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

1. To organize 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 and to end such representation;
4. To bargain with your employer about your wages and working conditions through a bargaining representative chosen by a majority of the employees and certified by the Board/
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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

WE WILL NOT discharge or otherwise discriminate against any agricultural employee because he or she has joined or supported a union or has acted together with other employees to protest the terms and conditions of their employment.

WE WILL restore Conrado Davalos to his former position and we will reimburse him with interest for any loss in pay or other economic losses he suffered because we discharged him.

DATED:

M. CURTI & SONS

By:

Representative Title

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

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

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

M. CURTI & SONS, a
California Corporation,

Respondent,

and

CONRADO DAVALOS, an
Individual,

Charging Party.

Case No. 92-CB-4-VI

Appearances:

Ronald H. Barsamian
Pinkie & Barsamian
Fresno, California for
the Respondent

Stephanie Bullock Visalia
Regional Office Visalia,
California for the General
Counsel

September 7, 1993

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN: This case was heard by me in Visalia, California, on August 3 & 4, 1993.

It is based on a complaint, issued April 6, 1993, which alleged that the Respondent violated the Act by discharging Conrado Davalos because of his support for and activities on behalf of Dairy Employees Union, Local 17, C.L.A. The Respondent answered asserting that Davalos had been properly terminated because he was negligent in the performance of this duties.

The Charging Party did not intervene. Because the case met the requirements of §20278 (e) of the Regulations as appropriate for disposition by oral argument without briefing, the General Counsel and the Respondent both presented oral argument prior to the close of hearing.

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

FINDINGS OF FACT

I. Jurisdiction

M. Curti & Sons is a California Corporation and an agri-'cultural employer within the meaning of §1140.4 (c) of the Act. Conrado Davalos is an agricultural employee within the meaning of §1140.4 (b). The Dairy Employees Union, Local 17, C.L.A. is a labor organization as defined in §1140.4 (f).

II. Background

Curti & Sons is a commercial dairy operation with two facilities: Dairy #1, referred to as the "home dairy", where approximately 22 employees work and where the offices, breeding facilities, and hospital barn are located, and Dairy #2, about 2 1/2 miles away, where approximately 10 employees work.

Conrado Davalos began working for the Respondent in September 1988. During the time in question – November 1991 through January 15, 1992 – he was a Pusher and Clean Up Man at Dairy #2. His direct supervisor is Patrick Silva; Silva and his family reside in a house on the property at Dairy #2. Benjamin Curti is the overall herd manager for both dairies and a part owner of the corporation.

There are two Pushers at Dairy #2: one works days from 9:00 a.m. to 7:00 p.m. and the other works nights from 7:00 p.m. to 9:00 a.m. The cows are kept in 16 pens, each consisting of 90 to 100 animals. Each pen is milked once every 12 hours.

The Pusher's primary job is to move the cows back and forth from their pens to the milking area. In January, Davalos was working the day shift. When he arrived for work, he would take over from the night shift pusher and move the cows who had just been milked back to their pens; during the rest of his shift, he would herd cows, two pens at a time, to and from the milking area. By the end of his shift, all of the pens would have been milked, and the night shift pusher would return to their pens the same cows who he had left in Davalos' hands that morning.

Pushers are also responsible for cleaning the milk machines, the pipe line, and the tanks used to collect the milk. Additionally – and on almost a daily basis – they transport cows needing medical attention to the hospital barn at Dairy #1, using a company truck and trailer.

Davalos was considered to be a good worker and an honest and polite employee.

III. Davalos' Activities on Behalf of the Union

In November 1991, Davalos and some of his co-workers at Dairy #2 began discussing, among themselves, the benefits of union representation. He obtained some union leaflets from another employee and distributed them to several co-workers at Dairy #2 and to a worker nicknamed "Spider" at the Hospital Barn at Dairy #1. While doing so, he indicated his support for the Union. During the first week in December he asked a number of workers at both dairies to sign a page in his note book to demonstrate their interest in obtaining information about unionization; seven workers signed, but at least three declined to do so.

On January 14th, the day before Davalos' discharge, Patrick Silva spoke individually with six or seven of the workers at Dairy #2. Silva explained that he did so after learning from Ben Curti 'that a union was attempting to organize them. With each, he outlined the company's medical and retirement benefits, the housing and utilities it provided, and its Christmas and Thanksgiving gifts, and he told the worker that he doubted those

benefits would be available if there were a union.¹ I accept the testimony of Alfredo Melendrez that during his interview Silva told him that he was aware that someone from Dairy #2 was urging employees at Dairy #1 to unionize.²

IV. Davalos' Discharge

On the same day that the interviews were conducted, Silva told Davalos to report to the office the next day. When he arrived, Ben Curti and Patrick Silva were there. According to Davalos, Curti [speaking through an interpreter] told him that he was being let go because of an earlier back injury, because of an automobile accident he had had the previous month, and because he had not been doing a good job during the past 30 days. When he asked why he had not been told earlier that there were problems with his work, Curti told him he did not have to answer the question and that the company had the right to do what it was doing.

Curti and Silva describe the discharge differently. Both testified that they had earlier decided to discharge Davalos because of the automobile accident in December and his negligence

¹Samuel Anguiano, who acted as an interpreter for Silva during some of the interviews, denied that the union was ever mentioned. This makes no sense in the context of the situation and conflicts with Silva's own testimony.

²I accept Melendrez's testimony because he struck me as an honest and forthright witness whose testimony is entitled the credibility deference accorded workers who testify against the interest of their current employer. (Georgia Rug Mill (1961) 131 NLRB 1304, fn. 2.) Moreover, Silva did not specifically deny this critical testimony. (See p. 10, infra.)

in leaving two gates open a week or so before, permitting the cows in Pen #3 to wander loose and trample the landscaping in the area of the dairy where Silva and his family lived. However, at the time of the actual discharge, Curti simply told him only he was being terminated because of problems with his work. When Davalos sought to question him, he said that the company was under no obligation to provide any further explanation.

V. The Incidents on which the Respondent Relies

A. The automobile accident occurred at 3:30 a.m. on December 17, 1991, month before his termination, as Davalos was driving away from Dairy #1 in his own car after delivering his time card to the office. He was working night shift at the time and was in a hurry to get back to work at Dairy #2.³ The weather was foggy, and the highway was wet. He lost control on a turn near the dairy, and his car rolled over once, breaking the side and front windows and damaging the roof. He was unhurt, and no other vehicle was involved. He walked back to the dairy and got some workers to assist him in righting the car. The next day, Patrick Silva asked him about the accident and whether he had been injured.⁴ According to Davalos, nothing more was said about the matter until it was raised at his termination.

Curti explained that he was concerned about the accident

³I accept Davalos' testimony that was driving his own car because the taillights on the company truck were not functioning correctly, and no other company vehicle was easily available.

⁴Silva testified that, in addition, he told Davalos, "You have to be careful." (II:11.)

because one of Davalos' duties was to transport sick cows on a regular basis to the Hospital Barn using a company truck and trailer and driving the same highway on which the accident occurred. He also testified that, because there had been other accidents involving company vehicles, his insurance carrier insisted that he take special care to see to it that the workers who drove them, were careful and reliable drivers. He testified, however, that the accident, standing alone, would not have led to Davalos' discharge; rather it was the combination of the accident with the negligence Davalos' displayed in allowing the cows to escape from their pen. Silva corroborated Curti's testimony and indicated that he had prepared a written report of the accident.⁵

B. The more significant incident occurred on January 6, 1992 when the cows in Pen #3 were allowed to escape from, their pen and wander across the property, destroying the new lawn in front of Silva's home and the plantings in front of the barn.

The Respondent presented careful and detailed testimony describing the configuration of pens, pathways, and gates, and explaining how they are utilized by the pushers in herding the cows, two pens at a time, in sequence, to and from the milking area. The Respondent was able to demonstrate how, on January 6th, the failure to secure two of those gates allowed the cows in Pen #3 to wander out into the parking area in front of the milking barn where they trampled the flower beds in a planted area and

⁵ It is unclear whether Davalos was ever furnished with a copy of that report.

went on to trample the newly planted lawn adjacent to the Silva residence. The lawn and flowers were destroyed, and, although no cows were hurt, both sides agree that they could have been injured on the bumper guards in the parking area or, had their escape not been noticed in time, in the road in front of the dairy.⁶ It was also agreed that an escape, such as this one, would disrupt their normal feeding routine and, consequently, have an adverse affect on their milk production. (II:37.)

The Respondent was further able to establish that, given the order and times at which the pens are milked, Davalos was the Pusher responsible for securing the gates in question even though the cows did not actually make their escape until after he had left work for the day.⁷

C . The back injury which Davalos testified that Curti mentioned at the time of his discharge had occurred the year before, on November 24, 1990. He had been unable to work for two weeks. When he returned, nothing was said about the injury until, according to Davalos, it was raised at his termination.⁸

⁶Where they would have been a hazard to motorists as well.

⁷Davalos testified that, when confronted by Silva on the day following the incident, he denied being at fault; however, he offered no explanation, then or later, which would serve to exonerate him from responsibility.

⁸Curti testified that he neither mentioned nor relied upon the back injury in deciding to terminate Davalos.

ANALYSIS. FURTHER FINDINGS. AND CONCLUSIONS OF LAW

I

Labor Code §1153(c) makes it an unfair labor practice for an agricultural employer "to discriminate in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." In order to establish a prima facie case of unlawful discrimination, the General Counsel must ordinarily prove: (1) that the worker engaged in union or protected activity, (2) that the employer knew it, and (3) that a causal relationship or nexus exists between the union or protected activity and the adverse treatment suffered by the worker. (Jackson & Perkins Rose Co. (1979) 5 ALRB No. 20.).

Here the General Counsel was able to establish that Davalos was active in seeking support for the union among his fellow employees. {Supra, p. 4.) The Respondent argues, however, that there is no convincing evidence that it knew of his support for the union or his activities on its behalf. General Counsel would have me find employer knowledge based on the so-called "small plant" doctrine, under which an employer with a small work complement is presumed to be aware of the union activities of its employees. (See, for example, United L-N Glass (1989) 297 NLRB 329, 348.)

Both the NLRB and the ALRB have held that small size alone is not enough to infer employer knowledge; there must be additional circumstantial evidence. (Handley Manufacturing Corp. (1954) 108 NLRB 1641, 1650; Mario Saikhon (1978) 4 ALRB No. 107; Del Mar

Mushrooms, inc. (1981) 7 ALRB No. 41.) Here, such additional evidence is to be found in Silva's admitted knowledge that union organizing was in progress at both sites (II:31) , and his statement to Melendrez the day before the discharge that he was aware that someone from Dairy #2 was urging employees from Dairy #1 to organize. (I:53-54; see fn. 2, page 5, supra). Throughout the period in question, Davalos was one of the employees from Dairy #2 who most frequently visited Dairy #1 (transporting cows needing medical attention to the hospital at Dairy #1), and he testified that he had, in fact, spoken with several workers there about the benefits of unionization.⁹ I therefore find that there is sufficient circumstantial evidence to invoke the small plant doctrine and conclude that the Respondent was aware of Davalos' support for the union and his activity on its behalf. (S. Kura-mura. Inc. (1977) 3 ALRB No. 49, pp. 13-14.)

The timing of the termination, occurring as it did on the day following Silva's conversations about the union with other workers; the content of those conversations, indicating that specific benefits would be lost if the union were successful (I:55, II:32-33); and Silva's statement to Melendrez that the employer knew who was participating in the organizing drive (I:53-

⁹Silva testified that he did not speak to Joaquin Cota, the other employee from Dairy #2 who frequently visted Dairy #1 (II:46), presumably because he only "...targeted the people that I thought were somewhat subject[ive] to this type of organization." (II:33.) He therefore would not have been alluding to Cota when he spoke with Melendrez. [As explained below (infra, p. 13), I do not accept his testimony (II:33-34) that he refrained from discussing unionization with Davalos for similar reasons.]

54) are enough to satisfy the nexus requirement and establish a prima facie case of unlawful discrimination.

II

The determination that the General Counsel has established a prima facie case does not, however, end the inquiry. Under the test fashioned by the NLRB in Weight Line, Inc. (1980) 251 NLRB 1083, 1086-80, approved by the U.S. Supreme Court in NLRB v. Transportation Management (1983) 462 U.S. 393, adopted by our Board in Nishi Greenhouse. (1981) 7 ALRB No. 18, and approved by the California Supreme Court in Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721, 729-731, once the General Counsel has carried its burden of proof as to the prima facie case, the burden of production and persuasion shifts to the Respondent to establish by a preponderance of the evidence that the adverse action would have been taken even absent the employee's protected activity.

Here the employer introduced credible evidence of two incidents, both related in greater or lesser degree to Davalos' work performance: (1) the automobile accident in December when he turn over his car near the dairy, and (2) his failure in January to properly secure two gates, permitting the cows in Pen #3 to wander loose in the parking and lawn areas of the dairy.

The circumstances, consequences, and relative seriousness of those incidents have already been described. (Supra, pp. 6-8.) Suffice it here to say that, in each instance, Davalos was the responsible party.

Given his responsibility for the incidents, the question is

whether he would have been discharged "but for" his union activities and sympathies. (Martori Brothers Distributors v. ALRB. supra, 29 Cal.3d at 730.) In making that determination, it is necessary to weigh the significance of the two incidents against other, persuasive evidence pointing toward unlawful motivation.

Some of that evidence has already been described: After learning from Mr. Curti that Local 17 was seeking to organize the his employees, Silva conducted individual interviews with the employees at Dairy #2 whom he felt might be swayed by the union. In these interviews, he reviewed the benefits provided by the company – the medical plan, the retirement benefits, the housing and utilities provided to some, and the company's annual Christmas and Thanksgiving gifts – and he then told each worker, ". . .in my estimation if the union came in, I know if I was an employer I surely wouldn't pay those items." (II:32.)

Despite Silva's protestation that he was simply stating his personal opinion, this "friendly warning", coming from the sole supervisor at Dairy #2, would naturally be understood by employees as management's position. It thus had, despite the friendly tone in which it was delivered, the full force and effect of a management threat to eliminate benefits should the employees obtain union representation. This was compounded by Silva's statement to at least one employee [Melendrez] that the company was aware of the identity of the employee who was doing the organizing. (1:53-54; see fn. 2, page 5, supra).

Further evidence that Silva was concealing his true motive

became apparent when he was asked why he had not included Davalos among the workers he interviewed. Recall that those interviews took place on January 14th, the same day he instructed Davalos to report to the office the next day so that Curti could discharge him. Yet, instead of giving that as his reason for not interviewing Davalos, Silva attempted to buttress the Respondent's claim that it was unaware of Davalos' union activities by saying that the reason for not doing so was because, "I didn't think [he would be pro-union]." (II:34). In the context of the situation, that answer makes no sense, and leads me to conclude that the Silva's testimony was contrived to conceal the Respondent's awareness of Davalos activities and its true motive for discharging him.

Perhaps the strongest evidence of unlawful motivation is the timing of the discharge. On the very day Silva was interviewing employees and telling them that the company knew who was responsible for promoting the union and that they would lose their benefits if the union came in, he told its most active union supporter to report to the office the next day so that he could be discharged.¹⁰

And then there is the discharge itself. Davalos had been working at the dairy, without incident, for three and half years. Indeed, Both Curti and Silva acknowledged that he was a good

¹⁰ Indeed, the clumsiness of the timing and statements made to workers about losing benefits are best explained by Silva's lack of awareness of his role as a supervisor in a situation where a union is seeking to organize workers. (II:32-33.)

worker and "a very nice gentleman". Yet, his discharge was handled in a preemptive, adversarial fashion. There had been no previous warnings. He was afforded no opportunity to explain or justify his actions. He was not even told precisely why he was being discharged. And, when he asked, Curti told him. that the company was under no obligation to explain its action.¹¹

The obvious inference from this behavior is that there was another motive, concealed and unstated, for the discharge. Its timing and the anti-union animus Silva displayed during the employee interviews the day before indicate that that motive was Davalos' support for and his activity on behalf of Local 17.

Turning to the incidents on which the Respondent relies, the automobile accident, occurring as it did off the premises and in his own vehicle, is only work related in the sense that it took place on the same road Davalos used when he drove entirely different company equipment. Because of the poor weather and road conditions which obtained, it is difficult to be certain that he was at fault.¹² Even the Respondent admits that, in and of itself, the accident was not serious enough to warrant discharge.

His failure to properly secure the gates is more serious. The only actual damage was to Silva's lawn and the plants in the

¹¹ Davalos inability to ascertain the reasons for his discharge may have contributed to his belief that one of them was the back injury he sustained the year before. (Supra, p. 8) There is, however, no good reason to believe that Curti relied upon that incident.

¹² The report which Silva prepared and which, I presume, deals with this issue was not introduced.

parking lot, plus some loss of milk production which was not extensive enough so that the Respondent was able to point to a specific overall drop in revenue or production; however, there was the possibility that, had things gone differently, cattle could have actually been injured.

Still and all, considering Davalos' length of service, the absence of previous problems with his job performance, and his reputation as a good employee and a fine gentleman, and weighing all that against the clear evidence of serious and contemporaneous union hostility, I cannot conclude that the Respondent has carried its burden of proving by a preponderance of the evidence that, in the absence of union activity, Davalos would nonetheless have been discharged for his single dereliction of duty and whatever minimal blame he might have for the auto accident.¹³

III

I therefore conclude that the Respondent violated §1153(c) and §1153 (a) of the Act by discharging Conrado Davalos on January 15, 1992.

¹³The General Counsel introduced evidence of a later incident in which cows not only escaped their pen but wandered out onto the roadway, and no one was punished; but she was unable to establish that the employer was aware of the incident. I therefore give no weight to that evidence. However, it is worth noting that, for its part, the Respondent was unable to come forward with evidence of previous discharges for incidents comparable in seriousness to that of the gate incident.

REMEDY

Having found that Respondent violated §1153(c) and §1153(a) of the Act by discharging Conrado Davalos for his union support and other protected concerted activities, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act. In fashioning the affirmative relief delineated in the following order, I have taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14.

Upon the basis of the entire record, the findings of fact and the conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor code section 1160.3, Respondent M. Curti & Sons, its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in Dairy Employees Union, Local 17, C.L.A. or any other labor organization by unlawfully discharging, or in any other manner discriminating against, employees in regard to the hire or tenure of employment or any term or condition of employment, except as authorized by §1153(c) of the Act.

(b) Discharging, or otherwise discriminating against, any agricultural employee with regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in concerted activity protected by §1152 of the Act.

(c) 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 Conrado Davalos full reinstatement to his former or to substantially equivalent position, without prejudice to his seniority and other rights and privileges of employment; and reimburse him for all losses of pay and other economic losses he has suffered as a result of being discharged, the amounts to be computed in accordance with established Board precedents, plus interest computed in accordance with the Board's decision in E. w. Merritt Farms. (1988) 14 ALRB No. 5.

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

(c) Sign the attached Notice to Agricultural Employees

and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purpose set forth in this Order.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from January 1, 1992 to December 31, 1992.


(e) Post copies of the attached Notice in all appropriate languages, for 60 days, in conspicuous places on its property, the exact period(s) and places (s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and places (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to compensate them for time lost at the reading and question-and-answer period.

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

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

DATED: September 7, 1993

A handwritten signature in black ink, appearing to read 'J. Wolpman', written over a horizontal line.

JAMES WOLPMAN
Chief Administrative Law Judge

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

DO NOT REMOVE OR MUTILATE