Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: D'ARRIGO BROTHERS COMPANY OF CALIFORNIA, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 93-CE-60-SAL 94-CE-2-SAL 21 ALRB No. 5 (August 17, 1995)

DECISION AND ORDER

On May 18, 1995, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached Decision in this matter. Thereafter, the Charging Party timely filed exceptions to the ALJ's Decision and Respondent filed a brief in response.

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, and to adopt her recommendation that the allegations in the complaint be dismissed.

ORDER

Pursuant to Section 1160.3 of the Agricultural. Labor Relations Act (California Labor Code section 1140 et seq.), the Agricultural Labor Relations Board finds that the complaint

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herein should be, and it hereby is, dismissed in its entirety.

DATED: August 17, 1995

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. PRICK, Member

CASE SUMMARY

D'Arrigo Brothers Company of California (UFW)

21 ALRB No. 5
Case Nos. 93-CE-60-SAL
94-CE-2-SAL

Decision of the Administrative Law Judge

The ALJ concluded that Respondent had not, as alleged, violated the Act by discharging an employee who had been active in union and other concerted activities. Although the ALJ found that General Counsel had established that the employee had engaged in such activities, with Respondent's knowledge, she also found that the termination was dictated by Respondent's policy governing discharges for a series of unexcused absences. Therefore, as the ALJ found, Respondent would have discharged the employee even in the absence of is having engaged in any activity protected by the Act.

Decision of the Agricultural Labor Relations Board

The Board affirmed the rulings, findings and conclusions of the ALJ and ordered that the complaint be dismissed in its entirety.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of : D'ARRIGO BROTHERS CO., OF CALIFORNIA, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 93-CE-60-SAL 94-CE-2-SAL

Appearances :

Geoffrey Gega
COOK, BROWN, REDIGER & PRAGER
Santa Ana, California
For the Employer

Ida Sotelo
MARCOS CAMACHO A LAW CORP.
Keene, California
For the Charging Party

Eugene Cardenas
Salinas ALRB Regional Office
Salinas, California
For the General Counsel

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 March 7, 8 and 9, 1995, in Salinas, California. It arises out of a complaint based on a charge[1] filed by the United Farm Workers Union ("UFW" or "Union") with the Salinas regional office of the Agricultural Labor Relations Board ("ALRB" or "Board") alleging that Respondent, D'Arrigo Brothers Co. of California ("Respondent," "Company," or "D'Arrigo") violated sections 1153(a) and (c) by discriminatorily discharging one of its employees, Rodolfo Garcia, because he engaged in union activity. Respondent claims it discharged him because under Company policy employees are automatically terminated if they receive five warning notices in a consecutive six month period, which Mr. Garcia did.

Upon the entire record, including my observations of the witnesses, and after careful consideration, of Respondent's and General Counsel's briefs, I make the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

D'Arrigo is a California corporation with its

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[1]The charge was timely served and was consolidated with charge number 94-CE-2-SAL by order of the Board's Executive Secretary on October 21, 1994. After the first day of the hearing, General Counsel determined that he could not prove a prima facie case on charge number 94-CE-2-SAL. Pursuant to Title 8, California Code of Regulations section 20222 (b), the General Counsel requested leave to withdraw the first amended consolidated complaint, which added the allegations of charge number 94-CE-2-SAL, and to reinstate the original complaint and to amend paragraph 6 of the original to identify managers Cooper and Manaserro as Joel and Jim, respectively. The UFW joined in General Counsel's request. I granted the request, and the hearing proceeded on the original complaint dated April 13, 1994.

principal place of business in Salinas, California, and is an agricultural employer within the meaning of sections 1140.4 (c) . The UFW is a labor organization within the meaning of section 1140.4(f), and Rodolfo Garcia is an agricultural employee within the meaning of section 1140.4(b).

Mr. Rodolfo Garcia has worked at D'Arrigo since October 12, 1984, as a broccoli cutter. In the 1992 and 1993 broccoli seasons, he worked in the crew of foreman Roberto Pizana. He was discharged by Mr. Pizana on September 1, 1993, after receiving a warning notice from Pizana for having missed work that day.

Union Activity and Employer Knowledge of Such Activity

Mr. Garcia did not become active in the Union until 1990 or 1991 when he was elected as the UFW crew representative and also as a member of the UFW ranch committee for negotiations with D'Arrigo. Thereafter, he always wore a UFW button on his cap at work. (II: 93-96.)[2]

Both Mr. Pizana and Mr. John Snell, D'Arrigo's labor relations manager, knew Garcia held these positions. (I:80; 129-130.) Mr. Snell implied Garcia was not especially active, saying he recalled seeing Garcia at only one negotiating session. It is apparent, however, that Mr. Garcia was well-known to Respondent.

[2]The citation is to the official hearing transcript with the roman numeral referring to the volume and the arabic numbers referring to the page numbers. Hereafter such citations will be in the same format. I construe footnote 7 in Respondent's brief as a motion to correct the transcript, and the transcript is hereby corrected as reflected in the revised transcript issued by the court reporter.

He attended four of the four or five sessions held in 1992, and his name is on the bottom of several letters regarding negotiations from the Union to the Company or its attorney indicating he was sent copies. (11:105, General Counsel's Exhibit numbers l(a) -(d) , and 10 -18.)[3]

In addition to his involvement in negotiations, Mr. Garcia was also well-known for his activities as the UFW representative for his crew.[4] On a number of occasions, he brought complaints to various supervisors and managers. His foreman, Roberto Pizana, who issued all of the warning notices to Mr. Garcia, was especially aware of Mr. Garcia's role as crew representative.

The complaints, some involving refusals of the crew to work until they were resolved, were initially directed to Mr. Pizana who often had to request action from his supervisor, Mr. Pedro Santiago, or higher management. Additionally, Mr. Pizana was named in a charge filed with the ALRB by the UFW because he ceased providing production records for the crew to Mr. Garcia. Moreover, Mr. Pizana was reprimanded by his supervisor for having given Garcia the records in the first place.

Protest re Foreman Gamboa

In November 1991, as a result of ongoing complaints by

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[3]Hereafter, General Counsel's and Respondent's exhibits will be identified as GCX or RX number, respectively.

[4]As with negotiations, Snell sought to downplay somewhat, Garcia's role in these incidents and Respondent's knowledge of his activity.

the women in Foreman David Gamboa's crew, Mr. Garcia called a short work stoppage by demanding of Gamboa that they be allowed to talk to John Snell. (II:38,96.) Gamboa called Mr. Santiago to the field, and Garcia described the crew's problems and asked if Santiago could remove Gamboa as foreman. (II:100.) Mr. Santiago did not have that authority and so called Mr. Snell. Snell came to the field where Mr. Garcia told him the women had concerns they wanted Snell to hear. Mr. Snell listened to the women and said he would have his supervisor, Joel Cooper, speak to them at the end of the day. (II:38-40,98-100.)

The crew returned to work after a stoppage of some 15 to 20 minutes and met with Mr. Cooper at the end of the day. The problem was resolved when he told the crew that there were only a couple of weeks left in the season and next season the crew would most likely have a new foreman. (II:100-102.)The next season, 1992, Pizana became foreman. (II:103.) It was not uncommon for crew foremen to change from season to season, but, in view of Cooper's comments, it is reasonable to conclude that the complaints at least somewhat influenced the change.

September 1992 Request to Resume Negotiations

In September 1992, Garcia informed foreman Pizana that the crew wanted him to call Jim Manaserro, executive vice-president of D'Arrigo, so they could talk to him because they wanted the Company to resume negotiations with the Union. (I:138,II:117-118.) Pizana had to contact his supervisor, Mr. Santiago, who came to the field and spoke to Garcia. Santiago told Garcia, who was working when Santiago arrived, that

the crew should not stop work to wait for Manaserro but that Manaserro would come to the field later.

When Manaserro arrived, the entire crew stopped working and came up to him. He asked what they wanted, and Garcia told him they wanted a date set for negotiations to resume. Then, most of the crew echoed what Garcia had said. (II:120-121.)

Manaserro told Garcia to convey to Gustavo Romero of the UFW that the Company would have a negotiating session the following week. Garcia asked why Manaserro didn't just send a FAX to that effect to the UFW, but Manaserro replied it would work just as well for Garcia to convey the message. (II:121-122.) The entire conversation with Manaserro took about 20 minutes.
(II:122.)

After this conversation, a negotiation session was held, but then no further dates were set. So, later that same month, Garcia, Efren Friday (another member of the ranch committee) , and some other people went to the D'Arrigo office, where Garcia put a letter in the suggestion box requesting weekly negotiation sessions with suggested dates included. As they were leaving, foreman Pizana came in. He asked if they were complaining about him and stated if they were it was unnecessary because he was going to leave the crew. (II:122-124.)

The Production Records

At some point, Pizana began supplying the crew's daily production records to Garcia. Both Garcia and Efren Friday testified about an incident when Garcia acted as crew spokesperson

complaining that the crew had not been properly paid. (II:42-43.-124-126.)

One day in October 1992, Garcia noted the crew was not paid for about 300 boxes, and he brought this to Pizana's attention. (II:42;125.) Pizana either called Santiago to the field or waited until he arrived and then told him about Garcia's complaint. Pizana then told Garcia that the error had already been found and corrected. (I:95, 137-138;II:124-126 .)

Pizana also told Garcia that Santiago had forbidden him to continue giving the records to Garcia who then said he wanted to talk to Santiago. Santiago came to the field, and Garcia and about 4 other workers told Santiago they wanted to continue to get the reports. (II:126-128.) Santiago said they could not have them because they were using the foreman's mistakes against the company. (II:44-46/128.) However, Garcia also testified that Santiago told them they could get the information they wanted from the loader. (Id.)

Garcia contacted Gustavo Romero at the UFW about the matter. The UFW filed a charge protesting D'Arrigo's refusal to continue to supply the documents and specifically naming Pizana. Snell acknowledged knowing about the charge and also acknowledged that Pizana was reprimanded for having provided the records to Garcia in the first place. (I:97-100.)

Later Incidents

The charge regarding the documents was filed near the end of the 1992 season, and, thereafter, according to Garcia, Pizana's attitude toward him changed. Previously, it had been

fairly cordial, but Pizana-began to pressure Garcia to do a perfect job, and his manner of talking to Garcia was not as cordial as before. (II:131.)

An example of pressure, according to Garcia, was Pizana assigning Garcia to make boxes rather than his usual job of cutting broccoli. This occurred in approximately June of 1993. (II:141.) It was the first time in Garcia's eight years at D'Arrigo that this had happened. (II:142.) Since he was not used to the work, he had trouble keeping up.

His co-worker and fellow ranch committee member Efren Friday confirmed Garcia's testimony that it was unusual for a cutter such as Garcia to be assigned to make boxes because there were others who usually had that task. (II:50-51.) He also confirmed that Garcia had trouble keeping up and was slowing the crew's production, so Friday told Pizana he would help Garcia, but Pizana told Friday to go back to his work that this was a matter between Pizana and Garcia. (II:51.)

Friday further testified he was on the broccoli machine and heard Santiago tell crew member Conrado Rodriguez that he would not rest until he "got rid of this 'Chavista,' referring to Garcia." (II:52-54.) Both Pizana and Rodriguez denied such a conversation ever occurred. I credit them.

Rodriguez was especially credible in his denial. Although he acted as a foreman for one day in each of the 1992 and 1993 seasons, there was no evidence of a particular bias in favor of D'Arrigo nor against Garcia or the UFW. Further, his demeanor

was credible. Additionally, I find it unlikely Pizana would have made such an incriminating statement in front of Friday who was on the UFW negotiating committee and had just complained about Garcia's treatment.

In March 1993, Pizana laid off Manuel Madrigal, a co-worker in Garcia's crew. Mr. Garcia complained to Pizana that it was unfair for him to have laid off Madrigal who had worked the preceding season while retaining a young, less experienced worker.[5] Pizana did not respond. Madrigal was rehired sometime after filing an unfair labor practice charge. (II:131-132.)

The Warning Notices

Mr. Garcia received five warning notices for absences within six months. Two Company policies are relevant to this issue: the absence policy and the bus policy.

Although there were no written pol-icies, the Company had specific procedures an employee must follow if he or she were going to be absent from work. Generally, the employee was required to obtain advance permission from the foreman. If not possible, i.e. in the event of an unexpected absence, the employee was required to telephone the foreman before the start of work. Foreman Pizana had his own phone number with an answering machine, and if he did not answer, the employee was instructed by the

[5]In its brief, Respondent argues that Garcia's complaint does not constitute concerted activity. To the contrary, although Garcia did not testify that he specifically told Pizana that he was speaking in his capacity as crew representative, that is the logical inference given Garcia's previous activities. As such, the conduct was concerted.

message on the phone to leave a message including a phone number where he or she could be reached.(I:133.) When the employee returned to work, he or she was required to bring a medical excuse or other appropriate justification for the absence.

Depending on the reason for the absence, it might be excused or unexcused. The most common example of an unexpected absence which would be excused if the employee telephoned before work and provided documentation upon returning to work is unexpected illness. (I:22-13.) Car trouble was not an excused absence. (I:23; 205.)

For the first two unexcused absences in a consecutive six month period, Company policy called for written warnings. The third and fourth such absences within the six months called for a 3 day and 5 day suspension, respectively. The fifth such absence results in termination. Mr. Snell testified that although he had discretion to not terminate an employee, he did not believe he had ever failed to fire a worker who reached this stage of the disciplinary process. (I:17-19.) No contrary evidence was introduced.

The first warning notice within the six months preceding his discharge occurred in March 1993 when Mr. Garcia was absent without permission. He did not give foreman Pizana a reason for the absence and was therefore given a warning (GCX 20) which he read and signed. Neither Mr. Garcia nor the General Counsel contend this warning notice was unjustified.

On Monday and Tuesday April 26 and 27, 1993,

Mr. Garcia was absent without having received permission from his foreman. When he returned to work on April 28, Garcia told foreman Pizana that he had left a recorded message on the 24 hour telephone recorder before the start of his shift on April 26 that he would be absent. He testified his message said he "had things to do at the United Farm Workers." (II:138) Pizana responded that there was no message when he listened to the tape.

Mr. Garcia was absent because he was helping the UFW organize transportation to the funeral of Cesar Chavez who had died the preceding Friday. There is no evidence whether Mr.Garcia could have asked permission on Saturday when he was at work or on Sunday either by speaking to Pizana or by leaving a message on the recorder with a telephone number for Pizana to contact him. (It will be recalled that the message on Pizana's recorder instructed the caller to leave a number where the caller ,could be reached.) When Garcia returned to work, he did not tell Pizana why he had been absent, nor did be bring any documentation justifying his absence without prior permission. (III:23.)

In conformity with Company policy, Pizana gave him a warning notice for the absence on April 26 and a 3 day suspension for the one on April 27. Garcia read the first notice (GCX 20) when he received it. He signed but did not read the suspension notice (GCX 21) until later that day because he was so upset about getting it.

On August 2, 1993, Garcia had another unexcused absence. He did not leave a message on the recorder or obtain

permission in advance. He acknowledged that when he returned to work he did not give Pizana a reason for his absence although he knew he needed to do so since he had not received advance permission to be off. (III:23, 50) He testified he failed to do so because he was upset because one of his sisters had died.

The next day, Pizana issued a 5 day suspension notice (GCX 22) to Garcia since this was his 4th warning for an unexcused absence within six months. He asked Pizana why he was being suspended for 5 days, and Pizana replied it was because he had received 4 warnings within 6 months and also told him that one more ticket would lead to termination. (III:23,26.) Faced with this suspension, Garcia still did not give Pizana a reason for the absence. (III:23)

Garcia maintained he did not know the Company rules regarding absences, and thus did not know why -he was being suspended. (III:23) However, he had known when he was suspended for 3 days in April that it was because he had received 3 warnings for unexcused absences in 6 months. (III:22) He also acknowledged he had been suspended at least once before for missing work. (III:46)

Even though he testified he did not know the Company policies regarding absences, Garcia acknowledged he knew that if he were absent without prior permission he needed to leave a message on Pizana's recorder before work and to bring proof the absence was justified when he returned to work or else he would receive a warning. (II:138-139,-III:50) I find it improbable he

did not know about the progressive penalties for absences given the number of years he had worked for the company, the fact that he admittedly knew the rule about three day suspensions, had been suspended previously for missing work, and that he was a UFW crew representative. In any event, Garcia knew after the second suspension that one more unexcused absence would result in termination.

Garcia received his final notice on September 1, 1993, when he did not arrive at the parking lot until after the bus he was required to take to the field had left. He missed the bus by only a few moments because Mr. Friday, who drove Mr. Garcia to work, had car trouble.

D'Arrigo had a strict policy that workers must ride the assigned bus to the field. They could not come to the field on their own if they missed the bus even if they could arrive at the field before work was to start. Nor could they ride a different crew's bus. The company also had a strict policy that the crew foremen who drove the buses were not allowed to wait for workers or to pick them up anywhere except in the parking lot.

On two occasions in 1993, Mr. Pizana did not follow this policy. Once, he waited a few moments in the lot for a woman who told everyone she was related to supervisor Santiago. On another occasion, he picked up a woman and the person she drove to work when they were in the shop area by the parking lot. The woman at the shop was a UFW representative for the women's crew, but there is no evidence whether Pizana knew this.

The September 1, 1993 Termination

Early in the morning, Mr. Garcia went to the personnel office to speak to Mr. Snell. Mr. Garcia complained about the two notices he received when he was absent in April because of arranging transportation to Cesar Chavez' funeral and about the warning he has just received. He asked Snell "to give him a chance," and Snell said he would review Garcia's file and get back to Garcia later that day.

Snell asked Garcia why he had not complained about the warning and suspension in April at that time rather than waiting so long. Garcia had no real answer. (I:77)

According to Snell, he spoke to Pizana about the absences in April. Pizana reported that Garcia had not received advance permission, that there was no message on the recorder and that Garcia had not brought any documentation -justifying the absence when he came back to work. (I:83.) This "information conflicted with Garcia's statement to Snell that morning that he had left a message on the recorder on April 26 before work.

After talking to Pizana, Snell determined that Garcia should be terminated. In assessing the propriety of the discipline, he weighed the fact that Garcia had not previously objected as one would expect if he believed the discipline were unwarranted and that Garcia had not provided proper documentation that the absence should be excused.

Pizana's testimony does not corroborate Snell's in one important way. According to Pizana, he told Snell there was an

employee who should be terminated because of the number of warnings the worker had for the same reason. Snell told Pizana to deal with the employee and did not ask who the employee was. (I:154) It was only when Pizana telephoned Garcia that Snell knew who the worker was.[6] (II:153-154)

If Pizana is credited, it means Snell's testimony that he asked Pizana about Garcia's absences is inaccurate. As between the two, I found Snell a more reliable witness.[7] Moreover, Pizana testified at one point that they talked for about ten minutes about Garcia which seems unlikely if the conversation consisted only of what Pizana relayed at the hearing.

Snell was determined to let the termination stand and told foreman Pizana to inform Garcia. Later that day or evening, Pizana telephoned Garcia and told him he was terminated.

ANALYSIS AND CONCLUSIONS

In cases of discrimination in employment under Labor

[6]Pizana's testimony on the issue taken as a whole indicates this is what he communicated to Snell although when asked what he specifically told Snell, he testified he told him the worker had four warnings. (I:153-154.)

[7]This particular testimony is not credible, and, overall, Pizana was not very credible. He repeatedly contradicted himself or testified he could not recall. Snell's testimony is marked by some inconsistencies, e.g. he testified he could not recall if Pizana or anyone had told him about Garcia before Garcia came in on September 1, but later testified he did not have Garcia's file when Garcia came to see him and did not know he had sufficient warnings to be fired but told Garcia he was in trouble or things were serious because he "assumed" the situation was serious simply because Garcia had come to see him. (1:75, 79-80.) Nonetheless, he was generally credible that he did check the warnings to determine they appeared warranted.

Code section 1153(c) and (a), General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference chat union activity was a motivating factor in the employer's action which is alleged to constitute a violation of the Act. General Counsel must show, by a preponderance of the evidence that: (1) the alleged discriminatee engaged in activity in support of the union; (2) the employer had knowledge of such conduct; and (3) there was a causal relationship between the employee's protected activity and the employer's adverse action (in this instance the discharge of Mr. Garcia).

Where it is clear that the employer's asserted reasons for its actions can be viewed as wholly lacking in merit, i.e., pretextual, the presentation of General Counsel's prima facie case is in itself sufficient to establish a violation of the Act. In 1980, the National Labor Relations Board (NLRB-- or national board) acknowledged that in certain cases, in which the record evidence disclosed an unlawful as well *as* a lawful cause for the employer's actions, the classic or traditional pretext case analysis proved unsatisfactory, and decided that such cases should not depend solely on the General Counsel's prima facie showing. In order to devise a standard approach for what came to be characterized as "dual-motive" cases, the NLRB modified the traditional discrimination analysis. Thus, in Wright Line A Division of Wriaht Line, Inc.,(Wright Line) (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (IstCir. 1981) 662 F.2d 899 [108 LRRM 2513], cert, den. (1982) 453 U.S. 989 [109 LRRM 2779], as approved in

NLRB v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857], the national board established the following two-part test of causation in all cases of discrimination which involve employer motivation:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. (Wright Line, supra. at p. 1089.)

In this case, Respondent admits knowledge of Mr. Garcia's union activity although I have found that Mr. Snell sought to downplay the extent of it. In determining the casual connection, it is usually necessary to consider circumstantial evidence. A critical factor is timing. Here, Mr. Garcia acted as a member of the ranch committee and a UFW crew representative presenting worker's grievances to management on several occasions. There was no incident of Union or other protected concerted activity near in time to his discharge. He attended negotiations in 1992 but not in 1993. There were no work stoppages in 1993 or other instances where he presented employees' grievances other that his protest regarding the layoff of Mr. Madrigal which was not nearly as significant a protest as those that occurred in 1992.

General Counsel argues that foreman Pizana began to treat Mr. Garcia differently near the end of the 1992 season after

the incident involving the production documents for which Pizana was reprimanded and which resulted in a charge naming Mr. Pizana being filed with the Board. Nothing occurred in 1992 between the time the charge was filed and the end of the season, and the only support for this contention in 1993 is the one incident where Pizana required Garcia to make boxes.

The warning and suspension for the April 1993 absences are not persuasive evidence because even if Garcia did leave a message, the fact remains the discipline was warranted because Garcia did not tell Pizana when he returned why he had been absent and did not bring the necessary documentation for his absences when he returned. Moreover, there is a real question whether the reason for Garcia's absence would have been sufficient to be excused from work. General Counsel has not shown that other workers with unexcused absences were treated differently and not given warnings.

Similarly, General Counsel pointed to only two instances over many months in the two broccoli seasons when Pizana was Garcia's foreman when Pizana picked up workers although they were not at the bus stop on time. In those instances, the workers were at or right by the lot when the bus stopped or waited for them whereas Pizana never saw Garcia since he did not arrive until after the bus left. So the incidents are not comparable. Moreover, in one instance, the worker was thought to be a relative of Pizana's supervisor which provides a motive for Pizana's conduct which has nothing to do with protected activity. Thus, at

most, there is one instance where Pizana picked up two workers who were not at the lot on time.[8] The one incident is not sufficiently significant to support a finding that Garcia was discriminated against because of his protected activity.

The severity of the discipline and lack of investigation are factors to consider in assessing motive. Giving false, inconsistent or changing reasons for the adverse action may be indicative of employer motive.

Here, there is some inconsistency between Pizana's account and Snell's as to what occurred on the day of Garcia's termination. Additionally, Snell's testimony about the events on the day Garcia was terminated was marked by some evasiveness and inconsistency from which evidence of an improper motive may be inferred.

Based on the foregoing, General Counsel has established a prima facie case of improper motive, but it is rebutted by the fact that each of the warnings was justified under Company policy,[9] and there is no persuasive evidence that Garcia was treated differently from other workers in similar circumstances based on his Union or protected concerted activity.

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[8]There is no evidence whether Pizana knew one of those workers was affiliated with the UFW, so I do not discount this incident on that basis.

[9]Garcia had a pattern of being absent and giving his Foreman no reason and failing to bring proper justification so Snell would have been reasonable in relying on Pizana's account that Garcia had not left a message and, in any event, the April 1993 warnings were justified because Garcia failed to bring in documentation of the reason for his absence.

I conclude that Respondent would have discharged Garcia even in the absence of his protected conduct. Consequently, I recommend that the charge be dismissed.

Dated: May 18, 1995

BARBARA D. MOORE,
Administrative Law Judge