Winton, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

P.H. RANCH, INC., a California Corporation; RAY GENE VELDHUIS, Individually and Doing Business as R-V DAIRY, a Sole Proprietor-Ship; and VELDHUIS DAIRY, Respondents, and TEAMSTERS UNION, LOCAL 517, INTERNATIONAL BROTHERHOOD OF, TEAMSTERS CREAMERY EMPLOYEES AND DRIVERS UNION, Charging Party.	Case No. 93-CE-24-VI 22 ALRB No. 1 (April 17, 1996)

DECISION AND ORDER

On October 26, 1995, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached decision in the above-referenced case, in which she found that Respondents P.H. Ranch, Inc., Ray Gene Veldhuis, individually and doing business as R-V Dairy, a sole proprietorship, and Veldhuis Dairy (Respondents or Employer) had violated section 1153(c) and (a) of the Agricultural Labor Relations Act (ALRA or Act) by discharging one employee and violated section 1153(a) of the Act by threatening employees with loss of benefits for exercising their rights under section 1152 of the Act, as well as by promising employees benefits for refraining from exercising such rights. Respondents timely filed exceptions to the ALJ's decision,[1] along with a

[1]Many of Respondents' exceptions were based on its disagreement with the ALJ's demeanor-based credibility determinations. The Board will not disturb credibility

(continued...)

supporting brief, and General Counsel timely filed an answering brief.

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ's decision in light of the exceptions and briefs submitted by the parties and affirms the

---

[1](... continued)
resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531] enfd. 188 F.2d 362 (3rd Cir. 1951) [27 LRRM 2631]; Nichols Farms (1994) 20 ALRB No. 17.) We find no basis for reversing any of the ALJ's credibility determinations in this case.

However, the Board wishes to state that it is interested in exploring the possibility of adopting a mechanism by which it might, in selected cases, conduct its own "de novo" hearings in which the Board could directly observe testimony and make its own demeanor-based credibility determinations. We are concerned that in cases where witnesses' demeanor is instrumental in deciding a case, the Board essentially must rely on the ALJ's determinations unless the record establishes direct evidence which contradicts the witnesses' testimony. We believe that a direct review of the witnesses' testimony might provide a more meaningful review of the evidence in some cases.

The Board has received several requests that it conduct such de novo hearings, and we have decided that before the end of this calendar year we will hold public workshops where interested parties and members of the public can present their views on whether such de novo hearings would be beneficial and, if so, how such a procedure should best be implemented. We are also interested in exploring the idea of video-taping hearings conducted before ALJs and making the video part of the record on review, so that the Board could observe witnesses' demeanor by reviewing the video tape. We will be seeking responses to this idea, as well, at the public workshops.

Member Frick is open to full consideration of any proposals offered by the public, by staff, or by fellow Board members, particularly those which aim to improve the Board's processes and procedures. However, she questions the appropriateness of committing to having public workshops or addressing regulatory matters in Board decisions, particularly in cases, such as the present one, which do not involve the perceived need for the effort.

ALJ's findings of fact and conclusions of law,[2] and adopts her recommended remedy.

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (ALRB) hereby orders that Respondents P.H. RANCH, INC., a California Corporation; RAY GENE VELDHUIS, Individually and Doing Business as R-V DAIRY, a Sole Proprietorship; and VELDHUIS DAIRY, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee with regard to hire or tenure of employment, or any term or condition of employment because the

---

[2] We find that regardless of whether Benito Morales failed to milk the cow he was accused of not milking, there was abundant evidence indicating that his union activities played a role in the Employer's decision to discharge him. For example, the testimony of Juan Rodriguez showed Respondents' hostility to Morales because of his union activities, and their intention to get rid of him for that reason. Supervisor Jesus Navarette acknowledged that employees are normally given a second chance before being fired, and yet Morales, an employee with seven or eight years' experience, was not. Despite his long-term employment, Morales was never given a chance to explain the cow-milking incident to the Employer's owner, who made the decision to terminate him. The Employer advanced shifting reasons for discharging Morales, whom it viewed as a primary spokesman for the Teamsters Union, Local 517. In light of all the evidence, we conclude that the ALJ correctly determined that Morales would not have been discharged in the absence of his union activities. (Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 455 U.S. 989 [109 LRRM 2779].)

employee was engaged in concerted or union activity protected under section 1152 of the Act;

(b) Threatening employees with loss of benefits for exercising their rights under section 1152 of the Act;

(c) Promising employees benefits for refraining from exercising their rights under section 1152 of the Act; or

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

(b) Make whole Benito Morales for all wages or other economic losses he suffered as a result of his unlawful discharge. The award shall reflect any wage increase, increase in hours or bonus given by Respondents since the unlawful discharge. The award shall also include interest to be determined in the manner set forth in E.Vf. Merritt Farms (1988) 14 ALRB No. 5;

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay and/or make whole

amounts due those employees under the terms of the remedial order as determined by the Regional Director;

(d) Upon request of the Regional Director, sign the attached Notice to Employees embodying the remedies ordered. After its translation by a Board agent into all appropriate languages, as determined by the Regional Director, Respondents shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order;

(e) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of a final remedial order, to all agricultural employees employed by Respondents at any time from February 8, 1993, until February 7, 1994.

(f) Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondents' property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which may be altered, defaced, covered or removed;

(g) Arrange for a Board agent to distribute and read the Notice in all appropriate languages to all of Respondents' agricultural 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 a reasonable rate of compensation to be paid by Respondents, to all non-hourly wage employees in order to compensate then for lost time at this reading and during the question-and-answer period;

(h) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of a final order in this manner;

(i) Upon request of the Regional Director or designated Board agent, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates, Respondents 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 after the date of issuance of this order, of the steps Respondents had taken to comply with its terms, and,

continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: April 17, 1996

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged we, P.H. Ranch, Inc., a California Corporation; RAY GENE VELDHUIS, Individually and Doing Business as R-V DAIRY, a Sole Proprietorship; and VELDHUIS DAIRY 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 Benito Morales because of his support for the Teamsters Union, Local 517, International Brotherhood of Teamsters Creamery Employees and Drivers Union (Union), by threatening workers with loss of benefits if they supported the Union, and by promising workers benefits if they refrained from supporting the Union.

The ALRB has told 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 (union);
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 union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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 retaliate against employees because they protest about their wages, hours or other terms and conditions of employment or because they support the Union.

WE WILL offer the employee who was discharged immediate reinstatement to his former position of employment, and make him whole for any losses he suffered as the result of our unlawful acts.

DATED: P.H. RANCH, INC., et al.

By: ______________________________
(Representative) (Title)

If you have any questions 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, CA 93291. The telephone number is (209) 627-0995.

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

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 93-CE-24-VI
P.H. RANCH, INC., a California Corporation; RAY GENE VELDHUIS, Individually and Doing Business as R-V-DAIRY, a Sole Proprietor-Ship; and VELDHUIS DAIRY,	)	
Respondents,	)	
and	)	
TEAMSTERS UNION, LOCAL 517, INTERNATIONAL BROTHERHOOD OF TEAMSTERS CREAMERY EMPLOYEES AND DRIVERS UNION,	)	
Charging Party,	)	

Appearances:

For General Counsel
Stephanie Bullock
Visalia ALRB Regional Office
Visalia, CA 95814

For Charging Party:
Ralph A. Miranda
Joint Counsel Of Teamsters Local 38
Modesto, CA 95354

For Respondent:
Andre P. Gaston
Bourdette & Partners
Visalia, CA 93291

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge: This case wa heard by me on September 5 and 6, 1995, in Visalia, California. It arises from a. charge filed by the Teamsters Union, Local 517, International Brotherhood of Teamsters Creamery Employees and Drivers Union (hereafter referred to as "Union" or "Local 517") with the Visalia Regional Office of the Agricultural Labor Relations Board ("ALRB" or "Board").

Based on the charge, which was timely filed[1] and duly served, the Regional Director of the Visalia Office issued a Complaint on February 15, 1995, alleging that P. H. Ranch, Inc., Ray Gene Veldhuis, individually and doing business as R-V Dairy, a sole proprietorship and Veldhuis Dairy (hereafter referred to collectively as "Respondent" or "Company" or individually as "PER," "R-V Dairy," or "Veldhuis Dairy") violated sections 115 (c) and (a) of the Agricultural Labor Relations Act[2] ("ALRA" or "Act") by the following conduct.

The Complaint alleges that on or about March 11, 1993, Respondent unlawfully discharged one of its employees, Benito Amador Morales because of his support of the Union.[3] It further alleges that Respondent unlawfully threatened Mr. Morales and other employees with loss of benefits if they voted for the Union and promised increased benefits to Mr. Morales and another

---

[1] Administrative notice is taken that the charge was filed and served on March 29, 1993.

[2] All section references hereafter are to the California Labor Code unless otherwise specified.

[3] All dates hereafter are 1993 unless otherwise indicated.

employee if they supported the Company and voted against the Union.

Respondent admits it discharged Mr. Morales, but denies it did so because of his support for the Union and denies that it engaged in threats or promised benefits. At the Prehearing Conference, Respondent contended it had been investigating low milk production. It identified Morales as a permanent full-time milker with a regular shift, and stated the investigation had disclosed Morales was the person responsible for the problem.

Consequently, the company was keeping an eye on Morales. As a result of this observation, supervisor Ralph Chavez and Mike Veldhuis, a son of Ray Gene Veldhuis, Sr., noticed a cow that had not been milked coming from the barn during Morales' shift. According to Respondent, they believed it came from the side of the barn to which Morales was assigned. Although it noted the low production problem and mentioned an episode when Morales allegedly hit a cow, Respondent's position was that Morales was fired not because of those incidents, nor even because he made a mistake and missed milking the cow, but because the company believed he lied when he denied responsibility for the last incident. At the hearing, it dropped the assertion that Morales was responsible for the low production and contended the incident of not milking the cow was the primary reason he was terminated but indicated the episode of allegedly hitting the cow was also a factor.

As to the other charges, at the Prehearing it acknowledged that supervisor Jesus Navarette told workers they would not be

covered by the company profit-sharing plan if the Union won tl election because the plan specifically stated it did not apply to unionized operations . It maintained this statement was not a threat but merely a statement of fact. At the hearing, Respondent changed its position to deny Navarette made any such statement. It denied Respondent promised Morales or any other worker more money for supporting the Company rather than the Union.

Following the hearing, both the General Counsel and Respondent filed briefs. Upon the entire record,[4] including my observations of the witnesses, and after careful consideration of the parties' briefs, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

Respondent is an agricultural employer; Benito Morales, Salvador Melchor Bucio and Carlos Licea Navarette are agricultural employees, and the Union is a labor organization within the meaning of sections 1140.4(c), 1140.4 (b) and 1140.4 (f) of the Act. Jesus Navarette, Ray Gene Veldhuis Sr., Ray Gene Veldhuis, Jr.[5] and Rafael Chavez are supervisors within the meaning of section 1140.4 (j) of the Act.

[4] Citations to the official hearing transcript will be denominated as "volume:page number" in parentheses. General Counsel's and Respondent's exhibits will be identified as GCX number and RX number, respectively.

[5] For brevity's sake, I will refer to the Veldhuises as Ray, Sr., Ray Gene, and Mike since that is how they were generally identified at hearing. Mike Veldhuis is deceased.

II. BACKGROUND: UNION ACTIVITY AND THE ELECTION

Mr. Morales began working for Respondent in 1985 or 1986. In early 1994, he began distributing union authorization cards and spoke to workers about electing a union. At work, he wore a Union button on his cap and shirt.

I take official notice that: (1) the Union filed a petition for certification in case number 93-RC-2-VI on February 8; (2) an election was held on February 16; (3) the Tally of Ballots issued on that same date reflecting that the Union received a majority of the votes cast; and (4) Respondent knew the results of the election the same day as evidenced by the fact that the Tally was signed by a representative of Respondent. On February 23, Respondent served on the Regional Director the Petition on Its Objections to the Conduct of the Election wherein it referred to Mr. Morales as a Union spokesperson. (GCX 1.) Accompanying the Petition were two declarations also identifying Mr. Morales as a vigorous supporter of the Union. (GCX 2 and GCX 3).

III. THE THREATENED LOSS OF BENEFITS

Morales testified that a few days before the election, as some workers were going off the shift which ended at 11:00 a.m. and others were coming on for the next shift, supervisor Jesus Navarette gathered them at the center of the milking barn. In addition to Morales, workers Salvador Melchor, Candido Amador, Jesus Arroyo and Dionel Navarette were present. (I:74.)

According to Morales, Navarette told them they would lose all of their benefits if the Union won. Navarette specifically

mentioned they would lose the milk they were allowed to take the meat they were given periodically, and their year end bonus. (I:73.)

Morales further testified he responded to these comments by making positive statements about the Union. He stated he was the only worker who spoke up. He testified Navarette seemed angry as evidenced by him becoming aggressive in his manner of speaking.

Salvador Melchor Bucio, a milker with Respondent sines 1985, corroborated Morales' testimony.[6] However, his testimony differs from Morales' in some respects. First, he said that none of the workers said anything in response to Navarette. (I:120-121.) Also, he recalled only 2 or 3 workers being present whereas Morales recalled, there were 4 or 5 people. (Compare I:120 with I:74.) Third, he failed to testify that Navarette specified certain of the benefits. I do not consider these differences significant. Individuals' recollections on such specific items often differ. Melchor corroborates the essence of Morales' account regarding Navarette's statements.

Supervisor Jesus Navarette worked for Respondent from approximately 1980 until March 19, 1993, when his employment ceased because of an off the job injury. Navarette acknowledged that he talked with most of the workers about the Union at various times. He also acknowledged workers asked him what would happen to the benefits, but he testified he told them only that he did

---

[6] At the time he testified he was still working for the company although in early 1993 he was terminated and later rahired. (See discussion infra.)

not know. He merely joined their general discussions speculating on what would happen if the Union won.[7] (II:80-82; 106-109.)

Navarette was asked several times to be specific about what he said to the workers. His answers were vague and referred in general to what everyone said, although he did deny calling a meeting in the barn. (II:81-82.) This and his other denials had a mechanical quality, and he seemed ready to issue them almost before the questions were finished.

I credit Morales and Melchor.[8] Melchor has nothing to gain by his testimony. He was let go by Respondent once and rehired. Now that he has his job again, there is no reason for him to testify adversely against Respondent risking disfavor. It is a

[7]His testimony differs from Respondent's position at the Pre-hearing Conference where Respondent acknowledged he told the workers they would not be covered by the company profit sharing plan if the Union came in, but contended he was not threatening them but merely describing the terms of the plan.

[8]Sometime before the election, Melchor had a court matter to attend to which resulted in him being away from work for approximately one month. When he was just about to return, Navarette told Melchor's wife that Melchor did not have a job any more. (I:121.) Melchor went to Navarette's house to ask why he had been dismissed. According to Melchor, Navarette told him it was just a pretext to get rid of all of them. (I:122.) Melchor went to talk to Ray, Sr., Chavez and Mike Veldhuis and told them what Navarette had said. (Chavez did not deny this testimony by Melchor.) They all said they knew nothing about it, told Melchor he still had his job and put him back to work. Chavez testified that part of the reason he returned Melchor to work was because he believed "everybody deserves a second chance...." (I:51.) When he returned to work, Morales was gone. Even though I have found Melchor credible as to Navarette's threat about loss of benefits, I do not credit his testimony on this point. It is implausible. The Company had a perfectly good reason to dismiss Melchor. The election was over, and Melchor was no longer working for the Company. There was no reason for Navarette to make such a statement.

well-settied legal principle that such testimony by a current employee is likely to be credible, and I so find.[9]

Additionally, Melchor's demeanor was credible. He listened intently to each question and directly answered questions of both the General Counsel and Respondent's attorney. He freely acknowledged that he had talked with Morales about his testimony, and generally created a good impression as a forthright witness.

IV. THE PROMISED BENEFIT

A few days before the election, Ray Gene was in the barn one night. Morales testified that just after a conversation in which Ray Gene accused Morales of hitting a cow, Ray Gene asked if he knew anything about the Union. Although he had been passing out authorization cards, Morales did not want to admit this, so he told Ray Gene he did not know anything.[10] (I:77.)

Ray Gene then told Morales that he (Morales) would receive a raise if he supported the Company rather than the Union. (Id.) Morales indicated to Ray Gene that he did not understand.[11] Ray

[9] Georcria Rug Mill (1961) 131 NLRB 1304

[10] When asked on cross-examination if his reply to Ray Gene had been untrue, Morales readily acknowledged that it was, but said he had not wanted to talk about the Union for fear that Ray Gene would fired him on the spot. (I:113-114.) This testimony is at odds with Morales' testimony elsewhere that he wore a Union button to work and so was identifiable as a Union supporter. It is also at odds with his testimony that he was already known as a Union supporter because this conversation took place after the one with Navarette where Morales spoke in favor of the Union. (I:110-111.)

[11] Ray Gene spoke mainly in English since he knows only a few Spanish words. Morales understands some English but does not speak it.

Gene responded it was "okay" and Navarette would Calk Co Morales the next day about the money and the cow. Navarette did talk to Morales die next day, but only about Morales supposedly hitting the cow.[12]

Morales further testified that right after Ray Gene spoke to him, Ray Gene went to speak to Carlos Licea Navarette, the other milker who was working on the other side of the barn. Morales could not hear their conversation.

Mr. Licea, who was still employed by the Respondent at the time he Cescified, confirmed Chat Ray Gene spoke to Morales just before he spoke to Licea.[13] He could not hear what was said.

Licea testified that Ray Gene encouraged him to support the Company rather than the Union and offered him more money if he would do so. Ray Gene told Licea to call him if he (Licea) changed his position. (I:131.) Licea recalled the conversation

[12] It is unnecessary to resolve whether Morales hit the cow or not. Although Navarette testified he told Morales he would be given a ticket, he further testified Ray, Sr. decided not to do so because it was "not right." In describing what he meant by Morales getting a ticket, Navarette testified that if a worker made a mistake serious enough to warrant firing, the company would give him one or two chances. (11:85) Not only was Morales not disciplined, I find this incident did not play any part in Respondent's decision to discharge him. Although Ralph Chavez testified the incident was in the back of his mind when he decided to recommend discharging Morales, I find his prior testimony, i.e. that the only basis for the discharge was the final incident, is more credible. (See discussion <u>infra</u>.)

[13] Both Morales and Licea also testified, without contradiction, that Ray Gene smelled of hard liquor.

occurred about: a week, or less, prior to the election.[14] (Id.)

Licea denied being a friend of Morales', stating they were just co-workers. He denied having contact with Morales after Morales was discharged except for riding to the hearing in the same car as Morales. He denied they discussed his testimony during the 1M to 2 hour drive; in fact, he testified they did not talk about anything during the long drive. From the context, the latter response may have referred to not talking about anything related to his testimony even though the question was not so limited. (I:132.)

Ray Gene was a supervisor at PER in early 1993, but at the time of the hearing he was self-employed. He testified the incident where he accused Morales of hitting a cow occurred some 3 or 4 weeks before the petition for certification was filed, ai. ,ie did not know anything about any Union activity until the filing. (II:118-119.) Consequently, he stated, he would have had no basis to say anything to Morales about the Union. He denied ever offering Morales or Licea more money if they supported the Union although he framed several of his answers in terms of denying he had negotiated wages with any of the workers. (II:118-121.)

As with Mr. Melchor, Carlos Licea has nothing personal to

---

[14] In its brief, Respondent argues Licea's testimony should not be credited because he did not become a relief milker until Morales left, and so he could not have been milking the same night as Morales. (Resp. brief, p.20). Mr. Licea testified the incident took place before the election. (I:131.) Morales, of course, was still working then. There is no evidence that even though his job classification had not been changed to relief milker that he would not have been assigned to fill in as a milker.

gain by risking his employer's displeasure by testifying against it. There is no evidence he was an ardent Union supporter; at most, there is an indication he was supportive of the Union. All this suggests his testimony is credible. The only negative is his unlikely testimony that he did not talk to Morales during the long car ride to the hearing which may have referred to discussing his testimony. On balance, I find him credible as to the incident in question.

I generally found Morales a credible witness. The fact that he lied to Ray Gene by denying he knew anything about the Union does not mean he was untruthful at the hearing. While his testimony that his denial was based on his fear of termination could be viewed as inconsistent with his testimony that he was already known as a Union supporter because of his comments to Navarette, there is a distinguishing element here.

Ray Gene was not just a supervisor, he was the boss' son. The incident took place late at night, and Ray Gene had been drinking. Under these circumstances, Morales reasonably might not want to assert his Union support and risk a serious direct confrontation.

Ray Gene also testified in a credible manner except that he qualified several of his answers on the main issue by framing his denials in terms of not having negotiated wages with any workers. His demeanor on this matter was decidedly less precise and less responsive than at other times. Consequently, I credit Morales and Licea over him.

V. THE DISCHARGE

As noted above, Mr. Morales began work for Respondent in 1985 or 1986. After about six months, he became a relief milker which meant he had no set shift but filled in for absent workers. Although he never became a permanent full-time milker with a regular shift, he did work full-time.[15]

On March 11, 1993, he was discharged by Ray, Sr. on the recommendation of Ralph Chavez. RX 1, prepared by Mr. Morales, and RX 2 (a) and 2 (b), prepared by Mr. Chavez, are diagrams of the milking barn and the surrounding area. They are helpful in following the witnesses' accounts of what occurred on Morales' last day of work.[16]

At PHR, two milkers work each 8 hour shift; each milker is assigned to work on only one side of the milking barn, also a :d the milking parlor, which is shown on RX 2 (a) at the top. Each milker milks about 500 to 600 cows on each shift.

While awaiting milking, the cows are put in the six corrals. A worker called a pusher moves one group of cows from a corral down the lane through a gate to the wash up pen where they are cleaned by automatic sprinklers. The lane is lined with horizontal pipes forming a fence about 4 ½ to 5 feet high. The

[15] Respondent did not present any contrary evidence. Clearly, it could not have identified Morales as being responsible for the low milk production by isolating it to his shift and his side of the barn, as it originally contended, because he did not work only one shift or one side as a permanent milker would.

[16] RX 2 (a) and 2(b) are meant to be lined up so the lane to and from the milk parlor identified on 2 (b) is a continuation of the return lane to the corrals shown on 2 (a) .

pusher then moves them to the holding and drip pen which is separated from the wash up pen by a gate. Gates are shut behind the cows as they proceed from one area to another.

After the cows are in the holding pen, the pusher uses the crowd gate to break them into two groups. Twenty cows go to the left side of the milking parlor, and twenty go to the right side. The cows cannot get mixed up by moving from one side of the parlor to the other. (I:24.)

Once in the milking stalls, each cow is milked by the milker assigned to that side. After each cow is milked, the milker dips her teats in TD (an iodine solution) which leaves a distinctive yellow color. In addition to the containers of TD in the barn, it is also stored in the treatment area noted on RX 2 (a).

After the TD is applied, the milker pushes a button which opens the front doors of the stalls so the cows can exit. The cows leave the stalls, moving through the area marked "exit parlor" into the exit lane, down to the return lane and back to the corral from which they came. The milker opens the back doors of the stalls so the next group of cows can enter to be milked.

The milker is responsible for controlling the cows in the milk parlor. Elsewhere, the pusher is responsible for operating the gates to keep the cows separated so they go to the correct areas.

Supervisor Chavez[17] testified the only place a cow that was

---

[17] Chavez has worked for Respondent since the mid-1970's when he was a small child helping out at the dairy and has been part of management since about 1983 or 1984.

not milked could get mixed up with those that had been milked s at the gates at the top right and top left corners of the holding pen that border the exit lanes. (II:60.) (See RX 2(a).) However, he did not explain why it would not also be possible for cows to get mixed up at other points, for example, in the return lane where all the cows from both sides of the barn commingle, if the pusher made a mistake in closing gates. (I:102.)

On the day he was discharged, Morales was working the 11:00 a.m. to 8:00 p.m. shift. About 6 or 6:30 p.m., Ralph Chavez and Mike Veldhuis brought to Morales' attention a cow which had not been milked.[18] They had spotted the cow at the point markad "C" on RX 2 (a). I note this point is in the return lane used by all the cows although if the pusher kept them properly separated, only cows from Morales' side of the barn should have been headed i this direction.

Chavez noticed her because he saw her udder was so full that milk squirted out every time she took a step. He also noted that she already had TD on her teats indicating she had been through the milking barn.[19] Chavez and Mike showed the cow to Navarette who was Morales' immediate supervisor. Navarette was in the bull chute and first saw the cow when she was at the point marked "1"

---

[18] Both Morales and Chavez testified that a cow can become seriously ill if she is not fully milked.

[19] General Counsel argues in its brief that Navarette did not testify about the TD when he described what he initially observed about the cow. While this is true, he did testify he told Morales she could not have jumped the fence because she had TD on her. (Compare II:87 and II:89)

on RX2 (b) .

Chavez and Mike told Ray Sr. about the cow. He instructed them to take her to the milking parlor and to use a bucket to collect the milk to see how much there was and find out why she hadn't been milked.

Chavez and Navarette testified as to what occurred next, but they are inconsistent on several points. Each testified he was the one who confronted Morales.[20] Neither testified the other one spoke to Morales. In fact, Chavez testified only he and Mike went into the barn. Yet, their accounts as to what transpired are otherwise similar.

Both agree Morales denied the cow had come through his side for milking. When asked how she had gotten in with the cows that had been milked, he replied she must have jumped the fence.[21] Chavez and Navarette each testified he challenged Morales' reply by pointing out that it did not explain how the cow came to have TD on her udder and that Morales responded that someone had planted the cow to frame him.

Morales testified he knew the cow had not come through his side of the barn because, as an experienced milker, he could recognize a cow by her udder. This particular cow was further

---

[20] Navarette testified he told Morales the cow had come from Morales' side of the barn. Based on his testimony as to where he just saw the cow, Navarette could not have known which side of the barn she had been in.

[21] Morales credibly testified he never said the cow had jumped the fence indicating it was a ridiculous suggestion. Navarette also testified the cow could not have jumped the fence.

recognizable as one of the large cows from corral 6. Morales did not testify that his comment about the cow being planted was made while he was in the barn. He puts it later when he was talking to Ray Sr.

After the discussion with Morales, Chavez milked the cow, and she gave enough milk to indicate she had not been properly milked. Chavez and Mike went to report to Ray, Sr. On the way, Chavez told Mike he was going to recommend Morales be fired because he did not believe him and believed he should not be kept on if he were treating the cows this way. Chavez gave Ray his recommendation. Ray concurred, saying each cow was an investment of $1,500 that needed to be protected. Chavez testified he had no reason other than this incident that caused him to recommend firing Morales.[22]

About 8:00 p.m. Navarette told Morales that Ray, Sr. wanted to see him. They went to the office in the barn. Morales does not understand much English, so Navarette translated. Ray, Sr. told Morales that he paid Morales to milk the cows not to neglect to milk them and that he no longer had a job.

Morales tried to tell Ray, Sr. that he had been set up because the cow had not come into one of his stalls and that he

---

[22] As noted above, he later testified under prompting from Respondent's counsel that in the back of his mind he had the incident where Morales allegedly hit the cow. He was quite definite in his initial testimony that it was only the last incident which influenced him, and I do not credit his later addition of the prior incident as a factor. Ray Sr. testified at a hearing regarding Morales' eligibility for unemployment insurance benefits and testified that Morales' failure to milk the cow was the reason he fired him.

was not a pusher and was not responsible for watching where the cows went.[23] Ray, Sr. would not listen. He offered Morales his final check which Morales refused, saying he would not take it because it was not right that he was being let go.

The day after he was discharged, Morales had a friend who speaks English telephone and ask if Morales still had a job. The friend was told Morales did not. A week or two later, Morales went to the office and got his check but did not talk to any supervisory or managerial personnel. He has not asked for nor been offered work with Respondent since then.

VI. Mike Veldhuis' Remarks

In February and March, Juan Manuel Rodriguez was a herdsman at Veldhuis Dairy. He was hired by the Company in September 1989 and worked there until December 1993 when he left work due to an injury. He later tried to return but was not rehired. (I:45.)

Despite the fact that the Company did not rehire him, he subsequently testified on Respondent's behalf in another forum on a workers' compensation matter regarding another worker. (I:59-60.) He credibly testified his testimony in this case was not motivated by any animosity toward Respondent.

According to Rodriguez, he came into the office to get some supplies for a repair and overheard a remark Mike Veldhuis made to a man whom Rodriguez did not see. Mike said Morales was talking

[23] The pusher who was working that shift was new and had only been working a few days. (I:69.) Despite this fact, Chavez and the others did not talk to him to see if he could have mixed up the cows. Nor did they talk to the other milker.

too much about the Union, and it was time for Morales to go.[24] (I:28.) He also testified that the day after Morales was discharged, Chavez told Rodriguez that it was over, that they had run Morales off. (I:27.) Chavez never specifically denied he made this comment.

Rodriguez could not recall when the incident with Mike occurred other than it was around the time Morales was let go, but he was firm in his recollection of what Mike said. Rodriguez' demeanor was sincere. His testimony was consistent. He answered questions from counsel for both sides with equal directness. I credit him.

ANALYSIS AND CONCLUSIONS

An employer may not interfere with employees' section 1152 rights to organize by threatening them with loss of benefits if they exercise those rights nor by promising benefits if they refrain from doing so. In order to establish that such conduct violates section 1153(a) of the Act, General Counsel is not required to show unlawful motivation; nor does it matter whether the coercive effort was successful. The sole test is whether the Respondent engaged in conduct which may reasonably be said tends to interfere with the free exercise of employee rights under the Act. (2 Hardin, The Developing- Labor Law (3rd ed. 1992) p.76).

In this case, I have credited General Counsel's witnesses as to Navarette's statements regarding loss of benefits. The

[24] Rodriguez testified he understands some English and was sure of what he heard. In fact, he testified in English that Mike said, "And it was time to go." (I:28.)

workers were quite clear that Navarette told them they would lose their benefits if the Union won. This statement was not a lawful prediction as Respondent asserted at the Prehearing but, rather, an unlawful threat of reprisal if the workers supported the Union. NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 618-619 [71 (RRM 2481]. Even the statement that the workers would not be covered by the profit-sharing plan is unlawful. (See Wilief Transp. v. NLRB (7th Cir. 1991) 946 F.2d 1308 [138 LRRM 2871] finding a statement that the company bylaws required the plant to be closed if the company became unionized was unlawful because the bylaws could be changed.)

Consequently, I find General Counsel has established a prima facie case that Navarette threatened workers. Respondent has not rebutted it, and I find a violation of section 1153 (a).

I have credited Morales and Carlos Licea that Ray Gene promised them more money if they would support the Company in the upcoming election. This credibility resolution decides the issue since such conduct clearly violates section 1153 (a) of the Act.[25] (Alpine Produce (1983) 9 ALRB No. 12.)

[25] In its brief (p. 19), Respondent argues it has not committed an unfair labor practice because there is no evidence Navarette's remarks were sanctioned by its upper management, and Navarette did not say the workers should vote. Neither is required. As a supervisor, Navarette is Respondent's agent, and Respondent is liable for his conduct. (Vista Verde Farms v. ALRB (1981) 29 Cal. 3d 307.) Section 1153(a) prohibits conduct which reasonably tends to interfere with employee's exercise of their section 1152 rights. J.R. Norton Co. v. ALRB (1987) 192 Cal. App 3d. 874, cited by Respondent (Resp. brief, p.19.), does not hold to the contrary but agrees that the coercion need not succeed in order to violate the law.

I turn now Co the issue of Morales' discharge. In cases alleged discrimination in employment under Labor Code sections 1153 (c) and (a), General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that 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.

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 se 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 Wright Line. Ing., (Wright Line) (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd (1st Cir. 1981) 662 F. 2d 899 [108 LRRM

2513], cart. 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 pritna 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. (Wriaht Line, supra, at p. 1089.)

There is no issue here about Morales' Union activity or Respondent's knowledge of such activity. Both are admitted. The only issue is causality.

Proof of an unlawful discharge almost always turns on circumstantial evidence. Here, I have credited Rodriguez' testimony that: (1) Mike Veldhuis, the son of the owner, said it was time for Morales to go because he was talking about the Union too much, and (2) Chavez told him they had run off Morales. Although Chavez' statement to Rodriguez, standing alone, might be open to interpretation, in connection with Mike's statement[26], it is clear evidence that Respondent wanted to get rid of Morales because of his vocal support for the Union.

---

[26] Although there is no evidence that Mike was a supervisor, his statement is imputed to Respondent because he is Ray, Sr.'s son and because his working in concert with Chavez as evidenced in the events leading to Morale's discharge, signify to workers his close association with management. (Vista Verde Farms v. ALRB (1981) 29 Cal. 3d 307.)

In addition, there is circumstantial evidence of unlawful motive. The timing is highly suspicious. Morales had worked for Respondent for 7 or 8 years. There is no history of prior problems with his work. Suddenly after all this time and on the heels of an election victory for the Union which Morales supported, if Respondent is to be believed, he failed to properly milk a cow and then lied about it offering the patently ridiculous excuse that the cow must have jumped a fence.

Despite Morales' long record of satisfactory employment, Chavez, Mike, Navarette and Ray, Sr., failed to conduct any investigation. A new pusher was on duty and might have made a mistake. They did not check with the other milker. The failure to make an investigation before taking disciplinary action is a traditional factor to consider in assessing unlawful motive.

Navarette testified that employees were normally given one or two chances before being fired. Chavez, too, testified he believed everybody deserved a second chance. Yet, Morales was not given a warning despite his long history of doing a good job.

The severity of the discipline is also a traditional factor in evaluating unlawful motive. Discharge has been termed the equivalent of capital punishment in an economic sense. Here, the ultimate sanction was imposed on a worker with many years of satisfactory service without any prior warnings.[27]

[27] Respondent's failure to issue a disciplinary ticket to Morales about the incident where he allegedly hit a cow could be viewed as evidence that Respondent was not bent on getting rid of him. However, this fact does not overcome the other evidence pointing to an unlawful motive.

Additionally, giving shifting reasons may indicate unlawful motive. Respondent initially took the position it fired Morales because an investigation into low milk production had been isolated to Morales' side of the barn and his shift. Respondent withdrew this defense after testimony established Morales did not have a regular shift and did not regularly work one side of the barn.

Further, Respondent initially contended Morales was not fired because he failed to milk the cow but because he lied about it. Chavez testified he recommended that Ray, Sr. fire Morales because Morales lied about not milking the cow and because the failure to milk her was mistreatment. Ray, Sr., on the other hand, told Morales that he was being fired because he did not milk the cow, and he again gave this reason at the unemployment hearing. He never mentioned low milk production or lying about the final incident.

The combination of the circumstantial evidence and the direct evidence of Chavez' and Mike Veldhuis' admissions convinces me that Morales would not have been discharged absent his Union activity. Consequently, I find Respondent violated sections 1153 (c) and (a) of the Act.

ORDER

By authority of Labor Code §1160.3, of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board (ALRB) hereby orders that Respondent P.H. Ranch, Inc., a California Corporation; RAY GENE VELDHUIS, Individually and Doing Business

as R-V-DAIRY, a Sole Proprietorship; and VELDHUIS DAIRY, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee with regard to hire or tenure of employment, or any term or condition of employment because the employee has engaged in concerted or union activity protected under §1152 of the Act;

(b) Threatening employees with loss of benefits for exercising their rights under section 1152 of the Act;

(c) Promising employees benefits for refraining from exercising their rights under section 1152 of the Act; or

(d) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exerc 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 Benito Morales immediate and full reinstatement to his former position of employment, or if his position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges of employment;

(b) Make whole Benito Morales for all wages or other economic losses he suffered as a result of his unlawful discharge. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award

shall also include interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5;

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay and/or make whole amounts due those employees under the terms of the remedial order as determined by the Regional Director;

(d) Upon request of the Regional Director, sign the attached Notice to Employees embodying the remedies ordered. After its translation by a Board agent into all appropriate languages, as determined by the Regional Director, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order;

(e) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of a final remedial order, to all agricultural employees employed by Respondent at any time from February a, 1993, until February 7, 1994.

(f) Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondent's property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which may be altered, defaced, covered or removed;

(g) Arrange for a Board agent to distribute and read the Notice in all appropriate languages to all of Respondent's agricultural employees on company time and property

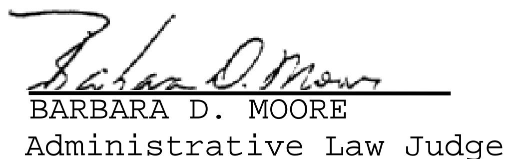
at time(s) and place (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent, to all non-hourly wage employees in order to compensate then for lost time at this reading and during the question-and-answer period;

(h) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of a final order in this manner;

(i) Upon request of the Regional Director or designated Board agent, provide the Regional Director with the dates of its next peak season. Should the peak season have already 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 after the date of issuance of this order, of the steps Respondent had taken to comply with its terms, and, continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: October 26, 1995



BARBARA D. MOORE
Administrative Law Judge