Hanford, California

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WILLIAM WARMERDAM, Individually, and doing business as, WARMERDAM PACKING COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 94-CE-64-VI 94-CE-81-VI 94-CE-154-VI 95-CE-06-VT 96-CE-47-VI 24 ALRB No. 2 (May 1, 1998)

DECISION AND ORDER[1]

On December 15, 1997, Administrative Law Judge (ALT) Thomas Sobel issued the attached decision hi which he recommended that the complaint in the above-referenced case be dismissed in its entirety. The complaint alleged that Warmerdam Packing Company (Respondent) took various forms of adverse action against employees Ruben Duarte and Jesus Ceja in retaliation for their union activities. The United Farm Workers of America, AFL-CIO, (UFW) timely filed exceptions to the ALJ's decision and filed a response to the exceptions.[2]

[1]A11 decisions of the Agricultural Labor Relations Board, in their entirety, are issued as precedent for future cases. (Gov. Code, §11425.60.)

[2]Respondent asserts that the UFW's exceptions fail to comply with Regulation 20282 (8 Cal. Code Reg. § 20282, subd. (a)(l)), and should be dismissed on that basis. It is true that

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 ALJ's findings of feet and conclusions of law, and adopts his recommended decision and order.[3]

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the exceptions contain somewhat less than the degree of clarity and specificity sought by the requirements set forth in the regulation. However, the Board has declined to dismiss exceptions where, as here, compliance with the regulation is sufficient to allow the Board to identify the exceptions and the grounds therefor and address them on their merits. *(Olson Farms/Certified Egg Farms, Inc.* (1993) 19 ALRB No. 20; *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11.)

[3]The UFW asserts that it was error for the ALJ to decline to impute to Respondent the knowledge of its foremen that Duarte and Ceja were leaders of the union organizing effort. We disagree. This Board, consistent with precedent of the National Labor Relations Board, will decline to impute such knowledge where credited testimony indicates that the information was not passed on to higher officials in the company who made the decision to take the adverse action complained of. *(Arco Seed Company* (1985) 11 ALRB No. 1; Dr. *Phillip Megdal, D.D.S., Inc.* (1983) 267 NLRB No. 24.)

ORDER

The complaint in Case Nos. 94-CE-64-VI, 94-CE-81-VI, 94-CE-154-VI, 95-CE-06-VI, and 96-CE-47-VI is hereby DISMISSED in its entirety.

DATED: May 1, 1998

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

GRACE TRUJILLO DANIEL, Member

JOHN D. SMITH, Member

MARY E. McDONALD, Member

CASE SUMMARY

WARMERDAM PACKING CO. (UFW)

Case No. 94-CE-64-VI,et al.
24 ALRB No. 2

Background

On December 15, 1997, Administrative Law Judge (ALJ) Thomas Sobel issued a decision in which he recommended that the complaint in the above-referenced case be dismissed in its entirety, for failure to establish any of the violations alleged. The United Farm Workers of America, AFL-CIO, (UFW) timely filed exceptions to the ALJ's decision and Warmerdam Packing Company (Respondent) filed a response to the exceptions. The complaint alleged that Respondent discriminated against Ruben Duarte and otherwise interfered with his right to engage in protected activities by changing his job classification and duties, ordering him not to speak Spanish to his supervisor, threatening to and reducing his overtime hours, and by laying off and refusing to rehire him It also was alleged that Respondent discriminatorily discharged Jesus Ceja. In addition to denying that it committed any violation of the Agricultural Labor Relations Act, Respondent also contended that Duarte was not an agricultural employee and, thus, the Agricultural Labor Relations Board (ALRB or Board) has no jurisdiction to adjudicate the allegations concerning him.

Board Decision

The Board summarily affirmed the ALJ's recommended decision and order, though it expressly addressed two arguments raised by the parties. The Board denied Respondent's request that the UFW's exceptions be dismissed for failure to fully comply with Regulation 20282 (Cal. Code Regs., tit. 8, § 20282, subd. (a)(l)), noting that in the past it has declined to dismiss exceptions where, as here, compliance with the regulation is sufficient to allow the Board to identify the exceptions and the grounds therefor and address them on their merits. The Board rejected the UFW's assertion that it was error for the ALJ to decline to impute to Respondent the knowledge of its foremen that Duarte and Ceja were leaders of the union organizing effort. The Board agreed with the ALJ that imputation of knowledge was inappropriate in this case, citing precedent holding that knowledge will not be imputed where credited testimony indicates that the information was not passed on to higher officials in the company who made the decision to take the adverse action complained of.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 94-CE-64-VI
	)	94-CE-81-VI
WILLIAM WARMERDAM, Individually,	)	94-CE-154-VT
and doing business as,	)	95-CE-06-VI
WARMERDAM PACKING CO.,	)	96-CE-47-VI
	)	
Respondents,	)	
and	)	
	)	
UNITED FARM WORKERS OF	)	
AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Chief Administrative Law Judge: This case was heard by me in Visalia, California .on September 30 thru October 3, 1997. Briefs were filed on November 19, 1997. After the filing and service of charges, General Counsel issued a complaint alleging that Respondents, admitted agricultural employers with respect to their farming and tree fruit harvesting operations, 1) discriminatorily changed the job classification and duties of Ruben Duarte, reduced his overtime hours, ordered him not to speak Spanish to his supervisor, and not only unlawfully laid him off, but, thereafter, both directly and indirectly, refused to rehire him; and further interfered with his protected activities by a) threatening to take away his overtime, b) warning him not to speak to other employees about the Union, c) and predicting that if the Union won a representation election, he and his fellow employees would not have enough to eat; and 2) discriminatorily discharged another, employee named Jesus Ceja. Respondents deny violating the Act and additionally contend that this Board lacks jurisdiction to adjudicate the allegations concerning Duarte because he was not an agricultural employee. I will take up the jurisdictional question first.

I. Duarte's "employee" status

A. The testimony

Respondents grow peaches, plums, nectarines, walnuts, cherries and apples. They also operate a packinghouse which

General Counsel concedes is commercial. See, Prehearing Conference Order, p. 2; Jurisdictional Facts. When Ruben Duarte began his employment with Respondents in 1992 as a tractor driver, his supervisors were Arne Tutschulte and James Myers. Duarte testified that in October 1993, he was taken out of the fields and assigned to the shop under the supervision of Manual Garcia, whereupon his primary duties became the delivery of firewood to customers and fruit to a fruitstand on one of Respondents' ranches. Respondent Bill Warmerdam testified that when he took an orchard out, the trees were cut up for firewood, RT p. 393 [Warmerdam]. Duarte testified that he sometimes picked the wood up in the fields, RT p. 48, 11. 24-28; p. 49 11. 1-3; and sometimes in front .of the packing shed where it had already been loaded into bins. RT p. 80. Warmerdam testified that the fruit was second quality fruit "from the packing shed", RT p. 393, 11. 23-24.

According to Duarte, when he was not hauling either wood or fruit, he might work in and around the shop, doing such things as general clean-up, including washing his truck as well as helping to fix or maintain other equipment, including tractors, RT p. 45, or he might be sent to the fields to gather brush, prune trees, or cut firewood. Duarte testified that this rough mix of hauling, shop and field duties continued through the spring of 1994, when he was also put to work levelling roadways around shop, packing shed and ranch; boxing and loading fruit in

the shed; and doing odd jobs, such as fixing leaking irrigation lines in the fields. RT pp. 47-48.[1]

Several of Duarte's co-workers also testified about his 1994 duties. With respect to his shop duties, tractor driver Luis Magana recalled Duarte's changing oil on the tractors "around" June, 199-4, RT p.236. With respect to field duties, Elias Rodriguez testified he saw Duarte spray grass with a backpack sprayer before and after June 14, 1994, as well as use a tractor to cut grass and to disk, RT p.251. Guillermo Medina testified that "just prior to the election", RT p.223 11. 11-12, he saw Duarte cutting grass with a tractor in the orchards near the packing house. Magana initially testified that he recalled Duarte's spraying weeds and disking in "the early part of 1994", RT pp. 235, 248, but later admitted he was uncertain about the disking, RT p. 247. Finally, Jesus Ceja testified that before the election in 1994, he saw Duarte spraying weeds on a tractor. Duarte testified he was confused enough by his mix of duties, that he asked a number of times where he was supposed to be working and, at least until the union campaign, he was always

[1]General Counsel implies that after the union movement started in the spring of 1994, Duarte was given more and more fruit hauling assignments in order to keep him away from the other workers, Post-Hearing Brief, p. 8. While it is undisputed that fruit hauling picks up during the summer months, RT p. 82, and, therefore, it is reasonable to infer, that the amount of fruit Duarte hauled around the time of the Union campaign increased, nothing in the record supports General Counsel's contention that Respondents were separately motivated by Duarte's union activities to give him more and more fruit hauling assignments.

told he was assigned to the shop, See, e.g., RT p.59.

Although Respondent's witnesses did not dispute that Duarte performed a variety of duties upon being transferred to the shop, on a number of important points they presented a different picture about what he did. In the first place, they place his transfer somewhat later than Duarte did: for example, Tutschulte recalled he started in November or December 1993. RT p. 579. Each day, Duarte reported to the shop in the morning where he readied his truck, RT p. 522 [Garcia], or did general clean-up, including cleaning the toilets and washing the tractors, RT p. 360 [Ward], before making whatever seasonal deliveries were required. Generally speaking, he hauled firewood from November thru February, RT p. 80, and fruit during the spring and summer months. Everybody agreed that hauling fruit during the peak of season between June and August could take up almost a whole day by itself.[2] Respondents' witnesses estimated he spent about "80%" of his time hauling wood and fruit, RT p. 517. What proportion of the total time spent hauling was devoted to wood as opposed to fruit is not clear from the record.

Garcia, Tutschulte, and Warmerdam also testified that besides these more or less regular duties, RT p. 455-23,

[2]Bill Warmerdam, for example, testified that Duarte might take as many as four loads a day to the fruitstand with each load taking between 1.5-2 hours. RT p. 393-4; see also, Ward RT p. 361. Duarte testified that during the busy season, he might make 7 trips a day. RT p. 120.

throughout almost all or 1994, Duarte also helped Garcia on the construction of a Controlled Atmosphere room which is used for long-term storage of fruit. Work on the room began in January or February of 1994 when Respondent cleared the site of trees. RT p. 512. It appears from Garcia's testimony that the next phase of construction was installation of a drainage system, RT p. 517, but whatever happened next, both Garcia and Duarte detailed a number of labor intensive tasks that Duarte either did by himself, or helped Garcia do, until the construction was completed in November of 1994, including, as noted above, hand-digging trenches for the drainage, doing tractor work for the pour, putting in irrigation lines, doing clean-up for the contractor, putting in a drainage system to recycle the "defrost water", regrading the lot after the building was up, and building a new parking lot and painting the lines on it. RT p. 517-22 [Garcia].

Perhaps the most important difference between the testimony of Respondents' witnesses and that of General Counsel's is that Respondent's witnesses did not recall Duarte's performing any field work around the time of the election. See, e.g., RT p. 482.

B. The records

At least for the months of October and November, and the first two weeks of December, Respondent introduced Duarte's timesheets which detail exactly what he was doing hour-by-hour.

No timesheets exist after December 9, 1993 since Duarte began to use a timeclock after that pay period.

The timesheets for October show him performing a variety of duties, mostly on various ranches, but some in the shop. As far as shop duties are concerned, Duarte did "repairs and maintenance" in the shop for 1 hour on October 5; "overhead" for 1 hour on October 6 and 1.5 hours on October 7; "repairs and maintenance" for 2 hours on October 15; and "cleaning" for 1 hour on both October 18 and October 20. The bulk of his time was spent in Respondents' orchards or ranches and his duties consisted of making borders, cutting wood, irrigating, mowing, repairs and maintenance, controlling weeds, "overhead", burning, cleaning, pulling and propping trees, picking walnuts, pruning, and shoveling. Assuming that Duarte's first assignment to the shop was in October, the timesheets are consistent with his testimony that he continued working in the fields after he was assigned to the shop. However, since both Duarte and Garcia testified that once Duarte was transferred to the shop, he spent most of his time hauling, and the October timesheets show no hauling, both men got Duarte's duties wrong at least to that extent.[3]

[3]In view of the conflict in the testimony about when Duarte was transferred to the shop, the time spent in the shop on his October timesheet may not be conclusive on the question of the date he was transferred, since his brief periods in the shop may have been incidental to his tractor duties, as opposed to being a regular assignment. For example, the timesheet for tractor driver Jose Luis Magana shows work in the shop on 8/27/94 and that of Samuel Ramirez shows work in the shop on 8/27/94 and again on 8/31/94. RX 13

Duarte's timesheets for the first two weeks of November again show *a* variety of ranch or orchard duties, including pruning, weeding, shovelling, cleaning, and propping trees. Not until November 15, when he worked for 1.5 hours doing "overhead", is he again shown in the shop, and from the 16th through the 23rd, he was apparently back in the fields, shredding brush, doing repairs and maintenance, controlling weeds, and mowing. Hauling appears on his timesheets for the first time on November 23, along with suckering and weed control on the berms at the Lopez Ranch, after which it takes up an increasing amount of time. Except for burning on the Lopez Ranch for 2.5 hours on 11/24, shredding brush for 4 hours in the May Diamonds on 11/26, and cleaning on the River Ranch for 2 hours on 12/4, the timesheets do not again show Duarte in the fields. His timesheet for November 26 puts him in the packing she'd for the first time. See, RX 7. Up until November 24, then, the timesheets are consistent with Duarte’s testimony that he regularly worked in both fields and shop; after November 26th, with the exception of 2 hours "cleaning" on the River Ranch on 12/4, they are consistent with Garcia's testimony that once Duarte began hauling, he ceased doing field work.

Moreover, it appears from the fact that Duarte was paid with the other tractor drivers through 12/12/93 that he was formally a tractor through that date. See, RX 4 (a) and (b) and RX

3 (a) and (d).[4] As a result, for the entire period during which his timesheets show him doing at least some work: in the fields, he was. still a tractor driver. This is consistent with Tutschulte's recollection that he was transferred to the shop in November or December. GCX 15[5] indicates that from 12/12 -12/24/93, Duarte was formally assigned to the shop. RX 2 (e) indicates that with the pay period ending 12/26/93, he was classified as a shed employee and signed for his checks with the shed employees. RX 2(d), See also, RX 2(g) - (k). The Signature Lists for the shed employees carry the code "SHD" on them.

C. Concluding findings

Obviously, Duarte had a variety of duties. There is no dispute that he hauled firewood and fruit, helped to construct the Controlled Atmosphere Room, and worked in the shop, doing clean-up and light maintenance, including washing tractors and, he testified without contradiction, changing oil in them. There is a factual conflict concerning whether or not he did field work after the start of 1994, with Duarte and the other employee witnesses testifying that he worked in the orchards, and Respondents' witnesses testifying that he did no field work after

[4]RX 3(a) and (d) and RX 4(a) and (b) are lists signed by employees when they receive their checks. They show Duarte in crew AT for the pay period ending 12/2/93. Maria Cabral, Respondent's Office Manager, testified that the AT crew designation stands for Arne Tutschulte, then Respondents' tractor driver supervisor. See, RT p. 266.

[5]General Counsel has moved to correct the Exhibit Index to reflect that GCX 15 was received into evidence. It is hereby corrected. See. RT p. 317

he came under Garcia's supervision. There is also a dispute about the origin of the fruit Duarte took to the fruit stand, with General Counsel contending it must have come from Respondent's trees because Respondent presented no evidence to the contrary, and Respondent contending that it was fruit from the packing shed. Before considering the parties' arguments relating to fruit hauling, I will briefly address the evidence relating to Duarte's field work.

Despite eliciting testimony that Duarte worked in the fields during 1994, General Counsel does not rely on it in her Post-Hearing brief to establish jurisdiction. Because she does not explain why she ignores the testimony, and it goes to jurisdiction, *I* will briefly explain why I decline to take it into account.

In view of the considerable amount of time that has passed since the spring of 1994, I am inclined to regard the testimony of Rodriguez, Medina, Magana, and Ceja about when Duarte might have done such un-noteworthy tasks as mowing grass, disking, spraying, or putting in irrigation lines, with some skepticism. While I would expect Duarte and Garcia, as those most interested, to be more aware of what Duarte was doing during the spring 1994, not only is their testimony in conflict, but a comparison between the timesheets that are available for the end of 1993 with their testimony about the same period, indicates that they, too, had difficulty accurately recalling the sequence

of Duarte's work assignments which, considering the records that are available, is understandable.

Thus, while both of them agreed that when Duarte started in the shop, he started hauling, if he started in the shop in October, 1993, the records show that he did not start hauling until almost two months later; and while Duarte recalled mixing field work with his hauling, the available records indicate that once he started hauling, he did not have field work; and while Garcia recalled Duarte's being transferred to the shop to assist him, if Duarte started in the shop in October, it appears that Tutschulte, who was a field supervisor, was still supervising him when he was supposedly under the supervision of Garcia. Such discrepancies between the records and the recollection of the arguably most knowledgeable witnesses, indicate that any of the witnesses' unaided memories of Duarte's episodic field duties are not reliable. In view of the conflict in the testimony, I decline to find that Duarte performed field work in 1994.

With field work eliminated as a basis for jurisdiction, three other potential bases remain: Duarte's construction work, his shop work, and his hauling. If I understand General Counsel correctly, she does not argue that the construction duties constituted "agriculture", but only that the fact that Duarte performed them did not put him within the construction worker exemption of 1140.4(b), which states that the ALRA does not apply

"to any employee who performs work to be done at the site of the construction, alteration, painting, repair of a building [or] structure . . . ."[6] General Counsel, therefore, bases her assertion of jurisdiction on Duarte's shop and hauling duties, and specifically, on his fruit hauling.

Respondents strongly dispute that his fruit hauling constitutes agriculture and further contend that because his fruit hauling was non-agricultural, it makes no difference what he did in the shop because this Board is preempted from even considering the matter.

The ALRA applies only to agricultural employees and only to those employees specifically excluded from coverage of the National Labor Relations Act. Labor Code Section 1140.4 (a) and (b). Labor Code Section 1140.4(b) defines an agricultural employee as "one engaged in agriculture", which is defined as:

> farming in all its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, furbearing animals, or poultry and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.

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[6]However, to the extent I am not construing her argument correctly, I will quickly state that if I had to decide the issue, I would conclude that Duarte's construction duties were "incidental" to Respondents' concededly commercial packing shed operation and, therefore, non-agricultural.

This definition has been held to have both a "primary" and a "secondary" meaning. The "primary" meaning embraces the operations listed in the statute, such as the cultivation and tillage of the soil and the growing and harvesting of agricultural commodities; the "secondary" meaning embraces any practices performed by a farmer or on a farm as an incident to or in conjunction with the farmer's own operations. See, 29 C.F.R. 780.141. A secondary practice, such as delivery to market, that is not "incidental" to the farmer's own operations is not "agriculture" within the scope of the definition. Farmers Reservoir & Irrigation Co. v McComb (1948) 337 US 755, 766 at n. 15.

General Counsel argues that Duarte's fruit hauling was agriculture within the meaning of the secondary definition because "Respondents presented no evidence that these deliveries consisted of anything other than Warmerdam's own produce." Warmerdam, however, testified without contradiction that the fruit came from Respondent's packing -shed from which Respondents argue: Since it is undisputed that Respondents' shed is a commercial shed, and the fruit Duarte hauled came from there,[7] it follows that the fruit was a commercial mix of both

[7]Under the rule of Camsco Produce Company (1990) 297 NLRB No. 157, an employee who "regularly" handles produce produced by employer-farmers other than his own employer is an employee under the national act. Since I am concluding that it is arguable that the fruit which came from the shed was a commercial mix, and Duarte only hauled fruit from the shed, it follows that when he hauled fruit, he"regularly" hauled a commercial mix.

Respondents' fruit and. that of other growers. Now, it is conceivable that the fruit grown by Warmerdam was kept apart from the fruit of other growers while it was in Respondents' shed, so that Warmerdam's testimony that the fruit Duarte took to the fruitstand "came" from the shed does not necessarily say anything about who grew it, and if Respondents had the burden of showing that it was more likely than not that the fruit Duarte hauled consisted of both their fruit and the fruit of other growers, I do not think they would have met it. However, under San Diego Building Trades Council v. Garmon (1959) 359 US 236, all that Respondents need do is put forth enough evidence to enable this Board to find that the national Board could *reasonably* determine that Duarte hauled fruit from growers other than Respondent and this Board has no jurisdiction to decide otherwise. Intern. Longshoremen's Ass'n., AFL-CIO v Davis (1986) 476 US 380, 394. I think testimony that Duarte hauled fruit from the shed reasonably implies that he hauled fruit out. of the shed in the same proportions that it went into the shed. [See, NLRB v. Gal-Maine Farms (5th Cir. 1993) 998 F2d 1336: testimony that distinctive dollies bearing shipping stickers of outside producers held, probative on issue of whether Cal-Maine processed outside eggs despite lack of any evidence about what was in the dollies.] I conclude that Duarte's fruit hauling duties were non-agricultural.

However, I reject Respondent's further argument that with this conclusion, the Board's jurisdiction is at an end for even though Congress intended the NLRB to have exclusive jurisdiction over employees who are arguably covered by the national Act, it also intended to place employees engaged in agriculture outside the NLRA. As a result, when someone, such as Duarte in this case, works for an employer-farmer and has multiple duties, this Board inquires into the nature of each of these other duties to determine if any of them constitutes agriculture. See, Produce Magic (1993) 311 NLRB No. 173, Royal Packing Company (1995) 20 ALRB No. 14, p. 5. Only if it be determined that each of these other duties is also "arguably" within the jurisdiction of the national Board, is this Board entirely preempted.

General Counsel argues that Duarte's shop duties were agricultural. As a general matter, "employees of a farmer who repair the mechanical implements used in farming, as a sub- ordinate and necessary task incident to their employer's farming operations," are agricultural employees. 29 C.F.R. Sec. 780.158.[8] Since it is undisputed that Duarte changed the oil and helped clean farm equipment, I find these duties agricultural. However, I did not understand Duarte to do either

[8] As General Counsel points out, Respondents did not contest the eligibility to vote of the shop employees during the election.

of these tasks every day, but to do them from time-to-time among a variety of other shop duties, such as cleaning his own truck, cleaning toilets, and sweeping up. While the Board has never directly declared "how much" agricultural work an employee must perform in order to be considered an employee under the ALRA, in Royal Packing, Ibid, it did make a point of finding that the agricultural component of the mixed work in that case was "substantial" when it-asserted jurisdiction on the basis of it. Since I cannot find that such shop work as Duarte performed was substantial, I decline to base the Board's jurisdiction on it.

The only remaining ground for asserting jurisdiction is Duarte's hauling firewood to customers. Since there is no dispute that the firewood came from an employer-farmer's own trees., if delivery of firewood may be considered a practice of "forestry or lumbering", Duarte's occasional gathering and delivery of it would be "performed on a farm in connection with [Respondents'] own farming operations" and, as .such, agriculture.[9] The term "forestry or lumbering operations" refers to the "cutting, hauling, and transportation of ... cordwood . ... It also includes the piling, stacking and storing of ... products [including cordwood.]" 29 C.F.R. Sec. 708. 201. "Cordwood" is defined as "1) wood stacked in cords for use as

[9]Only "lumbering operations" performed by a farmer or on a farm in connection with the farmer's own operations is considered agriculture and employees engaged exclusively in forestry or lumbering operations are not engaged in agriculture, 29 C.F.R. 708.200. s

fuel. 2) logs cut to a length of four feet to facilitate stacking in cords. 3) trees intended for timber but of a quality used only for fuel." Random House Dictionary, The Unabridged Edition, 1966. Except that there is no evidence that the firewood Duarte hauled was "stacked in cords" after it was sold, and some evidence' that it was not before it was sold, firewood clearly fits within the scope of the first dictionary definition as "wood . . for use as fuel." The sole remaining question is if, when the Department of Labor Regulations speak of "cordwood", they must be read as referring, not to wood used as fuel generically, but only to fuel wood that is measured or stored in a specific way. To read the regulation so narrowly would unduly constrict the statutory language: obtaining a "final harvest" from its own fruit trees is too clearly a practice related to Respondent's own farming operation for me to construe the reference to "cordwood" as other than a synonym for wood used as fuel generally.

Duarte's timesheets for November 26 - December 9, 1993, RX 6, indicate that he spent 2.5 hours hauling firewood on 11/26; 8.5 hours on 11/27; 7 hours on 11/28; 9.5 hours on 11/29; '5.5 hours on 11/30; 2.5 hours on 12/1; 7 hours on 12/2; 5.5 hours on 12/3; 6.5 hours on 12/4; 6 hours on 12/5; 4 hours on 12/6; 3 hours on 12/7; 7.5 hours on 12/8 and 5.5 hours on 12/9 and this is exclusive of any of the time he spent operating the forklift which, it is reasonable to conclude, he must have used to load the wood onto the truck for delivery. While the timesheets end

after 12/9, it is reasonable to conclude that the hours reflected on the timesheets in evidence are representative of the amount of time Duarte spent hauling firewood during all the winter months when he hauled firewood. Hauling firewood, then, would be both regular and, over the course of a year, substantial. The Board has jurisdiction.

II. The Alleged Unfair Labor Practices

A. Introduction: The alleged discriminatees' protected activities

General Counsel contends that Duarte and Ceja were discriminated against because of their leadership role in a successful organizational campaign that began in the spring of 1994 and ended in the August, 1994 certification of the United Farm Workers of America, AFL-CIO, as the collected bargaining representative of Respondents' agricultural employees. Because both men engaged in roughly the same protected activities during a relatively brief period of time,[10] I will first describe their activities so that they may serve as background for considering-Respondent 's treatment of them.

There is no evidence of any protected activities on the part of either of the alleged discriminatees until shortly before

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[10]In speaking of the alleged discriminatees protected activities as taking place during a concentrated period, I am not overlooking General Counsel's contention that both alleged discriminatees wore union insignia and attended bargaining sessions after the election; however, as will be discussed below, I am not inclined to find either of these activities to be a factor in their treatment.

a petition for certification was filed in June 1994. Not long before the UFW filed its Petition, Ruben Duarte contacted Roberto Escutia of the UFW about how to obtain union representation. Escutia told Duarte to bring him evidence that Respondents' employees were interested in a union. It appears from Duarte's testimony that he spoke to Ceja about what Escutia wanted for it was Ceja who circulated some kind of initial petition among Respondents' employees. See, RT p. 52.[11]

Evidently satisfied by what Ceja obtained, Escutia gave the two men authorization cards. Though Duarte and Ceja were to remain at the heart of the organizational campaign — Ceja testified that he collected a majority of the signatures and Duarte testified he visited a number of crews for-the same purpose — Duarte admitted that they were not alone in their •efforts; according to him, almost all the tractor drivers circulated cards, among the crews. RT p. 52

Although Duarte initially testified that they obtained signatures among the crews "secretly",[12] RT p. 54, he acknowledged that the campaign was no secret among Respondents'

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[11]In view of Duarte's testimony that Ceja sought signatures on a petition before the employees sought to make a showing of interest, when Duarte later speaks of gathering signatures it is not always clear whether he is referring to gathering signatures to prove to the union that the employees were interested in it or gathering the showing of interest itself. I have reconstructed the chronology as best I can.

[12]The employees only sought to keep the campaign "secret" from Respondents' "bigger" supervisors, such as James Myers and Arne Tutschulte, RT p. 93, whom the employees did not "feel comfortable with."

foremen who learned about it in any of three ways: observing Ceja gathering signatures in the field; Duarte's telling them what he was doing when he visited the crews to obtain signatures; and, most important, because they were invited to attend the first organizational meeting, which was held sometime in May at a church in Hanford.[13] Duarte himself invited foremen Jose Luis Rodriguez, Ignacio Mendoza and Miguel Pecino, but other foremen were also present, such as Pascual Gonzales, Francisco Javier Ceja, Luis Puga, and Guadalupe Medina.[14] At this meeting, Escutia introduced Duarte as the man who brought the Union to Warmerdam.

After the meeting in Hanford, the campaign evidently proceeded apace. Duarte openly wore Union insignia and his foreman, Manual Garcia admitted he saw him wearing it; Ceja, too, wore union insignia, and Tutschulte's assistant, James Myers, acknowledged that he saw Ceja do so. The two alleged discriminatees were not exceptional in this: according to Arne Tutschulte, Respondents' Ranch Manager, perhaps half the employees wore union insignia before the election; Myers recalled "everybody else [besides Ceja]" wore insignia, RT p.

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[13] Duarte spoke of the foremen as "sort of part of the group", RT p. 94, which I take to mean "sharing their sympathies." The only foremen Duarte spoke of as not "trusting" was Pascual Gonzalez. Ibid

[14]Though Duarte spoke of not fully trusting Pascual Gonzales, he admitted that Gonzales, too, had been invited to the meeting. RT p. 94.

478; Bill Warmerdam estimated that somewhere between 80-90% of his employees and, in some crews, "everyone" displayed pro-Union sentiments. RT p. 396.

B. The alleged interference with and discriminatory treatment of Ruben Duarte in 1994

According to Duarte, sometime in May, after he started 'displaying Union insignia, Garcia told him to speak to him in English, so that he [Garcia] could understand him better. RT p. 60. Duarte did not understand this because, although Garcia's native language is Portuguese, he spoke to other workers in Spanish. Garcia denied ordering Duarte to speak English. RT p. 540. Duarte recalled additional changes in Garcia's attitude towards him after the Petition for Certification was filed. When he initially testified, he recalled Garcia's telling him that he could not "speak to these people, the field workers", and that he could no longer use the phone in the shop to call the fruitstand, but would have to use the phone in the packing shed, RT p. 49-50. Later, on cross-examination, he testified that Garcia told him he didn't want him to "be in the shop other than whatever [he] needed to do or put in the truck," and he "shouldn't even go to the packing house" or "talk to the people in the packing house or in the fields." RT p. 106.

Garcia recalled speaking to Duarte about his overuse of the phone as well as what he regarded as excessive fraternization, but he denied prohibiting him from using the

phone. According to him, Duarte asked him if he could use the phone and he said he could, but only during lunchtime and breaks, and not on work time.

> But I also told him that he was doing a lot of talking with the forklift drivers and people driving the trucks, bringing the fruit in. If I sent him out to get something, he wouldn't be back for a while and he would be sitting in the pad talking to a couple of truck drivers or forklift drivers. I said, Ruben, you know, it's time to get back to work. RT p. 525

Duarte also recalled Garcia's telling him that even if the Union won the election, the company would never sign a contract, that Warmerdam would rather chop down all the orchards than sign a contract with the union and that "because of [him] a lot of families would be without work and without food." RT p. 58. Garcia denied making any of these statements. RT p. 526

Duarte related another conversation between him and Garcia before the election when Garcia asked him "what [he] wanted with these workers since he didn't belong out in the fields. RT p. 57-58. Duarte told him these were his people, that he had always been "categorized as a field worker [and he] was not happy with the treatment that was given to me and the farmworkers and [he] wanted to be with them to support them." RT p. 58. Since Duarte also recalled Garcia's telling him, -"it didn't matter because [he] was not a farmworker; [he] was a worker of the packing house and [he] . . . would not be protected under the law," RT p. 58, it is possible that these

statements were either variants, or components of the same conversation. In any event, Garcia denied making such statements to Duarte. He did admit Duarte spoke to him about voting: according to him, the only thing he said was that Duarte could vote on his lunch hour. RT p. 524. Duarte also testified that prior to Garcia's telling him he didn't belong in the fields, both Garcia and Tutschulte had repeatedly told him he was a shop worker. RT p. 59. Although Garcia recalled Duarte' s asking him who he was assigned to, he testified that he told him he was "going to work in the shed with me." RT p. 541.

Duarte also testified that from the time he was assigned to the shop under Garcia, he frequently worked overtime, sometimes as much as 15, but "almost always" 11 hours, a day, RT p. 61, and he frequently worked 7 days a week. According to him, after the "union movement" began, he was told[15] that his "overtime was reduced from seven days to five days and to eight hours"; that, in other words, his workweek was reduced to a regular 40 hour week, RT p. 62. The so-called "Punch Detail Reports" show the amount of overtime Duarte worked from 12/19/93 through 2/10/95. See, GCX 15. On the basis of GCX 15, *I* have prepared a chart listing the number of days he worked, his total

[15]As far as I can tell, this is the only evidence that supports the allegation that Duarte was threatened that his overtime would be reduced. Usually, to constitute separate allegations, the threat would be distinct from the operative reduction. In this case, the threat and the reduction were apparently the same event.

hours, his hours of regular pay, and his overtime hours. It is attached to this Decision as Appendix A. From 12/19/93 through 6/10/94, the week before the election, Duarte averaged 5.7 days of work per week (149 days/26 weeks) and 13.7 hours of overtime (357 hrs.[16]/26 weeks). From the week ending 6/17/94 until 12/9/94 Duarte worked an average of 4.9 days per week (129 days/26 weeks) and averaged 9.46 hours of overtime (246 hours/26 weeks.) In other words, he averaged 4.2 hours/week less overtime after the election as he averaged before the election. Between 3/1/94 and 6/10/94, he averaged 16.8 hours of overtime and from the week ending 6/17/94 thru the week ending 9/30/94, he averaged 12.33 hours of overtime, again a difference of about 4 hours. Moreover, he had more days with double overtime hours after the election than he had before the union campaign started. While it is true that Duarte stopped working 6 and 7 day weeks after 6/10/94, the practical effect was that he lost on average half a day's work per week.

RX 16 indicates that week to week variations of five hours was not unusual among Respondents' employees: thus, for the week ending 4/1/94, Jose Morales worked 37.49 hours and for the week ending 4/8/94, he worked 42.89 hours; for the week ending 4/1/94 Roberto Rodriguez worked 43.62 hours and for the

[16]Overtime hours in excess of whole numbers are apparently not recorded in fractions of an hour, but as minutes: thus, I had to add the minutes of overtime in the last column of Appendix A and divide by 60 to determine how many additional hours of overtime Duarte worked.

week ending 4/8/94, he worked 34.74 hours; for the week ending 4/1/94 Sean Buckner worked 64.54 hours and for the week ending 5/15/94, he worked 87.62 hours.

On the day of the election, Respondents scratched Duarte's name off the eligibility list used by the Board so that his vote was challenged by the Board agents. See, GCX 6, 7.[17] Because nothing else happened to Duarte until February of 1995, I will pick up Ceja's story next.

C. The alleged discriminatory discharge of Ceja

According to Respondents, Ceja was terminated for two reasons: abuse of machinery and falsifying his timesheets by failing to indicate that he did not work during the noon lunch break when he did, in fact, work. Before relating the specific events that led to his discharge, I will briefly outline Respondent's policy concerning employee breaks. Employees have two breaks a day, one at 9:00 a.m., the so-called morning break, and another from 12:00 noon to 12:30 p.m., the so-called lunch break. All the witnesses agree that the tractor drivers take a noon break. Ceja: RT p. 130, 131; Myers: RT p. 451[18] It was also agreed that if an employee takes a noon break, it should be reported on his timesheet. Myers acknowledged that Respondents

[17]Because Duarte's vote was not outcome determinative, the challenge was never resolved and Duarte's status remained an open issue.

[18]Ceja agreed that tractor drivers were .supposed to take a lunch break. See, RT p. 130 11, 26-27 ["And then at 12 noon, you take a half an hour for lunch."]

do not always expect every employee to stop work in order to take lunch: for example, truck drivers in the middle of a run during break time would often rather complete the run than take their lunch, or would eat their lunch while they drove; similarly, sprayers would complete their assignment rather than doffing their suits, cleaning up and eating, only to suit up and return to spraying. RT p. 489. He also acknowledged that an employee waiting for equipment to be repaired was not required to eat his lunch just because he was idle; but if the equipment broke down during the normal lunch period and the employee did not work as a result, he would expect the employee to take his normal lunch hour. RT p. 488. The rule of thumb was: if an employee was not working *during the lunch hour,* he should record it as lunch time so as not to get paid for non-work time. Respondents contend that Ceja ran afoul of this rule, taking a noon break without reporting it and was being paid for non-work time.

1. The alleged falsification of timesheets

According to Myers, he initially stumbled upon what Ceja was doing by accident, and thereafter kept an eye on him in order to confirm his suspicions. Myers testified that on August 11, he was called out to the 7th Avenue Ranch shortly before noon to deal with a problem between two employees. While he was there, he noticed Ceja was in the yard, doing nothing. Myers did not specifically recall whether it was Ceja who explained to him

that the forklift was down, or whether he knew it before he encountered Ceja: in either event, Myers knew Ceja was waiting for a mechanic. RT p. 453. Myers was on the ranch for at least a half an hour and during the entire time he was there Ceja was not working.

Shortly after noon about a week later, August 19th, Myers went to the 60 Acres Ranch to see one of his foreman. When he stopped in the yard to ask a tractor driver where the foreman was, he saw Ceja watching another man use a forklift; 20 minutes later, he saw Ceja sitting and talking to Ezequiel Mosqueda. RT p. 458. December 10, 1997 Myers did not think much of either incident and did not connect them both until about a week later when one of the secretaries asked him about whether "the guys" were supposed to take lunch. Myers explained Respondent's policy and, recalling that Ceja was not working when he passed through the 60 Acres' yard and, therefore, expecting that Ceja had reported a lunch break, Myers turned to Ceja's timesheets for illustrative purposes[19] and noticed that he hadn't recorded a lunch break for the 19th. Puzzled by this, Myers recalled seeing .him idle on the earlier occasion and checked Ceja's timesheet for

[19]Myers could not recall whether it was he who chose Ceja's timesheets for illustrative purposes or whether the secretary happened to be working on the report which contained his hours, Compare, RT p. 461 II. 1-5 with p. 496 11. 5-11.

August 11, too.[20]

Myers spoke to Tutschulte and, to the extent they could, the two resolved to keep track of whether or not Ceja was failing to record taking his break. RT p. 464. According to Myers, his chance to observe Ceja next occurred on August 31 when he was called out to the 7th Avenue Ranch shortly before noon to remove some tree limbs. . RT p. 468. On his way to the part of the orchard where he was going to work, Myers passed the end of the row where Ceja was supposed to be operating a shredder. He observed the time: it was shortly after noon and the shredder was not running. Since it was not unusual for an operator to turn the machine off from time to time during shredding, Myers went about his business, but remained alert for the sound of the shredder. On his way back to his truck, Myers heard the shredder start up: since he noted that it was 12:40 when he returned to the truck, he estimated that the shredder started up after 12:30 p.m. RT p. 471.

Ceja testified generally that if he took a lunch break he always recorded it and if he did not record it, it was because

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[20]Myers testified that he then looked at the truck driving logs for both days and, seeing that no fruit had been hauled between 11:30 a.m. and 2:00 p.m. on the 11th, See, RX 14, p. 2, and between 10:45 a.m. and 2:00 p.m. on the 19th, See, RX 14, p. 4, he confirmed that Ceja must have been idle during the noon-break, just as he had recalled. Although General Counsel did not object to this testimony coming in, I had earlier quashed her subpoena seeking truck driving logs for other employees to determine if the length of such trips was unusual. The basis of my ruling was that the logs by themselves prove nothing: it was only Myers' seeing Ceja idle that gives any meaning to the logs. Because of my earlier ruling, I decline to rely on the logs even as corroboration.

he had not taken it. RT p. 129. With respect to the specific incidents related by Myers, he testified that on August 11, the tractor ran out of gas and he was idle while he waited for the gas to be brought; on August 19,"he was hauling fruit and had no time to take a lunch break; and on August 31, Myers happened by while he was fixing his machine because the hooks that rake the brush into the machine had fallen off. RT pp. 586-7; RT p. 174. He acknowledged that he was not shredding for about 20 minutes because, without tools, it took him about 20 minutes to reconnect the hooks; however, according to him, he was up and running before noon. RT p. 174. Because he had lost time fixing the shredder, he worked without a break so as not to hold up Jose Magana, who was following behind him with fertilizer. RT p. 173.

Magana tells a slightly more complicated story: according to him, he was sent to shred brush that day when he had difficulties running the shredder for reasons which will become more relevant later. RT p. 238. When he called for help, Ceja came out with another tractor and took over the shredding while he took over the task of throwing fertilizer. Thus, while Magana corroborated Ceja's testimony that he was throwing fertilizer behind Ceja, he said nothing about the hooks falling off while Ceja was shredding.

2. The alleged damage to the shredder

As noted, shredding brush was among Ceja's duties. Respondent has two tractors and two shredders. I am concerned

with one tractor, the Massey Ferguson "290", and one shredder, the yellow one. The 290 runs the shredder off a so-called PTO (Power Take-Off) unit which transmits the power of the tractor engine to any machinery, such as a shredder, which may be attached to it. The tractor driver drives the shredder over piles of debris which are raked into the shredder for grinding. Respondent contends that Ceja tried to shred material that was too large for the machine to handle and, as a result, damaged both shredder and tractor, but primarily the tractor. Ceja denies damaging the machine.[21]

Respondent's witnesses testified that the machine is designed to handle material no larger than an inch or an inch and a half in diameter. See, RT p. 530 [Garcia]; pp. 402-3 [Warmerdam]; RT p 551 [Ramirez: less than 2 inches.] Ceja, however, testified that he had occasionally used it to handle pieces of brush that were 4-5 inches in diameter. See, RT p. 162.[22] Myers testified plausibly that if the operator encountered material too large for the machine to shred, he was not supposed to try to shred it, but to call Myers who would

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[21]Respondent also contends that Ceja was not even supposed to be shredding the day he damaged the machine. RT p. 474-75. Ceja denies violating Myers instructions. RT p. 589. However, inasmuch as Ceja was not terminated for using the shredder, but for "abusing" it, See, RX 21, there is no need for me to resolve this dispute. With so many conflicts between the parties' testimony, one more cannot help me determine who is telling the truth.

[22]According to Ceja, he would occasionally shred a 4-5 inch round "knob" which an apple tree would develop on an apple tree. RT p. 162

arrange for the removal of the oversized material. RT p. 475[23] [Myers]; RT p. 552 [Ramirez]; Both Jeff Ward, Respondent's former mechanic, and Garcia testified that even if an operator failed to see that a piece was too large to handle, he would immediately know it from the jerk of the tractor and the laboring of the engine. RT p. 332 [Ward]; RT p. 532 [Garcia]. If, instead of stopping the machine to remove the object, the operator continued to try to force the material through the machine, he ran the risk of jamming the machine and wearing out the clutches in the PTO assembly. RT p. 532.

According to Respondents' witnesses Ceja brought the yellow shredder to the shop on August 29 with a large piece of wood[24] jammed between the barrel and the top. Ward testified Ceja admitted jamming the machine. RT pp. 328.[25] Myers, too,

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[23]Relying on Ceja's testimony that Myers was responsible for the removal of pieces too large to be shredded, RT p. 199, General Counsel contends that Ceja had no responsibility to avoid large pieces of wood. Post- Hearing Brief, p. 21. This is carrying the division of labor too far.

[24]In her Post-Hearing Brief, General Counsel asserts that Ward testified that the PTO was still running when Ceja brought the shredder in, Brief, p. 19. What Ward said was that he estimated Ceja had failed to turn off the machine for some period of time after the piece of wood got stuck in the shredder. RT p. 331.

[25]General Counsel contends that Ward testified inconsistently about whether Ceja said anything when he brought the machine in; according to her, after twice testifying Ceja made no response, when Ward asked him why he was shredding such big brush, See, RT pp. 328,11. 7-8, 329,11. 21-22, Ward testified Ceja said, "I don't know." RT p. 330. 11. 6-7. While it is true that Ward says that Ceja said "I don't know", it is not clear to me that he was not interpreting a gesture for he repeatedly speaks of what Ceja "did", namely shrugged his shoulders: "That's basically what he did, just I don't know." RT p. 330,11. 6-9. I do not find any inconsistency.

testified that when he spoke to Ceja, Ceja acknowledged that the piece was too big for the shredder. RT p. 475. According to Ward, the shredder itself required some repairs. RT p. 355. Since Garcia wanted Ward to keep the tractor on duty, Ward ignored his own concerns that the PTO might have been damaged and merely fitted the tractor with a mower and sent out again. According to Ward, the machine was back in the shop less than a day later when the PTO gave out. RT p. 339.

The damage to the PTO was particularly galling to Ward because he had rebuilt the PTO a few weeks earlier. RT p. 337. Ward testified that when he opened up the PTO assembly this time, he found the snap ring that held the clutches together had broken which resulted in the clutches rotating, against each other and the splines on the drum tearing. RT p. 341-2. According to him, Garcia told him that it didn't look too bad and instructed him 'to do a less radical repair than Ward thought was necessary. Ward replaced the clutches and seals and put in a new snap ring and sent it out again with considerable misgivings.[26] If I Understand Ward's testimony correctly, the tractor was down for about a week while these repairs were made, RT pp. 353, 356, 366. Ward estimated the repairs cost about $600-700, RT p. 352; and he

[26]Ward testified the tractor ran for several weeks before the PTO assembly gave out again; Garcia recalled it running for about 6 -8 months before it gave out again, RT p. 534. In either event, Ceja was terminated before Ward had to work on the tractor again, which means that none of these events bears on the question of cause to fire Ceja.

recalled having to special order the parts from Kings County Equipment.

Garcia recalled the sequence of events differently. Although, like Ward, he recalled trying to run lighter equipment off the PTO; contrary to Ward, Garcia testified that the mower would not function, RT p. 531, and because the tractor had to be repaired immediately, RT p. 533, he ordered the parts form Kings County Equipment. RT p. 534. RX 19 is Invoice from Kings County Equipment which indicates that Garcia picked up parts on September 12, 1994. RT p. 535[27]

If Ward's estimate that the tractor was brought in "less than a day" after August 29, under both his and Garcia's version, the tractor should have been out of commission on August 31, 1994. Luis Magana, however, testified that he was using the 290 tractor on the day Ceja had to bring out another tractor,, which turned out to be August 31, and the reason he had to call for the new machine was because the PTO valve overheated. RT p. 243. Magana's testimony is irreconcilable with that of Ward or Garcia: for even if Ward were off by a day about when the tractor had to be returned to the shop, he testified that the 290 was only sent out for light duty and not for shredding.

Warmerdam testified that he was called out to see jam

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[27]RX 19 has two parts: Garcia testified that the printed invoice, which he initialled "OK'D BY" is his authorization to the office to pay the bill. RT p. 536.

and he could not understand how anyone could have used the machine on a piece of wood that size. Not only did it put the machine at risk, but it was also dangerous in that it could have resulted in a thrown blade. He discussed the matter with his foremen and decided to terminate the employee responsible for the jam. When he did so, he had no idea that Ceja was a pro-union employee; indeed, according to him, the Union had won by such a large margin that he assumed everyone was. RT p. 407. He also recalled Myers' mentioning that there were also some problems with Ceja's time cards.

When first examined by General Counsel, Ceja testified that the only problem he had with a shredder before his discharge was that the hooks which feed the brush into the shredder would fall off. RT p. 135. However, on cross-examination, he did admit catching the head of a branch in the shredder during the last week of August while shredding, in the Black Beauts, a variety of plum, RT p. 165 11. 7-22, which is where Respondent contends the shredder became jammed. According to Ceja, he accidentally picked up the branch because he could not see the thicker branch underneath the brush. Although he admitted that he had to return to the shop to remove the "stud", he insisted that he was nevertheless able to remove it by himself.

The following day, Myers terminated Ceja for abuse of machinery and falsifying records. It is undisputed that Myers did not ask Ceja for any explanation about either his time sheets or

the shredder incident before terminating him.

D. Duarte's layoff in 1995

Duarte was laid off on February 10, 1995. It is undisputed that he was laid off with a number of other employees. RT p. 528 11. 9-10, [Garcia]; RT p. 397 [Warmerdam.][28] Duarte recalled Garcia saying that he might be recalled in 3 or 4 weeks. After speaking to Garcia, Duarte spoke to Bill Warmerdam who told him that, while he was not sure when he would be called back, he would be recalled "whenever the fruit season started." RT p. 66. After he was laid off Duarte attended one negotiation session on February 14, 1995. RX 7. He also testified that, besides actually sitting in on negotiations, "he was outside the room where the parties were negotiating on one or two other occasions. RT p. 56. The sign-in sheets indicate" that, in addition to Duarte, at least 20 other employees attended the sixteen negotiation sessions.[29]

When he had not been recalled by the peak of season, Duarte went to speak to Garcia who, according to him, expressed surprise that he was still laid off. Garcia advised him to find a tractor job because he could do so many things. Warmerdam

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[28]Duarte testified that Garcia told him 2 or 3 other workers, including him, were going to be laid off, but that "I believe two, [sic] were going to start the following week." RT p. 65 No other evidence was presented that two of the employees laid off with Duarte were recalled shortly.

[29]While some of the employees' signatures on the sign-in sheets are heard to read, a partial list of the names I could distinguish comes to 20.

testified that he had *a.* conversation with Duarte in late April or early May in which he told him that because they were done with the construction project, he could only give him 2 or 3 hours a day; he advised Duarte that if he could find more hours, he would be better off. According to him, Duarte said fine and did not pursue the matter.

D. Andrade' s alleged refusal to hire him

Duarte testified that he applied for work in April, 1996 with Sergio Andrade, a foreman for Manual Herrera, a labor contractor, who provides crews for Warmerdam. When Andrade did not call him, Duarte called Andrade. Andrade recalled who he was and told Duarte "he was over here on Excelsior near this packing house. And he said what's the name of it, what's the name of it. And he repeated this about three times." RT p. 68-69. Duarte volunteered that it was Warmerdam's. When Andrade asked him if he knew it and Duarte told him that he had worked there, Andrade asked him if he were one of "the ones that were on strike." Duarte told him that he was involved in "that", but didn't clarify that it was not a strike. RT p. 69. Andrade said he couldn't hire him because the company didn't want anyone "that was involved in the strike." Ibid. It is undisputed that there is an unrelated company called Warmerdam Orchards located in the same area as Respondents. RT. p. 92.

Andrade testified that Ruben Duarte never asked him for work, that he does no hiring for Herrera, that he has never

supervised any of Warmerdam's crews, RT p. 428-29, and that the only time he has ever spoken to Duarte, was when Duarte asked him about some tax forms.

III. Analysis

Before considering the merits of General Counsel's case in greater detail, there are a number of allegations that may be quickly disposed of. First, since the records clearly show that Duarte was formally assigned to the packing shed in December 1993, approximately six months before he engaged in any protected activities, I cannot find that his classification was changed to prevent him from voting[30] and I, therefore, dismiss the allegation. Second, while it is true that Duarte stopped working more than 5 days a week after the election, his average total hours decreased less than 5 hours a week during the entire rest of .his tenure at Warmerdam. Moreover, in the three months immediately after the successful organizing campaign, when Respondents' retaliatory instinct might be expected to be at its keenest, he worked more double overtime than he did before the election. While such fluctuations in hours are changes, such variations in hours are not unusual. The allegations concerning

[30]Moreover, even though I have found that Duarte was an agricultural employee under the Act, the fact that Respondent scratched him off the list cannot be considered intended to prevent him from exercising his right to vote unless it were totally unreasonable for Respondent to believe that he was ineligible to vote. Based upon my finding that Duarte's fruit hauling was arguably non-agricultural and that he was classified as a shed employee since December 1993,1 find that Respondents could challenge his status as an agricultural employee in good faith.

both the change, and the threat of change, in Duarte's overtime hours are dismissed.

These conclusions provide a vantage point for considering Duarte's testimony about Garcia's telling him to speak English, warning him not to speak to other employees, and telling him that Warmerdam would rather take out his orchards and a lot of employees would be put out of work if the Union won the election. For the following reasons, I credit Garcia's denials that he made such statements. The records make it clear that Duarte was classified as a shed employee in 1993, and that he signed for his checks with the shed employees for months before the election from which it is reasonable to conclude that he must have known he was considered a shed employee; nevertheless, Duarte testified that, up until the election, whenever he asked Garcia or Tutschulte who he worked for, they told him that he was a shop (that is, an agricultural) employee.

Since I cannot understand either why Garcia or Tutschulte would have wanted to continually mislead Duarte before the Union campaign even started, or how, based upon his being paid with the shed employees, Duarte himself could have any doubts about where he worked, I can only conclude that this testimony is false. Moreover, despite Duarte's testimony that he worked a 40 hour week after the Union campaign started, the records again demonstrate that he averaged almost the same number

of overtime hours after the election as he did before it. Where it is possible, then, to test the credibility of Duarte's claims against Respondents' records, his testimony cannot stand and appears designed only to make a case against Respondents. Accordingly, where there is a direct conflict between his testimony and that of Garcia, I credit Garcia.

All that remains of the complaint are the allegations of discrimination in connection with Duarte's layoff, the subsequent failure to rehire Duarte, and Ceja's termination. In order to prove Respondent's unlawfully discriminated against Duarte and Ceja, General Counsel must make out a prima facie case that the employees' protected activities were a motivating factor in Respondents' treatment of them, after which the burden of proof shifts to Respondent to demonstrate that it would have taken the same action in the absence of the alleged discriminatees protected activities.

To make out a prima facie case, General Counsel must show that Duarte and Ceja engaged in protected activities, that Respondent knew about them, and, finally, that there was a causal connection between the protected activities and Respondents' treatment of them. The final, causal element is often the most difficult one to establish and frequently General Counsel must resort to circumstantial evidence to do so. Among the types of. circumstantial evidence that have probative force are the proximity of the adverse action to the employee's protected

activities, employer expressions of animus, other unfair practices committed by the employer, conflicting explanations, and, especially in the case of a disciplinary action, the lack of any prior warning to the affected employee. Del Mar Mushroom Inc. (1982) 7 ALRB 41.

There is no question that Duarte and Ceja engaged in protected activities. At the hearing, General Counsel contended that Respondents must have known that Duarte in particular was active because so many of its foremen were present at the meeting when he was introduced as the man who brought the Union to Warmerdam. Although General Counsel has apparently abandoned reliance upon this testimony in her brief, since employer knowledge of union activity is ordinarily established by proof that it was conducted in front of the employer's agents, I should explain that I am not prepared to conclude that men whom the employees themselves trusted enough to invite to an organizational meeting must have informed Respondents' about what happened at it.[31] As Respondents point out in their brief, Duarte testimony about keeping the campaign "secret" is a strange way to speak unless they *knew* the foremen "were on their side."[32]

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[31]The same considerations apply in connection with the Duarte's and Ceja's testimony about circulating authorization cards in the fields. Moreover, Respondents' witnesses generally denied knowing about the campaign until the Petition was filed.

[32]In view of Duarte's feeling that the campaign was "secret", in the absence of evidence that the one foreman whom he said he didn't entirely trust actually informed on the employees, I decline to conclude that he did.

In any event, General Counsel now contends that employer knowledge is proved by Warmerdam's testimony that "he was aware that both Duarte and Ceja supported the Union", Post-Hearing Brief, p. 39. This interprets Warmerdam's testimony too broadly: he did not testify he was specifically aware that both Duarte and Ceja supported the Union, but only that he assumed everyone did.[33] Warmerdam did testify that he became specifically aware that Duarte supported the Union on the day of the election when Duarte said he wanted to vote and Garcia and Myers admitted seeing Ceja wearing Union insignia, along with most of Respondents' employees.[34] Thus, General Counsel has established Respondents' knowledge that Duarte supported the Union and that Ceja was a Union supporter.

The first two elements of a prima facie case, then, are established.[35] General Counsel must still establish a causal connection between the two men's Union activities and

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[33]General Counsel also argues that while Garcia and Warmerdam "specifically testified that they were unaware of the extent of Duarte's and Ceja's [activities?] with the union, Myers never denied that he had knowledge of [their] major involvement", Post-Hearing Brief, p. 39. General Counsel has the burden of establishing the elements of a prima facie case; her burden is not met by Respondents' failure to deny what she did not prove.

[34]That both men attended negotiation sessions *after* they were adversely treated, is obviously irrelevant to the question of why the one was laid off and the other terminated, although it cannot be overlooked in connection with Respondents' alleged refusal to rehire Duarte after he attended negotiation sessions.

[35]That Duarte's and Ceja's Union sympathies did not particularly distinguish them from their fellow employees does not go to the element of Respondents' knowledge of those sympathies, but to the likelihood that they would have been a factor in Respondents' actions.

Respondents' treatment of them. Most of the usual indicia of a causal connection are absent with respect to Duarte's layoff: it did not follow either immediately upon, or even close to, his campaign activities, here is no evidence of collateral unfair labor practices, and no credited expressions of animus. Moreover, it is undisputed that he was not laid off alone, but in connection with a more general seasonal layoff. I find General Counsel has not made out a prima facie case with respect to Duarte's layoff and I, therefore, dismiss the allegation.

General Counsel's case with respect to the refusal to rehire Duarte has many of the same weaknesses: it is remote in time from any alleged protected activities[36] and there is no context of other proved unlawful conduct. The only additional element is Warmerdam's purported statement to Andrade that he would not hire anyone on strike. Putting aside my other difficulties with Duarte's credibility, this testimony makes no sense since there was no evidence there was ever a strike against Respondents. General Counsel contends that Duarte merely overlooked Andrade's mistake as though the latter's supposed ascription of a motive to Respondent that Respondent did not possess has no bearing upon whether, if Andrade made such a statement, he was describing Respondents at all. In view of the

[36]Even though Duarte had attended negotiation sessions by this time, the alleged refusal to rehire him was still many months later.

testimony that there was another Warmerdam company in the same area as Respondents, even assuming Andrade made the statement, I cannot be sure he was referring to Respondents. I dismiss the remaining allegations of the complaint so far as it relates to Respondents' treatment of Ruben Duarte.

It remains to discuss whether or not General Counsel has established a causal connection between Ceja's Union activities and his termination. General Counsel essentially contends that Respondents' supposed causes are pretexts: the one concerning the timesheets because Respondents did not apply it's “okay to work through lunch" policy; and the other concerning the shredder. because the incident just did not happen the way Respondents' witnesses testified it did. If these causes were not real, it follows that Respondents' true motive was one it wanted to conceal. However, it also follows that if I conclude that Respondents' reasons were not pretextual, the final element of General Counsel's prima facie case has not been established.

I will take up the matter of the shredder first. Jeff Ward, among others, testified that Ceja admitted jamming the shredder. General Counsel contends that Ward should not be credited because his testimony that the tractor was repaired twice was unsupported by Respondent's records which only demonstrate that PTO parts were ordered once. General Counsel argues that, if the tractor had to be repaired twice, it is "unthinkable" that Respondent would not have maintained the

records and, therefore, that Ward's testimony was false. I agree with General Counsel that Ward's testimony is difficult to follow, difficult to square with the records, and not consistent with Garcia's .

Nevertheless, since the incident took place three years ago, it is understandable that memories could have become blurred and I do not credit Ward's testimony about how many times the tractor had to be repaired. However, given the evidence that Respondent did repair the tractor, and Ceja's admission that he brought in the shredder with a knob jammed in it on the very day Respondent contends he did, the only important question is whether or not the repairs which the records indicate were performed arose from "Ceja's jam." Because Ward no longer works for Respondent, he has no apparent motive to lie about the shredder's being damaged even if he got the sequence of events wrong and I credit him. Accordingly, I find Ceja did damage the shredder and Respondent's reliance upon it was not a pretext.

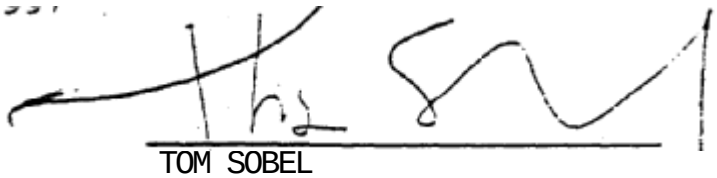
So far as the matter of his timesheets is concerned, General Counsel does not dispute that Ceja was idle when Myers observed him on August 11 and 31, but contends that he was still on work time on both occasions, waiting for gas on August 11 and fixing a shredder on August 31.[37] Ceja's testimony about the

[37]There is one other factual dispute concerning the episode on the 31st, namely whether Myers saw him at noon, as Myers[1] testified, or earlier, as Ceja testified. I credit Myers who testified about how he verified the time.

19 this net entirely clear and I do not know whether ha was claiming that, while Myers might have observed him apparently waiting around, he was really working, waiting for his truck to be loaded, before talking; off for a run or whether he was "contending that Myers could not have seen him at all because he was in the midst of a run. Nevertheless, it is clear that, at least with respect to two of the incidents, Myers' testimony about seeing Ceja's apparently not working was corroborated by Ceja himself. Since I do not find Respondents' application of its "lunch break" policy to be unreasonable -- an employee not working during the established lunch break should not claim that he was -- it does hot matter that Myers was too hasty in drawing his conclusions" about the two incidents when Ceja was not apparently working. That Myers failed to talk to Ceja about his observations make him a bad manager, but it does net establish that he had a bad motive.

It is hereby recommended that the complaint be dismissed in its entirety.

DATED: December 15, 1997



TOM SOBEL
Chief Administrative Law Judge