El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CIENIGA FARMS, INC. aka CIENAGA FARMS, INC.,	)	
Respondent,	)	Case No. 00-CE-334-EC(SM)
and	)	27 ALRB No. 5 (August 10, 2001)
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	

DECISION AND ORDER[1]

On March 8, 2001, Chief Administrative Law Judge (ALJ) Thomas Sobel issued the attached Administrative Law Judge Decision (ALJD) in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Cieniga Farms, Inc. (Respondent or Cieniga) filed an answering brief.

The Agricultural Labor Relations Board (Board) has considered the record as a whole and the ALJD in light of the exceptions and briefs and has decided not to affirm the ALJD except to the extent consistent herein.[2]

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

[2] Member Ramos Richardson did not participate in this matter.

The General Counsel excepted to the conclusion of the ALJ that Respondent did not violate the Agricultural Labor Relations Act (ALRA or Act)[3] as alleged in the Complaint. The Board finds merit in this exception. Based on our de novo review of the record, we find that Cieniga did violate section 1153(a) of the Act by discharging certain employees in retaliation for their protected concerted activity.

The General Counsel also excepts to the ALJD on the basis that a Mixtec or Zapotec[4] translator was not provided to her witness, Evaristo Bautista, causing him to testify in Spanish, a language in which he is marginally fluent. We find this exception to be without merit. General Counsel chose to proceed with the available translator at the hearing and did not adequately create a record regarding the translation issue. Furthermore, the Board has reviewed the entire record de novo and finds the record to be sufficient to reach our decision.[5]

Background Facts

The following facts are not in dispute. Respondent, an agricultural employer, grew strawberries at two locations, Nipomo and Oceano, during the year 2000[6] season. On Monday morning, March 20, the Nipomo crew refused to begin work without clarification of their rate of pay. To this end, the owner and supervisor of the crew, Maria

[3] The ALRA is codified at Labor Code section 1140 et seq. All references in this Decision are to the Labor Code unless otherwise indicated.

[4] It is unclear from the record which of these languages was needed by the witness.

[5] Member Barrios wishes to acknowledge the translation problems in this case. While she agrees that the record here is sufficient to render a Board decision and to avoid a remand, she believes that both the General Counsel and the ALJ have the responsibility to insure the adequacy of language assistance at Board hearings. (See Gov. Code § 11435.15.)

[6] All dates refer to the year 2000 unless otherwise indicated.

"Chayo" Garcia, was summoned to the field where crew members, including discriminatee Alejandro Perez, questioned her regarding the piece/box rate for the season. According to credible testimony and payroll records submitted into evidence by Respondent, the crew had been working hourly until some time on Saturday, March 18, when they began picking strawberries by piece rate. However, they had not been told what the piece rate would be and there were rumors that the rate would be 20 cents per box less than it had been the year before. When Ms. Garcia arrived on the morning of March 20, she told the crew that she did not yet know what she would be paying per box and said that they should work by the hour until she had the information. The crew agreed and entered the field to work. The parties disagree about what happened next. We credit the testimony of the General Counsel's witnesses for reasons discussed below.

The ALJ Decision

In resolving the conflicting versions of events, we first consider the analysis and conclusions of the ALJ. The ALJ found that employees were paid piece rate for picking strawberries and hourly for other tasks. He points out that the hourly rate was $6 per hour and the piece rate was $1.50 per box. He seems to have discounted the possibility that employees might occasionally also pick for $6 per hour, such as when the berries were too sparse to justify piece rate. Under this scenario, employees who were working hourly would weed, cull, *and* pick. This is the scenario supported by General Counsel's witnesses and, to a certain extent, by Respondent's witnesses.[7]

[7] For example, Ms. Garcia, the owner, testified that on the morning of March 20, when the crew was working hourly, they "changed from one field to the other…because we saw that there weren't very many strawberries to pick there." (Reporter's Transcript (R.T.), Vol. II, p. 8.)

Prior to March 18,[8] the Nipomo crew[9] was paid on an hourly basis. On March 18, the crew also worked hourly in the morning, but then worked piece rate for the rest of the day. We disagree with the ALJ's conclusion that picking strawberries was always a piece rate job, since that would mean that strawberries were not picked until sufficient in number to justify piece rate. On balance, we find it more plausible that employees picked strawberries at an hourly rate before moving to a piece rate as the season progressed and the berries became more plentiful. It is uncontradicted that boxes were in the field on March 20 for the purpose of picking strawberries. The availability of boxes is consistent with the routine performance of the work. General Counsel's witnesses credibly testified[10] that they took boxes in an attempt to pick strawberries at an hourly rate.

The ALJ points to Mr. Perez' testimony that the hourly workers were both culling and picking yet finds it "undisputed that the crew was paid different rates for culling and for picking." We disagree. The undisputed testimony is that the crew was working hourly. As stated above, we find it entirely plausible that picking was amongst the hourly tasks that were being performed on the morning of March 20. While we agree with the ALJ that there is no basis to find that employees were "engaged in two different

[8] This was the last working day of the weekly pay period.

[9] Although the violations considered by the Board occurred in Nipomo, the parties elicited testimony and the employer submitted exhibits relating to separate incidents at the Oceano location. This caused confusion in the record.

[10] The ALJ made his credibility resolutions based upon what he perceived to be the implausibility and inconsistency of the testimony of the General Counsel's witnesses. Since the witnesses' demeanor did not determine the ALJ's credibility resolutions, we base our findings as to the facts on our de novo review of the entire record. (*Standard Dry Wall Products, Inc.* (1950) 91 NLRB 544 [26 LRRM 1531]; *M. Caratan* (1983) 9 ALRB No. 33; *Kophammer Farms* (1982) 8 ALRB No. 21.)

tasks *at two different rates of pay* at the same time" (emphasis added), we do not understand this to be the testimony of General Counsel's witnesses.

The ALJ discredited, in its entirety, the discriminatees' testimony about entering the field, based on his finding regarding the rate of pay. As we do not accept this finding, we are not bound by its conclusion.

Findings of Fact

We find credible the testimony of General Counsel's witnesses that one group of employees, the discriminatees in this matter, was instructed by Ms. Garcia to stay behind while the other crew members entered the field to work on an hourly basis. Ms. Garcia told this group that they should leave and return after she found out the piece rate. When asked by Mr. Perez whether he was being fired, Ms. Garcia equivocated. This interchange took only a matter of minutes, after which Ms. Garcia left the group at the edge of the field. Mr. Perez testified that he believed that he had been fired, but that the others were uncertain about whether or not Ms. Garcia had meant to fire them. The group decided to test the owner's intentions by entering the field and attempting to work hourly along with their fellow crew members. General Counsel's witnesses further testified that when they walked into the field and took boxes, demonstrating their intention to work, Ms. Garcia angrily told them that they had been fired and should leave the property.

Based on the record, we find credible the discriminatees' testimony that they were fired when they entered the field and attempted to work. We are especially impressed with the recollection and consistency of detail among the discriminatee

witnesses regarding the facts surrounding this incident.[11] By contrast, Ms. Garcia denied that she had asked the group to stay behind, denied that the group had entered the field, and denied that she had fired anyone. Respondent's other witnesses were unable to corroborate her testimony on these critical events. Felipe and Lucia Estrada each testified that they had no knowledge of these events.[12] It appears that they were not in a position to observe what transpired.[13] They did corroborate the testimony of Ms. Garcia and their foreman, "Chencho," that they were not using boxes when they began working on the morning of March 20. However, we do not consider the question of whether the crew was using boxes to be critical in determining whether the discriminatees were fired when they entered the field and attempted to work.

Analysis and Conclusions

Section 1152 of the ALRA protects agricultural employees who "engage in protected activity for the purpose of mutual aid and protection." Under section 1153(a), an employer commits an unfair labor practice by interfering with, coercing or restraining agricultural employees in the exercise of their section 1152 rights. Where, as here, there is no union presence, employees will be found to be exercising their rights by acting in concert with or on behalf of their co-workers. (*T.T. Miyasaka, Inc.* (1990) 16 ALRB No.16*; Gourmet Farms, Inc*. (1984) 10 ALRB No. 41.)

[11] As but one example among many, there was testimony that Ms. Garcia ("Chayo") appeared to be looking for her cell phone and that Mr. Perez offered her the use of his.

[12] In response to questioning by Respondent's attorney regarding the events that occurred prior to the crew entering the field, Felipe Estrada testified that "I wasn't able to hear what she [Ms. Garcia] said because we were in a line and the line was spread out." (R.T., Vol. II, p. 141.)

[13] On direct examination, Lucia Estrada testified that she saw three or four workers stay behind but that she did not notice whether those people went to work that day. (R.T., Vol. II, p. 148.)

Protected concerted activity includes conduct arising from any issue involving terms and conditions of employment, such as the discussion of wages which took place on March 20. (*Boyd Branson Flowers* (1995) 21 ALRB No. 4.) Retaliation against employees for engaging in protected concerted activity, such as the firing of employees on March 20, is an unfair labor practice under section 1153(a).

We find that General Counsel proved by a preponderance of the evidence "that the employer knew…that the employee(s) had engaged in protected concerted activity and discharged [them]…for that reason." (*Lawrence Scarrone* (1981) 7 ALRB No. 13, p. 5.) General Counsel's prima facie case is supported by both direct and circumstantial evidence. (*Miranda Mushroom Farm, Inc.* (1984) 6 ALRB No. 22.)

We find that the employees engaged in protected concerted activity when they jointly engaged in a refusal to work pending the employer's satisfactory clarification of the rate of pay. The action of the employees is clearly protected under the Act as it pertains to terms and conditions of employment.

As noted above, we credit the testimony of General Counsel's three employee witnesses that Respondent angrily told their group that they were fired when they entered the field and attempted to work at the hourly rate. Some of the employees, particularly Mr. Perez who asked for the paperwork to submit for unemployment, believed that they had been fired at the edge of the field. However, because of the Employer's lack of directness, there was no consensus in the group about their status at that point in time. Since the discriminatees all wanted to work that day, they determined to settle the matter by entering the field and attempting to work hourly along with their

co-workers in the crew. Respondent's angry reaction was to discharge them on the spot. At that point, any remaining doubt was dispelled. Because the discharge followed immediately upon the heels of protected concerted activity and because the Employer put forward no evidence of a legitimate motive for the firing, we conclude that the firing was retaliatory. Accordingly, Respondent violated section 1153(a).

ORDER

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Cieniga Farms, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee for participating in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Agricultural Labor Relations Act:

(a) Offer to Alejandro Perez, Susanna Aguilar, Rosalina Cruz, Evaristo Bautista, Felipa Bartolo, Maria Bartolo, Antonio Amaya, Agustin Naranjo, and Jaime Naranjo, immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment.

(b) Reimburse Alejandro Perez, Susanna Aguilar, Rosalina Cruz, Evaristo Bautista, Felipa Bartolo, Maria Bartolo, Antonio Amaya, Agustin Naranjo, and Jaime Naranjo for all wage losses and other economic losses they have suffered as a result of Respondent's discrimination against them, such losses to be computed in accordance with Board precedent. Such amount shall include interest thereon, computed in accordance with our Decision and Order in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

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

(d) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by Respondent during the period March 1, 2000, to April 30, 2001.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days at conspicuous locations on its premises, the places of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed. Pursuant to the authority granted

under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of copies of the attached Notice.

(g) Provide a copy of the attached Notice in all appropriate languages to each agricultural employee hired by Respondent during the 12-month period following the date this Order becomes final.

(h) Upon request of the Regional Director, 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.

(i) Arrange for a representative of Respondent or Board agents to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time, at times and places to be determined by the Regional Director. Following the reading, Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions 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 to compensate them for time lost at this reading and during the question-and-answer period.

(j) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with the

terms of this Order. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing as to what further steps it has taken in compliance with the Order.

Dated: August 10, 2001

GENEVIEVE A. SHIROMA, Chair

GLORIA A. BARRIOS, Member

MEMBER MASON, Dissenting:

In discriminatory discharge cases, the General Counsel (G.C.) must prove that the alleged discriminatees engaged in protected activity, that the employer had knowledge of the protected activity, and that the employer took some adverse employment action because of the protected activity. In this case, it is undisputed that the employees in question engaged in protected activity when they refused to begin work before receiving clarification of their rate of pay. It is also undisputed that the employer, Cieniga Farms, Inc. (Employer), knew of this activity. Moreover, it is fair to say that if the employees were fired as alleged, it was due to the protected activity they had engaged in minutes before the alleged discharges.[14] Rather, the central issue in this case is whether or not there was any adverse action taken against the employees, i.e., whether

[14] While timing alone normally is insufficient to establish the causal element of a prima facie case, here the timing was nearly simultaneous and the record contains no evidence of any other explanation for the alleged discharges.

they were fired. Because I believe that the Administrative Law Judge (ALJ) was correct in concluding that the General Counsel failed to prove this element of her prima facie case, I must dissent.

The majority is correct in pointing out that the ALJ appeared to err when he stated in his decision that it is undisputed that the crew was paid at a piece rate for picking and paid at an hourly rate for all other work. From this premise, along with the testimony of witnesses from both sides that when the crew began working on the morning of March 20[15] the work was hourly and included cleaning out bad berries, he concluded that it was not plausible that the crew was using boxes. Based on this conclusion, he discredited the G.C. witnesses' testimony that Maria Garcia ("Chayo") angrily told them that they were fired when they grabbed boxes and attempted to enter the field to pick berries along with those already working.

It is true that the record contains no definitive evidence indicating that picking is never done on an hourly basis. While there is no question that picking is normally done on piece rate (for the economic benefit of both the employees and the employer), it is possible that there may be times during the season when there are marketable numbers of berries but not enough to allow for piece rate work. Having concluded that it was possible that picking berries could occur on an hourly basis**,** the majority rejects the ALJ's conclusion that the crew was not picking on the morning of March 20 and, thus, not using boxes as claimed by the G.C. witnesses. The majority then concludes that the entire scenario painted by the G.C. witnesses should be credited over

[15] All dates refer to the year 2000, unless otherwise specified.

the contrary testimony of the Employer's witnesses.[16] I do not agree with that assessment.

This is not to say that the record compels the opposite conclusions; indeed, the record is a poor one from which it is difficult to draw definitive conclusions. However, the mere fact that the ALJ appears to have erred in stating that it was undisputed that picking was never paid at an hourly rate does not itself compel the conclusion that boxes were being used on the morning of March 20, nor does it provide a basis for crediting the G.C. witnesses' version of events. Moreover, a careful analysis of the record provides as much, or more, basis for questioning the G.C. witnesses' version of events as it does for questioning the version put forth by the Employer's witnesses. At minimum, the facts are far less clear than a reading of the majority opinion would indicate.

None of the Employer's witnesses recalled any incident where a group of employees attempted to work but were stopped by Chayo. Contrary to the assertion of the majority, this does corroborate Chayo's assertion that no such confrontation occurred on March 20. All of the Employer's witnesses, including three employees, testified that when the crew began work on March 20, they were just cleaning out the bad berries and did not use boxes. Ascencio Ballesteros ("Chencho"), the foreman, testified that the crew did not take boxes with them in the field that morning "because we were going to work

[16] While the majority overstates the consistency of the testimony of the three G.C. witnesses, it should be noted that the three witnesses are related (Perez and Aguilar are married and Bautista is cousin of Perez). They would, therefore, have had ample opportunity to discuss their recollections of the events of March 20.

on an hourly basis and then that means just cleaning the strawberries."[17] When asked if cleaning the plants is done before picking the good berries, he replied, "Well, yes. First one cleans, and then you start picking."

The testimony of the Employer's witnesses was corroborated by other evidence. Payroll records indicate that on the previous workday the crew spent part of the day picking berries on piece rate. Payroll records establish that on March 20, the day in question, the crew worked for three hours at an hourly rate, then picked at piece rate for the remainder of the day. The payroll records also show that for the remainder of the week the crew was paid by piece rate. Assuming that hourly picking, if it occurs at all, occurs at the beginning and end of the season, this indicates that by March 20 there were sufficient berries to warrant paying at piece rate, thereby supporting the testimony that on the morning of March 20 the crew was culling, not picking. Moreover, since piece rate work had begun the prior week, it makes little sense that on March 20 the crew would have picked at an hourly rate for three hours then at piece rate for the remainder of the day.

In sum, the record is replete with evidence supporting the ALJ's conclusion that on the morning of March 20 the crew was not picking berries. As the ALJ further found, this casts grave doubt upon the scenario painted by the G.C. witnesses, i.e., that they grabbed boxes and attempted to join the crew that was already in the field picking, only to be stopped by Chayo and told that they were fired.

[17] He also explained that the boxes were on the top of his truck and were not utilized until several hours later when picking began. He further explained that he gives the crew instructions before they begin working and that when the work involves picking he is the one that hands out the boxes and punches the employees' tickets when they return with full boxes.

The General Counsel's case also suffers from another critical flaw. As the ALJ pointed out, there is no plausible rationale for Chayo to have singled out the nine alleged discriminatees from the entire crew during the initial meeting at the edge of the field. As the ALJ noted, even the G.C. witnesses described the encounter as one between Chayo and the entire crew as a whole, characterized by many workers voicing their questions and concerns. Yet the three G.C. witnesses claimed that, when the crew began to go toward the fields to begin working, Chayo pointed to some of the crew members and told them not to go in. The ALJ acknowledged that an employer might target a family group, or even a group chosen at random, in order to maximize the chilling effect of its actions or stamp out any germ of organizational activity. However, as the ALJ correctly concluded, in this case the General Counsel failed to produce evidence to reflect any selection based on group affiliation, nor did she argue that the group was randomly selected.

In addition, the record does not indicate that there was a reasonable basis for the employees to believe that they had been fired at that time.[18] The only consistent testimony is that Chayo stated that those who wanted to work (hourly) could work and those that did not should leave (and come back when she was certain of the rate per box).[19] The most plausible scenario is that these employees stayed behind because they

[18] Where an employer makes ambiguous statements to employees and from those statements the employees reasonably believe that they have been discharged, it is incumbent upon the employer to clarify his or her intent. Absent such clarification, it may be found that the employees were discharged. (See *American Protection Industries, Inc.* (1991) 17 ALRB No. 21; *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4; *Dole Farming, Inc.* (1996) 22 ALRB No. 8.)

[19] As noted by the ALJ, similar words have been held to not constitute a discharge. (*Tailored Trend, Inc.* (1960) 126 NLRB 337; *Eaborn Trucking Service* (1965) 156 NLRB 1370.)

remained unsure of the pay structure and/or they were uncertain if they wanted to continue working for this employer.

Assuming that there is insufficient evidence to establish that Chayo had singled out the alleged discriminatees during the first encounter, it makes little sense that Chayo would later fire them when they attempted to join their crew members who had already begun working. If anything, she would have told them that she thought they had quit, or that they already had quit so they could not work, or simply that they should put the boxes down because the crew was not picking at that time. Moreover, there is no indication in the record that Chayo easily became angered or that she had done so during the earlier encounter.

For the reasons stated above, I believe that the General Counsel has failed to prove by a preponderance of the evidence that the alleged discriminatees were fired or reasonably believed they were fired.[20] Cases such as these are always a challenge to decide, for they invariably involve two (or more) irreconcilable stories as to what was said to employees by their employer. The somewhat muddled record in this case makes resolution particularly difficult. But it is important to remember that the General Counsel carries the burden of proof in establishing an unfair labor practice. (*Lawrence Scarrone* (1981) 7 ALRB No. 13.) When the resolution of the case depends, as it does here, on a tangled web of speculation in order to determine facts critical to establishing a prima

[20] This is not to say that the G.C. witnesses intentionally fabricated their story. More likely, it is the result of a combination of the vagaries of perception, coupled with confusion and misunderstanding at the time of the events. It also should be noted that memories of witnesses were undoubtedly affected by the passage of time. The unfair labor practice charge was not filed until nearly six months had elapsed since the events of March 20 and there is no indication that recollections of the events in question were memorialized prior to the filing of the charge.

facie case, I submit that we must conclude that the General Counsel's burden of proof was not carried. I would, therefore, dismiss the complaint.

DATED: August 10, 2001

HERBERT O. MASON, Member