

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HANSEN FARMS ,)
)
)
 Employer,) No. 75-CE-238-M
)
 and) 3 ALRB No. 43
)
)
 UNITED FARM WORKERS OF)
 AMERICA, AFL-CIO,)
)
 Charging Party.)
 _____)

This decision has been delegated to a three-member panel. Labor Code Section 1146.

On February 8, 1977, Administrative Law Officer Irving Stone issued his decision dismissing the complaint in this case. The General Counsel and the Charging Party filed timely exceptions.

Having made a careful review of the record, we adopt the law officer's findings, conclusions and recommendation. The complaint is hereby dismissed in its entirety.

Dated: May 24, 1977

Richard Johnsen, Jr. , Member

Robert B. Hutchinson, Member

Ronald L. Ruiz, Member

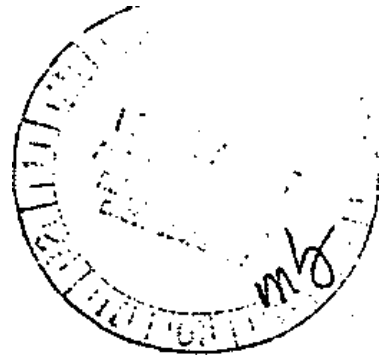
STATE OF CALIFORNIA
BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of :
HANSEN FARMS, :
-and- : Case No. 75-CE-238-M
UNITED FARM WORKERS OF AMERICA, :
A.F.L.-C.I.O. :

I

Lorenzo Campbell, Esq., of Salinas,
For the General Counsel

Abramson, Church & Stave, Esqs. by
Joseph A. Stave, of Salinas, For the
Respondent



Paul Barnett, Esq., of Salinas,
For the Charging Party

DECISION

Statement of the Case

Irving Stone, Administrative Law Officer: The above case was heard by me in Salinas, California, on January 5 and 6, 1976. The complaint, which is dated the 17th day of December,

1975,^{1/} alleges violations of Sections 1153(a) and (c) and Section 1140.4(a) of the Agricultural Labor Relations Act, herein called the Act, by Hansen Farms, herein called Respondent.^{2/} The complaint is based on a charge filed on November 13 by United Farm Workers of America, A.F.L.-C.I.O., herein called the Union. A copy of the charge was duly served upon the Respondent.

All parties were given full opportunity to participate in the hearing, and after the close thereof all parties filed briefs in support of their respective positions.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the

1/ All dates referred to herein are in 1975 unless otherwise stated.

2/ At the hearing General Counsel moved to amend paragraph 6(a) of the complaint to read as follows: "On or about the months of October through November, by and through foreman, Fidel Rodriguez, Respondent at its Kern County and Monterey County premises, threatened its employees with discharge for supporting the United Farm Workers." As originally set forth in the complaint paragraph 6(a) read as follows: "On or about the week of November 3 through November 8, by and through foreman Fidel Rodriguez, Respondent at its Kern County premises threatened its employees with discharge for supporting the United Farm Workers." Attorney for the Respondent objected to said motion. I granted the motion. See Section 20210.3 of Board's Regulations dated August 28, 1975. General Counsel also moved to amend paragraph 6(c) of the complaint by adding the word "premises" after the words "Kern County" which had been omitted in the typing of the complaint. There was no objection thereto and the motion was granted.

briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Hansen Farms is a sole proprietorship owned by Albert C. Hansen. He is engaged in agriculture in Kern County and Monterey County, California. The complaint alleges, Respondent admits and I find that the Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The complaint alleges, Respondent admits and I find the Union to be a labor organization within the meaning of Section 1140.4(f) of the Act.

The complaint alleges, Respondent admits and I find that at all times material to the within proceedings, Jose Garcia was an agricultural employee within the meaning of Section 1140.4(b) of the Act.

II. The Alleged Unfair Labor Practices

The complaint alleges that Respondent violated Section 1153(c) of the Act by the discriminatory discharge of Jose Garcia. The

complaint also alleges that Respondent violated Section 1153(a) of the Act by unlawfully interfering with the rights guaranteed his employees by Section 1152 of the Act, by threatening said employees with discharge for supporting the Union.

Respondent denied having discriminatorily discharged Jose Garcia or having threatened his employees with discharge for supporting the Union.

A. The Operation of the Farm.

Hansen Farms is engaged in the growing and shipping of vegetables. In October and November Hansen was harvesting lettuce at his farms located in Salinas and Lost Hills. Salinas is in Monterey County. Lost Hills, which is one hundred miles from Salinas, is in Kern County. In the harvesting of lettuce the farm employees work in crews of about 30 to 35 workers. The employees form teams of three called a "trio" in which two will do the cutting and one will do the packing of the lettuce. The number of crews and the size of the crews will vary depending on the volume of lettuce to be harvested at any particular time of the year. Respondent will usually start with one crew in the spring when the volume is low. As the volume increases additional crews will be added, usually to a maximum of four, declining again in the fall as the volume to be harvested declines. Hansen testified

that during the lettuce season of 1975 there was a maximum of four crews and that the harvesting of the lettuce crop that season followed the pattern above described.

B. The Alleged Unlawful Threats.

The complaint, as amended, alleges that during the months of October and November, Respondent, through Fidel Rodriguez, his foreman,^{3/} threatened the employees with discharge for supporting the Union. The only evidence introduced by the General Counsel in support of the above charge is that of Gerardo Flores. Flores testified that on Monday, November 17, while telling Rodriguez that he did not think that it was fair to fire Garcia, Rodriguez replied that "if it was up to us we would have fired all of you. . . and the reason we haven't fired you all is because Mr. Hansen said he didn't want us to fire anybody." When Flores was asked whom Rodriguez meant when he said "all of you" Flores replied "he is speaking of all that were sympathizers to the Chavez movement." Rodriguez denied making such statement to Flores. I do not find it necessary to resolve the credibility of either Flores or Rodriguez for the reason that even if made, the statement

3/ Paragraph " 4 " of the complaint alleges and Respondent admits that Fidel Rodriguez, during all times material to these proceedings, was a supervisor within the meaning of Section 1140.4(j) of the Act and agent of the Respondent acting on its behalf.

attributed by Floras to Rodriguez would not constitute a threat of discharge within the meaning of Section 1153(a) of the Act. Of course an employer is accountable for the acts of his supervisor even though they may be contrary to his express instructions. But where the employee is informed or is aware of the fact that the acts complained of are contrary to the employer's instructions or policy then that rule is not applicable and the employer cannot be held accountable.^{4/} It seems perfectly clear that what Rodriguez said was an expression of his own personal feeling and not that of the employer. As a matter of fact his very words attest to his disappointment in not being able to do that which he would like to do. Under all of the circumstances I must conclude that even if Rodriguez did make the statement which Flores said he did, it is not and cannot be considered to be a threat made by Respondent. Since this statement cannot be attributed to the Respondent and since I find no other evidence of threats made during October and November, I therefore find that General Counsel has failed in his burden of establishing by a fair preponderance of the evidence that Respondent, through Fidel Rodriguez, his foreman, threatened his employees with discharge for supporting the Union and that Respondent did not violate Section 1153(a) of the Act.^{5/}

^{4/} Reynolds Corp., 74 N.L.R.B. 1623; 16 L.R.R.M. 148 (1945).

^{5/} General Counsel's reliance upon a finding that Respondent violated Section 1153 (c) of the Act as support for a finding that Respondent violated Section 1153, (a) of the Act must fail inasmuch as that portion of the complaint alleging a violation of Section 1153 (c) of the Act will also be dismissed.

Garcia testified that prior to the time when the employees were assigned to Lost Hills he heard Tony Rodriguez, a foreman, tell Fidel Rodriguez, that Garcia's crew was being assigned to work under Alvaro Piedra because Piedra "was used to break in rough or unbroken mules" and that Tony Rodriguez had told Garcia that Piedra "is the one that is going to break you in because I couldn't." General Counsel's contention that Respondent was motivated by anti-Union bias in assigning the chosen employees to work under Piedra at Lost Hills is devoid of any substantiating evidence. To the contrary, the credible evidence indicates that all employees were asked, in order of their seniority, whether or not they wanted to go to Lost Hills and that those employees who indicated their unwillingness to go were not threatened and were not sent to Lost Hills.

C. The Alleged Discharge of Jose Garcia.

The complaint alleges and General Counsel contends that Jose Garcia was discriminatorily discharged on November 10. Respondent insists that Garcia quit on November 8.

Garcia worked for Respondent for about three years until November 8, when the employment relationship was terminated. Garcia worked as a lettuce packer as part of a "trio," the other two crew members doing the cutting. During the month of October Garcia had been working in Tony Vasquez' crew in Salinas. Sometime

prior to October 29,^{6/} Fidel Rodriguez began assembling crews to work at Lost Hills. The prevailing practice was to canvass the workers in order of their seniority to determine their availability. On October 29 Rodriguez spoke to Garcia and told him that he was to report for work at Lost Hills the following morning. Garcia did so. Respondent provides bus transportation for some of the workers who work at Lost Hills. Others will drive there in their own cars either alone or with co-employees. Garcia drove to Lost Hills by himself in his pick-up truck. At Lost Hills most of the workers live in a hotel. Meals are provided by Respondent for which the workers pay. Garcia did not live at the hotel. He stayed at the camp. Garcia testified that he was under treatment for high blood pressure and was on a salt-free diet. He stated that he would prepare his own breakfast and dinner in keeping with his dietary limitations. At Lost Hills harvesting operations proceeded practically continuously during the daylight hours and seven days a week. Garcia testified that working on Sunday was voluntary and that he did not work on Sunday, November 2.

The credible testimony indicated the existence of a very flexible and permissive policy on Respondent's part regarding

6/ Garcia and Burgos testified that it was the preceding Friday. Fidel Rodriguez testified that it was about ten days to two weeks before. Rodriguez¹ testimony is more consistent with Respondent's harvesting procedure and practice. The credible evidence indicates that it was Respondent's intention to send two crews to Lost Hills, one earlier than the other. Both Garcia and Flores testified that some workers had left for Lost Hills at an earlier date. Rodriguez testified that when he asked Garcia whether he wanted to go to Lost Hills, Garcia stated that he wanted to go with the second crew.

absences. Walter Pemberton, the field supervisor at Lost Hills, testified that lettuce workers often left for extended week-ends starting on Saturday to visit their families in Mexicali and would not return until late Monday or Tuesday. Fidel Rodriguez and Albert Hansen testified that if an employee asked to be excused his request would most often be granted despite the fact that the excuse might not be a substantial one; that even if an employee were to absent himself without first having advised his foreman or obtained permission, he would be permitted to return to work if he tenders an excuse or even a semblance of one. Garcia admitted that on October 31 he was suffering some ill effects resulting from some excessive drinking the night before and after working a few hours asked to be excused and was permitted to take the rest of the day off without any resultant disciplinary action. Gerardo Flores, testifying on behalf of the Union, stated that he did not report for work on Saturday, November 8, and was not discharged even though he had not advised his foreman that he would not report for work on that day.

Friday evening, November 7, Walter Pemberton spoke to the crew. He told them that they would have to work the next day and asked whether it would be all right. He promised that they would quit between 12:00 noon and 1:00 p.m. and told them he would make sure the salesman did not push them past 1:00 p.m. The crew agreed. Work commenced at about 6:00 a.m. on November 8.

Raul Burgos, who worked in the same crew as Garcia, testified that Saturday, November 8 was a very cold day and that during the break, between 10:00 a.m. and 11:00 a.m. the workers began to "mumble to each other" that they "were going to strike or whatever . . . at 12:00" and that at 12:00 noon they packed their last box and went to eat lunch. Apparently Pemberton and Piedra had become aware of this. When the crew members came to the place where lunch had been set out, Pemberton was already there. He spoke to the workers about his agreement that they would not work past 1:00 p.m. He asked them to keep their promise to work until 1:00 p.m. All of the employees agreed to and did return to work with the exception of five employees, one of whom was Garcia. After the men finished their lunch they worked ,another 20 or 30 minutes and then quit at 1:00 p.m. Pemberton testified that due to the discussions during the lunch period the crew did not finish the work order at 1:00 p.m. and he was compelled to go to the other crew, explain to them what had happened and ask them to work after 1:00 p.m. to help him get the order out. They agreed to do so and did finish the work order left uncompleted by the crew in which Garcia worked. Alvaro Piedra, foreman of the crew in which Garcia worked, testified that during the morning of November 8 he "noticed something among them; that some of them or a few of them didn't want to stay and help and principally him" [referring to Garcia]. Piedra went on to state, "I was talking to all of them and I can't remember who was there, but I was telling them all if they would please stay

and help until 1:00 o'clock." He also testified that after he heard that Garcia planned to leave early he said to Garcia, "Please. You have already helped me until 12:00. Could you please keep helping me until 1:00 o'clock? Don't leave." However, shortly before 12:00 noon Garcia told Piedra that he would leave as soon as he finished packing the remaining four crates of lettuce. He did not tell Piedra why he was leaving.

The following day, Sunday, Piedra gave Pemberton a list containing the names of those who did not return to work after lunch the previous day. Pemberton told Piedra that "These men that walked off the job were not to be put back to work." When Garcia reported for work on Monday, he was told by Piedra that he had left his work on Saturday and that he was to go to the office to pick up his check. Garcia discussed the situation with Pemberton and Tony Vasquez in an effort to get his job back but to no avail. Neither he, nor the other four crew members who left that Saturday after lunch were permitted to return to work.

General Counsel contends that Garcia was discharged. Respondent insists that he quit. In his brief, General Counsel argues that "the basic issue in the present case is whether or not Mr. Garcia was discharged." I do not agree. Whether Garcia was discharged or whether he quit is not the basic issue. The issue to be resolved, as I perceive it to be, is whether Respondent,

in refusing to permit Garcia to return to work on Monday, November 10, was thus motivated by reason of Garcia's support of the Union. Even assuming arguendo, as Respondent contends, Garcia did quit his job by refusing to work after 12:00 noon on November 8, if Respondent in refusing to re-hire Garcia on November 10, did so because of Garcia's support of the Union, such conduct on the part of the Respondent would be violative of the Act. Section 1153 (c) of the Act prohibits not only discrimination in "tenure of employment" but also "discrimination in regard to the hiring." As I therefore see it, the basic question turns on the determination as to Respondent's motive in refusing to permit Garcia to return to work. I do not believe, taking all of the credible evidence into consideration, that in so doing, Respondent was motivated in whole or in part by Garcia's support of the Union, and I so find.

Garcia testified that he was being treated at the Union's clinic in Salinas for high blood pressure and that he was on a salt-free diet. He had last been seen by the doctor at the clinic on October 12 and was given an appointment slip setting up another appointment for November 8 at 10:00 a.m.^{7/}

Garcia testified, as we have observed, that prior to his being sent to Lost Hills, Tony Rodriguez, Garcia's foreman

^{7/} Intervenor's Exhibit 1 in evidence.

at Salinas, had told Fidel Rodriguez that Garcia and his fellow crew members were going to be put under Alvaro Piedra's foreman-ship because Piedra was "used to breaking in rough or unbroken in mules;" that at another time, Tony Rodriguez, pointing to Piedra, had told him "there he is. There is the one that is going to break you in because I couldn't." Garcia also testified, as we have noted, that when questioned by Fidel Rodriguez about his going to Lost Hills he told Rodriguez that he could not go because of his medical condition and dietary requirements, of which Rodriguez was aware having discussed Garcia's condition with him several times. On or about October 29, a Wednesday, Rodriguez went to Garcia's house and not finding him home asked Garcia's wife to have Garcia call him. On his returning home, Garcia called Rodriguez and was told that he was to go to Lost Hills the next day. Garcia stated that he told Rodriguez that he couldn't go because of his "medical problem" and his special dietary requirements. According to Garcia, Rodriguez told him that if he did not go to Lost Hills he was not to "present" himself "for work in Salinas the next day" and that he would lose all of his seniority and rights. Also, that the next day his wife tried to call Hansen but was unable to reach him but she did speak to Tony Vasquez who promised to talk to Fidel Rodriguez. However, she heard nothing further. The Union, in its brief, contends that Respondent transferred a "strongly pro-UFW crew," which included Garcia, to Lost Hills, to be supervised by Alvaro Piedra, a strict disciplinarian, to "break the rough mules;" that Garcia who was

an active Union supporter, was forced to go to Lost Hills, against his wishes and despite the fact that Respondent was aware of his condition and his need to be close to home where his wife could prepare the special foods he required, all under threat of loss of seniority, rights and perhaps his job if he refused to go.

Fidel Rodriguez, who supervised the four lettuce crews, testified that Piedra did not replace Tony Rodriguez as crew foreman, as claimed by General Counsel or for any such reason as alleged by Garcia. Hansen had testified that at the time in question there was a decline in the volume of lettuce to be harvested necessitating a reduction from four to three crews. Two crews were being sent to Lost Hills with only one remaining in Salinas. Consequently, there was a reshuffling of the crews and the foremen. Piedra was sent to Lost Hills. Tony Rodriguez remained in Salinas. Fidel Rodriguez testified that about ten days or two weeks before the workers started to go to Lost Hills, Walt Pemberton, the field supervisor at Lost Hills, gave him a list of the lettuce workers with their names arranged in order of seniority. According to Rodriguez all crew members were questioned in order of their seniority and asked if they wanted to go to Lost Hills. Those who indicated that they did not want to go would be left off the list of available workers. At that time there were more employees than jobs. Rodriguez testified that when he asked Garcia whether he wanted to go to Lost Hills Garcia first asked his trio what they were going to do and when they said that they were going to go to Lost Hills he told Rodriguez

that he would go with the second crew. Rodriguez denied making any threats to Garcia about his working or not working at Lost Hills. I credit the testimony of Fidel Rodriguez for several reasons. In the first place, Garcia admitted that Salvador Cortez told Rodriguez that he did not want to go to Lost Hills and he was not sent to Lost Hills nor was he disciplined. Raul Burgos, testifying as to what had taken place, said that Rodriguez "had a list, a seniority list, and he goes through it and he goes through each man. He went through each man in Salinas. This was on a Friday and I [he] asked him if he wanted to go to Lost Hills or not and if you said yes, well you are on. If you are not, you don't." He did not hear of any threats made and as far as he knew no one was forced to go to Lost Hills and everybody -who went there went voluntarily. Furthermore, if Rodriguez intended to compel any of the workers to go to Lost Hills, for any reason whatsoever, why would he inquire of the men as to their availability in order of their seniority? There were more employees than jobs and Rodriguez' explanation as to how the crew members were selected for work at Lost Hills, on a seniority basis is far more credible than General Counsel's position that this was part and parcel of a scheme to get "a strong pro-UFW crew" to Lost Hills to be broken under the strong hand of Alvaro Piedra.

Tony Vasquez testified that Mrs. Garcia had called him and told him of her husband's diet problem and that he could not

be away from home for any length of time; that he was under a doctor's care and that Fidel Rodriguez had told her husband he had to go to Lost Hills. Vasquez said that he told Mrs. Garcia that if her husband had a medical problem "all the boys were told they did not have to go. They are not forced to go and he could come home any time he wanted." I credit his testimony.

Garcia went to Lost Hills on October 30. On October 31 it rained and no work took place. On November 1 Garcia worked only part of the day and then asked to be excused because he was "hungover".

Now, as we have seen, Garcia had an appointment at the Union's clinic at Salinas on Saturday morning at 10:00 a.m. and an appointment slip attesting to that fact. However, at no time prior to November 10 did he ever mention it to any of his foremen or supervisors or ever try to show his appointment slip to any of them despite the fact that at all times said appointment slip was in his wallet. Garcia's explanations in this regard are not convincing.

On Friday evening, November 7, when Pemberton told the crew that they were going to work the next day, Garcia said nothing to Pemberton or Piedra about his appointment at that time. Garcia said that Pemberton had said that they would only work until 11:00 a.m. to 12:00 noon and that he planned to keep on working until

noon and leave for the clinic then; that although he would be late it would not matter because he had arrived late for his appointment at other times but was nevertheless attended to.^{8/}

Garcia stated that on November 7, when Tony Vasquez was at the camp, he tried on two occasions to tell him about his appointment at the clinic the next day. He made a sign to Vasquez to indicate that he wanted to talk to him. Vasquez was talking to other employees and according to Garcia, Vasquez asked him to wait until he was finished. However, when he did finish he got into a car with Walt Pemberton and left. Why Garcia did not try to tell Pemberton of his appointment when Pemberton was telling the men that they were going to work the next day was never explained.

Garcia testified that he intended to tell Piedra at 11:00 a.m. on the morning of November 8 about his appointment and his intention to leave at noon. He said that at 11:00 a.m. he told Piedra- "I am going to stop working at noon" but Piedra ignored him. Finally at 12:00 o'clock he told Piedra "I am just

8/ The clinic is about 100 miles from Lost Hills. Garcia testified that it took him about three hours to drive from Lost Hills to Salinas. It should be noted in this connection that Courtney Simpkins who works at the Union's clinic in Salinas testified that she cautions the patients to be on time for their appointment and that when they are late special emphasis is made in telling them to please come on time.

going to fill these four boxes" and that "Piedra just did the same and ignored me ." Again, at no time did Garcia try to tell Piedra why he was leaving. I find it difficult to reconcile Garcia¹s stated concern over his medical condition when asked to go to Lost Hills, which he testified he went only under threats of loss of seniority and benefits, and his casual attitude toward the appointment at the clinic on November 8. It seems clear that Garcia and Piedra did not relate well to one another. Garcia testified that Piedra "talked to me in a way like he wanted to humiliate me ." Piedra described Garcia as "a person that had the worst language I had ever met in my life ." But Garcia could have made a more determined effort to discuss his appointment with one of the other foremen or supervisors. Pemberton was at Lost Hills at all times. Vasquez testified that he would go to Lost Hills twice a week, on Tuesdays to pick up the payroll^{9/} and on Friday to deliver the payroll and that each time he "stayed at, least anywhere from two hours to two and a half hours to discuss any problems with the members of the crew, if they had any ." While Vasquez did not remember Garcia calling to him on Friday, November 7, Gerardo Flores testified that he had spoken to Vasquez on two occasions on Friday, November 7 and that both times Garcia called to Vasquez. Flores remembered that the first time Vasquez asked Garcia to wait a minute. He did not remember whether or not

9/ Probably referring to the data necessary to compute the amount earned by each employee during the week.

Vasquez answered him the second time. If the appointment at the clinic was a matter of concern or importance, it seems to me that Garcia might have been more persistent in his efforts to speak to Vasquez. Why he did not try to speak to Vasquez on the preceding Tuesday when Vasquez was there to "pick up the payroll" again is not explained.

Garcia had several opportunities to tell Piedra about his appointment on November 7 and early November 8. After work on November 7 Piedra was handing out the paychecks to the employees in his crew. Garcia testified that when he got his check he noticed that he had been improperly charged for two meals that he had not taken. He complained to Piedra about this and an argument ensued, in the course of which Piedra said, "I don't have time for that" in a "loud strong manner" talking to him in a "way like he wanted to humiliate me." Garcia replied by saying "But you did have time to charge me for them" and Piedra closed the argument by saying, "I don't have time for that. Just save the receipts." Piedra's version differs from that of Garcia. He testified that when he gave Garcia his check Garcia told him that there were "two meals missing." He told Garcia to wait a minute and to hold the check stub; that when he had finished handing out the checks he would go to Garcia. Garcia then said "what is happening is that you are acting dumb. You idiot." Piedra

said that Garcia did not say anything to him after he finished handing out the checks. Incidentally, Garcia testified that he was reimbursed for the two meals. Again, although Garcia had the time and opportunity to argue about the improper charge for two meals he did not take advantage of the opportunity to tell Piedra about his appointment the following morning. Even on November 8, Garcia testified that there was a break at about 8:00 a.m. but still he said nothing to Piedra about his appointment. Garcia also testified that on that morning, as is customary on any work day, Piedra walked up and down the rows of lettuce where the men were working and that Piedra passed him about 15 or 20 times. But not until 11:00 a.m. does he try to say anything to Piedra.

What appears to be more consistent with the credible evidence is that an abortive work stoppage for 12:00 noon was brewing on the morning of November 8 and that Garcia in refusing and failing to continue to work after 12:00 noon on that day was punished, whether justly or unjustly, for having participated in such action. Such a conclusion finds support in the credible evidence. It is undisputed that on Friday, November 7, Pemberton told the men that they were going to work the next day. According to Garcia they were to work only until 11:00 a.m. to 12:00 noon Pemberton stated that he promised the men that they would work until 12:00 or 1:00 p.m. but not beyond 1:00 p.m. I credit Pemberton's version. Raul Burgos had testified that on Friday,

November 7, Pemberton had asked the men to work the next day and that most agreed. Saturday, November 8, was a very cold day, according to Burgos, and the men began talking among themselves about not working beyond 12:00 noon. Pemberton and Piedra, becoming aware of this, began to talk to the men in an effort to get them to work until 1:00 p.m. Piedra spoke to the men in his crew and asked them to please stay and help until 1:00 p.m. Garcia does not deny this. He testified that Pemberton spoke to Piedra who "then asked us to work a little while longer." In spite of all of this, shortly before 12:00 noon Garcia told Piedra that he was going to finish packing "these four boxes" and leave. Again, without offering any explanation as to why he was going to leave. Piedra testified that when Garcia told this to him, he shrugged his shoulders and said "If you are going to leave, well what can I do."

In the meantime, lunch had been set out for the men. Pemberton was there. He told them that there was an agreement that they would work between 12:00 and 1:00 p.m., that some of the workers had not reported for work and they should realize how important it was when they gave him their word to keep it. All of the employees went back to work with the exception of Garcia and four others. The next day Piedra gave Pemberton a list with the names of those who did not return to work after 12:00 noon on Saturday. Pemberton told Piedra that they were

not to be given any work on Monday. None of the five have worked for the Respondent since.^{10/}

General Counsel's theory was that Respondent was deliberately striking out at the pro-UFW employees by sending them to Lost Hills to be "broken" by Alvaro Piedra. I have already stated that in my opinion everyone who went to Lost Hills went there voluntarily and that no threats of any kind were made to anyone who indicated that he did not want to go and I so find. General Counsel contends that Respondent seized upon Garcia's early departure as a pretext to discharge him because of his support for the Union. Yet, Gerardo Flores, also a known Union supporter, testified that he absented himself from work on Saturday, November 8, without first informing Piedra of that fact and he was not discharged. Pemberton testified that Roberto Madrid, an active Union supporter, told him to "be sure and let Mr. Hansen know that this was not a Chavez walk-out; that he was proof. He was working himself."

The credible evidence strongly suggests that Pemberton was angered at the incipient walk-out, upset over the prospect

10/ There was testimony regarding Garcia's actions and behavior after he stopped working on November 8 and also regarding his efforts to discuss his situation with Piedra, Pemberton, Vasquez or Hansen during the period from November 10 to November 13. Suffice it to say that Pemberton's decision was adhered to. In my opinion, a detailed discussion of all those happenings is not germane to the issue and would only serve to confuse.

of not being able to complete the work-order; and embarrassed in having to go to the other crew and appeal to them to finish the harvesting that Garcia's crew did not. He testified that "if our salesman tells them they will have their order we will look awful stupid and we will lose a customer if we don't fulfill it." That he felt very strongly about the five who walked off the field on Saturday after 12:00 noon is revealed in the following question and answer:

Q [By Mr. Barnett] - If Garcia quit on Saturday and he came to you on Tuesday asking for his job back, why didn't you rehire him?

A I would not rehire him if I had my way. That was Tony Vasquez's. That was in his hands and Mr. Hansen's because they left me short on an order after we had promised the buyers that they would have their order.

Obviously Pemberton did have his way and in my opinion for the reason he set forth and no other, inasmuch as Vasquez and Hansen did not see fit to put Garcia back to work. Any support for Garcia from Piedra was out of the question. Each disliked the other. Their personal ties seemed to clash. Only the night before they had engaged in a harsh and unpleasant argument. The next day Piedra had to plead with Garcia and the

other members of the crew to "please keep helping me until 1:00 o'clock. Don't leave,"an unpleasant task. Then to top it all Garcia tells him he is leaving at noon without any explanation of any kind whatsoever and does so. If Piedra and Pemberton had concluded that Garcia was part and parcel of the mutinous members of the crew, correctly or otherwise, Garcia's acts certainly would have contributed to such a conclusion. Thus one can understand Pemberton's instructions to Piedra not to assign any work to the five walk-cuts and Respondent's refusal to accept Garcia's after-the-fact explanation, especially since Garcia had failed to tell any of the foremen or supervisors of his appointment or to show any of them the appointment slip. In my opinion, that and that alone was the reason for Respondent's conduct towards Garcia. Cold anger and not the fact that Garcia favored the Union was the motivating force. Whether or not it was justified or whether the punishment did truly fit the "crime" is not the issue nor is it for me to judge.

Again, the issue is not simply whether or not Respondent discriminated against Garcia. To sustain a violation of the Act General Counsel must establish by a fair preponderance of the credible evidence that Respondent's discriminatory conduct was designed to "encourage or discourage membership in any labor organization."^{11/} This General Counsel has failed to do and I so find.

11/ Section 1153(c) of the Act.

For the purpose of establishing a background showing anti-Union bias on the part of the Respondent, General Counsel introduced evidence as to alleged threats made by Fidel Rodriguez to Respondent's employees during August and September. These statements were made during an organizational campaign by the Union and in the course of a representation proceeding and election conducted under the auspices of the Board.^{12/} However, the credible evidence indicates most strongly that anti-Union animus did not enter into the decision by Pemberton, and affirmed by Rodriguez, Vasquez and Hansen, not to permit Garcia or any of the other walk-outs to return to work. It is very important in evaluating the evidence that it be viewed within the context of the time and place of occurrence; within the res geste of the acts by the members of Piedra's crew on the 8th of November. In my opinion whatever acts were committed by Fidel Rodriguez or any other supervisors or foremen in August and September, they did not contribute to or play a role in motivating Respondent to refuse to permit Garcia to return to work on November 10.

For all of this it must also be said that Garcia is not blameless. It appears fairly certain that had he informed any of the foremen or supervisors of his appointment he would have been permitted to leave. However, for whatever reasons he

12/ In that case [Albert C. Hansen dba Hansen Farms, 2 A.L.R.B. 61, 1976] the Board declined to certify the election having found that misconduct which affected the results of the election had taken place. The results of the election were: "No Union-300; U.F.W. - 247; challenged ballots-28; void ballots-5."

may have had, he did not do so. Even with knowledge of the revolt brewing among his co-workers he leaves without stating any reason and after Piedra's plea that he stay. Certainly it must have occurred to him that Pemberton and Piedra might think that he was being rebellious and that they would act accordingly. When asked why he did not tell Piedra why he was leaving when he told Piedra that he intended to do so, Garcia said that it was Piedra's "duty" to ask him. To ask one to accept that as an explanation is to strain one's credulity. But, be that as it may, if Garcia had but uttered a single word to indicate that he was leaving to keep a medical appointment the result might well have been different. But he did not.

"An employer may discharge or refuse to re-employ one of his employees for any reason, just or unjust, except discrimination because of union activities and relationships, and the controlling and ultimate fact which determines an issue of the kind here presented is, what was the true reason back of the discharge."^{13/} I find that the true reason for Respondent's refusal to permit Garcia to return to work was his failure to return to work after 12:00 noon on November 8. "The Act's grant of rights to employees to engage in organizing activities,

13/ N.L.R.B. vs. Adkins Transfer Co. [226 F.2d 324; 6th; 1955]; See also N.L.R.B. vs. Condenser Corp. [128 F.3d 75; 3rd; 1942].

to belong to a union, and to engage in collective bargaining, was not intended to deprive management of its right to manage its business and to maintain production and discipline." ^{14/} In the Marmon Group case,^{15/} the N.L.R.B. stated that where an employee engages in misconduct which would provide the employer with an independent reason to discharge him, the fact that the employer welcomed the opportunity because of the employee's prior union activities does not make the discharge violative of Section 8 (a) (3) of the L.M.R.A.

Upon all of the credible evidence I find that the Respondent's refusal to permit Jose Garcia to return to work on November 10 was not motivated in whole or in part by reason of any activity by Jose Garcia on behalf of or in connection with the Union and that General Counsel has failed to establish by a preponderance of the credible evidence that Respondent engaged in unfair labor practices within the meaning of Section 1153 (c) of the Act.

CONCLUSIONS OF LAW

1. Hansen Farms is, and at all material times has been,

^{14/} Star-News Newspapers, Inc. [183 N.L.R.B. 1003; 1970]

^{15/} 219 N.L.R.B. 12 [1975].

an agricultural employer within the meaning of Section 1140.4(c) of the Act.

2. United Farm Workers of America, AFL-CIO, is, and at all material times was, a labor organization within the meaning of Section 1140.4(f) of the Act.

3. Jose Garcia, at all material times, was an agricultural employee within the meaning of Section 1140.4(b) of the Act.

4. General Counsel has failed to establish by a preponderance of the evidence that Respondent has engaged, or is engaging, in unfair labor practices within the meaning of Sections 1153(a) and (c) of the Act.

Upon the foregoing Findings of Fact, Conclusions of Law, and the entire record, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended

ORDER

It is hereby recommended that the complaint be dismissed

in its entirety.

Dated: February 8th, 1977.

A handwritten signature in cursive script, appearing to read "Irving Stone", written over a horizontal line.

IRVING STONE
Administrative Law Officer

