

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

GOLDEN VALLEY FARMING,)	
Respondent,)	Case Nos. 77-CE-32-D
)	77-CE-32-1-D
)	
)	
and)	
)	
UNITED FARM WORKERS)	4 ALRB No. 79
OF AMERICA, AFL-CIO,)	
)	
Charging Party.)	
_____)	

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On March 29, 1978, Administrative Law Officer (ALO) James Moore King issued the attached Decision in which he concluded that Respondent had not, as charged, committed unfair labor practices in violation of Labor Code Section 1153 (c) and (a) by its discharge of employee Miguel Castillo. Accordingly, he dismissed the complaint in its entirety but recommended that Respondent be awarded its litigation costs in defending this matter.

Thereafter, the General Counsel and the Charging Party each filed timely exceptions with a supporting brief and Respondent filed a brief in response to the General Counsel's exceptions, pursuant to 8 Cal. Admin. Code Section 20282 (b).

The Board has considered the attached Decision in light of the exceptions and the briefs and has decided to affirm the rulings, findings and conclusions of the ALO and to adopt his

recommended Order, except his recommendation that litigation costs be awarded to Respondent. Even assuming that this Board has the power to award litigation costs to a respondent exonerated of unfair labor practice charges, a question left open in S. L. Douglass, 3 ALRB No. 59 (1977), we do not consider that the issues raised by the complaint and the answer herein were so lacking in merit that prosecution of the case could be characterized as frivolous. Accordingly, we award no litigation costs in this matter.

Respondent and the General Counsel agreed with the ALO's characterization of this matter as one which turns solely on the credibility of the witnesses concerning factual, rather than legal, issues. Consistent with this view, the ALO has set forth a detailed analysis of his findings based on the evidence and on his observation of the demeanor of witnesses. We have reviewed the record and find that the ALO's resolutions are supported by the record as a whole.

ORDER

Pursuant to Section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: October 23, 1978

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Golden Valley Farming (UFW)

77-CE-32-D

77-CE-32-1-D

4 ALRB NO. 79

ALO DECISION

Respondent discharged an irrigation worker for allegedly taking a break in a manner inconsistent with company rules. Because of the nature of their work, irrigators do not take breaks at predetermined times but are permitted to "stand-by" during unscheduled interruptions in their work, provided that they remain standing or sitting.

The ALO credited a supervisor's account of having found the employee in question lying down with his hands under his head and observing him in that position for 15 to 20 minutes. The supervisor testified that the employee had been reminded of the rule and also warned about his work performance. The ALO discredited the testimony of the dischargee, and that of another employee-witness, that he had been sitting down for only a half minute while a tractor completed discing the row in which he had been working.

The ALO set forth a detailed analysis of his findings, based on the evidence and on his observation of the demeanor of witnesses, concluded that the employee had been discharged for cause, and recommended that the complaint be dismissed and that the Charging Party be ordered to reimburse Respondent for its litigation costs in defending this matter.

BOARD DECISION

In the absence of a showing of unlawful motivation for the discharge, and accepting the ALO's credibility resolutions, the Board affirmed the ALO's conclusion that the employee had not been discriminatorily discharged in violation of Labor Code Section 1153(c).

As to the award of litigation costs, the Board rejected the ALO's recommendation on the grounds that the issues raised by the complaint and the answer were not so lacking in merit that prosecution of the case could be characterized as frivolous.

BOARD ORDER

The Board ordered that the complaint be dismissed in its entirety.

* * *

This case summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
)
 GOLDEN VALLEY FARMING,)
)
 Respondent,)
)
 and)
)
 UNITED FARM WORKERS OF)
 AMERICA, AFL-CIO,)
)
 Charging Party)

Case Nos. 77-CE-32-D
 77-CE-32-1-D



Ricardo Ornelas, G.L.A.,
 of Fresno, California for the General Counsel

Gordon and Glade, by
 J. Richard Glade, Esq.,
 of Los Angeles, California for the Respondent

No appearance for the Charging Party.

DECISION

Statement of the Case

JAMES MOORE KING, Administrative Law Officer: This case
^{1/}was heard before me in Porterville, California, on August 29, 30, 31 and
 September 8, 9 and 10, 1977. The Notice of Hearing

^{1/} Case No. 77-CE-32-1-D is no more than an Amendment to
 Complaint filed on August 9, 1977, substituting the name "Miguel
 Castillo" for that of "Felix Adonis" in paragraph seven of the
 Complaint.

and Complaint was filed on August 1, 1977. The Complaint alleges violations of Section 1153 sub-sections (a) and (c) of the Agricultural Labor Relations Act, herein called the Act, by Golden Valley Farming, herein called the Respondent. The Complaint is based on charges filed on May 9, 1977, by the United Farm Workers of America, AFL-CIO, herein called the Union. A copy of the charges was duly served upon the Respondent; a copy of the Amendment to Complaint was also duly served. The Respondent filed its Answer to Complaint on August 8, 1977.

On August 29, 1977, at the hearing and pursuant to Section 20222 of the regulations of the Agricultural Labor Relations Board, the Complaint, paragraph 4, was amended to include the names of several additional persons as alleged supervisors of the Respondent.

All parties were given full opportunity to participate in the hearing, and after the close thereof the General Counsel and the Respondent each filed a brief in support of its respective position.

Upon the entire record, including a visit to the Woodlake M-95-96 ranch and especially including my observation of the demeanor of the witnesses and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Golden Valley Farming is a land management group with

operations in Kern and Tulare Counties, California. Its operations consist of cultural care, e.g., irrigation timing, spray and pest control, frost protection and fertilization for grape vineyards and fruit and nut groves owned by those individuals and corporations which hire the services of the Respondent. Accordingly, I find the Respondent to be an "agricultural employer" within the meaning of Section 1140.4(c) of the Act.

Miguel Castillo was an employee of the Respondent engaged primarily in irrigation and also in other cultural work as assigned by his foreman during the month of April 1977, among other times. I find him to have been during these times an "agricultural employee" within the meaning of Section 1140.4(b) of the Act.

I further find, based on the pleadings on file herein, that the Union is a "labor organization" within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The Complaint as amended alleges that the Respondent violated Section 1153(c) of the Act by the discriminatory discharge of Miguel Castillo. The Complaint further alleges in substance that by this same act the Respondent has violated Section 1153(a) of the Act.

The Respondent denies both that the discharge of Miguel Castillo was "because of his concerted activities in support for the UFW" and that said discharge constituted interference,

restraint or coercion of agricultural employees in the exercise of rights guaranteed by the Act.

A. The Operation of The Company

The Respondent operates twenty-eight independently owned ranches totaling approximately 4200 acres in Kern and Tulare counties.

One of the ranches is known as Woodlake M-95-96 (hereinafter, "Woodlake") and is shown graphically by Respondent's exhibits E and N; portions of that ranch also appear in photographs which are marked as Respondent's exhibits B-1, B-2, B-4 and B-5. The Woodlake ranch consists of 280 acres of navel orange groves except for smaller sections in the southwest and northwest devoted to tangelos and valencias respectively (Respondent's exhibit N). The ranch is situated in Kern County, bounded on the east by the Garces Highway (State Highway 65) and on all other sides by dirt roads separating other ranches from Woodlake. Woodlake is split into two blocks by a dirt road running east and west. The southern block is the larger of the two and is again divided into halves by an east-west dirt road. The Sabre M-63 ranch is contiguous to the southern block of Woodlake to the west.

A reservoir which serves as an irrigation source for Woodlake is situated in the southeast quadrant of the north block and next to the dirt road dividing the two blocks. This reservoir has the capacity to irrigate 160 acres, i.e.,

one irrigation unit at a time. The method of irrigation used in such a unit is known as a five-day drag line sprinkler system. The line is a hose with three to five sprinkler heads, about twenty feet apart, i.e., the distance between two trees in a row, on the line from each other. The hose is plugged at its far end while, the other end receives water from a riser to which it is connected. The riser, a piece of vertical pipe, is in turn connected to an underground lateral pipe which lays across the grove from one border of the irrigation unit to the other. Several laterals usually span one unit. One underground water main, with its source at the reservoir feeds the laterals connected to it. These laterals feed the risers connected to them. The risers break the ground surface close to the tree trunk so that the ground space between rows of trees is clear of permanent obstructions for the passage of tractors and other farm equipment vehicles.

Tactically placed, one sprinkler head can throw water a sufficient distance to quench the thirst of two adjacent rows of trees. Thus, in the process of irrigation, drag lines are placed between every other row of trees so that all trees in each and every row receive water.

This system is shown by Respondent's exhibit D, a drawing prepared by the witness Jim Cleland, Respondent's farm manager and in charge of all the business of the

Company.

While one irrigation unit is receiving water, the other is being prepared for irrigation. This preparation includes discing of the ground with a tractor. Inasmuch as the process of discing is essentially one of softening and aerating the earth as preparation for watering the soil through which the tractor pulls the rows of discs, simultaneous irrigation and discing do not seem to be compatible activities; there is always the danger of the discs shredding the irrigation hose.

Woodlake presented another problem for the workers of the Respondent. The slope of the land in the southern half of the south block sloped steeply up and away from the direction of the reservoir and toward the south. The slope of the land was so steep that when the Respondent first acquired the management contract for Woodlake in March 1977, it discovered that none of its tractors, neither the W/4000 nor the W/5000 had the weight or strength to work the discs up those southern slopes.

The Respondent attempted to remedy the situation by hiring a land leveling company to prepare those slopes for-irrigation by ripping the south slopes with a D8 Caterpillar. This ripping, however, did not chew and disc the ground as well as a tractor with discs; the water would not soak into the earth as thoroughly as if the ground had been chewed by

a discing tractor. Subsequently and after the termination of Miguel Castillo, the Respondent purchased a W/9000 tractor which proved to be powerful enough to disc the Woodlake south slope.

Irrigation is seasonal work, beginning in February or early March and lasting usually through late October or early November. Many of the agricultural employees, including Miguel Castillo, who irrigated the groves managed by the Respondent were seasonal workers.

According to the Respondent's hiring policy, an employee who had performed satisfactorily as a seasonal irrigator would be called prior to the beginning of work the following season and offered a job. Miguel Castillo had been called back at least twice since he was first employed as an irrigator by the Respondent in 1974.

At the time of Miguel Castillo's termination on April 12, 1977, the Respondent had no written policy with regard to the firing of agricultural employees. The company's unwritten policy was that

if it were a case where it was an extreme harmful or negligent act endangering other people's health and welfare, they'd be fired instantly.

If it was just not anything in regard to that, there would be at least three warnings and then he would be fired if he persisted to do the things he was warned not to do.

Unfortunately, the company's termination policy failed to

clearly address the question whether unsatisfactory incidents would cumulate against a seasonal employee from season to season.

Miguel Castillo was an agricultural employee who had entered this country illegally and had not yet changed his status. This fact was known to "Martin Mendoza who hired Miguel in 1977 in spite of a company policy against the hiring of known illegal aliens.

Golden Valley employed one farm manager previously identified as Jim Cleland. Martin Mendoza was the one field forman who reported directly to Mr. Cleland. The Respondent stipulated that Martin Mendoza was a supervisor within the meaning of Section 1140.4(j) of the Act. He had the authority to hire, fire and reprimand agricultural employees. Raymond Quesada and Marcello Mendoza worked as assistant field foremen under Martin Mendoza.

The parties stipulated that Quesada was also a supervisor. By reason of his exercised authority to direct and fire agricultural employees, I find that Marcello, too, was such a supervisor during these beginning months of the 1977 irrigation season. ^{2/}

B. The Employment and Discharge of Miguel Castillo

Miguel Castillo first began working for the Respondent

^{2/}Although Marcello did have the authority to fire agricultural employees, company policy dictated that he consult with Martin prior thereto.

on August 19, 1974 as an irrigator. His work was seasonal; in addition to working as an irrigator he did brief stints as a tractor driver and a sprayer. According to Martin Mendoza, Castillo was a "good person; [knew] his job, good worker" and worthy of a favorable recommendation as an irrigator. For at least two years Martin called Miguel back to work for the irrigation season; he was re-hired again for the 1977 season following a telephone call and face-to-face meeting with Martin in Martin's pickup truck sometime during February 1977.

Castillo testified that Martin called him and wanted to talk with him alone, just the two of them. At the meeting, according to Castillo, Martin explained: That he was going to re-hire Miguel but he was not sure it would be to Miguel's advantage because the job was going to be on the hills and far away; that he wanted to tell Miguel this because he knew Miguel was working close to Porterville and the new job was far away, but Miguel was" the only one who knew more about that kind of irrigation. Castillo had nothing further to say concerning this conversation.

Martin's version of the conversation and its purpose was substantially different. Martin testified that he called for this meeting because, as he told Miguel, he wanted to get something straight now about Miguel having taken extended lunch breaks of about one hour to one and a

half hours instead of the allowed half hour, during August and November 1976. Martin also said that inasmuch as he considered himself to be Miguel's "real good friend" and provided further that he got no feedback, he would let it go.^{3/} Nevertheless, Martin testified that he knew "it was getting to the point where in '77 [Miguel] wouldn't perform right on this if it happened again the way he was doing it."

Other supervisors testified without contradiction about their problems with Miguel Castillo's activities on the job. Raymond Quesada, an assistant field foreman for the Respondent during the months of February through April 1977, and in charge of an irrigation crew of which Miguel and Miguel's father were members, testified that on one occasion he observed Miguel and the father sitting down and talking on the job in one of the Jasmin fields when they should have been working. Quesada testified that he warned Miguel about this incident.

Marcello Mendoza testified that twice he caught Miguel sitting down at times when breaks were not authorized. One of the times was near the reservoir on Woodlake. Miguel was sitting down about 3:30 p.m.; according to Marcello the afternoon break usually came about 2:00 or 2:30 p.m. when

^{3/} Unbeknownst to Miguel, Jim Cleland had already expressed his own dissatisfaction to Martin with Castillo's extended lunch breaks, prior to this conversation in the pickup truck.

the sun was hotter. Marcello testified that Porfirio Monteon, an agricultural employee of Respondent, was present on this occasion. Senor Monteon testified subsequently to Marcello; Porfirio was not questioned on this point, nor did he deny or explain this occurrence.

Although he admitted that it was "up to the individual employee to decide when he's going to take a break," Marcello explained that "we can count if they're going to take the break, they have to take it--everyone and not having one of the workers here and there and there taking a break at different times all over the grove."

The other time happened in the middle of a 6:00 a.m. to 12:00 noon span when Miguel was working with his father. The two of them had been working with two others earlier, but now were lagging behind. Marcello testified that he "saw Miguel he was in the middle of the row and he was sitting down."

Miguel's father, Honorato Castillo, also known as Pedro Hernandez, did not testify at the hearing. Castillo confirmed the fact that at times he and his father had worked on the same crew, but had been subsequently separated.

Miguel Castillo did not deny that any of these incidents did occur, although he was in the witness chair for an extensive and repetitive interrogation by both counsel. Castillo countered these "charges" by stating that his supervisors, Martin and Marcello, never gave any breaks--

they never ordered a break. However, Miguel did admit that if and when workers did take breaks in the field, they could not be sitting or laying down.

Martin explained that there was no laying down allowed during breaks. He added that everytime the workers would come out from irrigating a line of trees in the grove, the workers would get five or ten minutes; that by the time the workers had been given water their break time had been consumed and that when they had to be transported to another ranch or block twenty or twenty-five minutes would pass. Other than general denials of getting breaks, Martin was not refuted in this specific testimony.

Miguel's work as a tractor driver was also the subject of unrefuted criticism. One day Miguel neglected to keep the oil tank full on a newly overhauled tractor in spite of the fact that he had been previously informed by Raymond Quesada that it was his job to do so. Both Raymond and Marcello observed during the day that the oil level was several quarts low and that it had not been kept up as it should have been.

On another occasion someone reported that Miguel had driven the tractor over a company orange crate and crushed it. No one who testified at the hearing actually saw the incident. Miguel denied that he crushed the box and volunteered that someone else had done it. Apparently Martin, when informed of the incident did not consider it significant

enough to merit the filing of a report. "It was a broken bin and I just let it go as a broken bin," he said.

Miguel testified that on one particular afternoon just four or five days prior to his termination he tasted bad drinking water from Marcello's truck. Afterwards he told Marcello to change the water in the afternoon so there would be fresh water the next day. Apparently Marcello had already changed it for Miguel indicated that Marcello said he had changed the water, that maybe something was wrong with the container. "So," Miguel said, "I told him that maybe we were going to have to bring the union in so we could have better water here."

April 11, 1977, proved to be a fateful day for Miguel Castillo, for on that day he was involved in an incident which led directly to his termination from the Respondent company at noon on April 12th.

Marcello Mendoza was driving through the Woodlake Ranch about 4:00 p.m. looking for his crew to give them water. Marcello did not see any of his crew so he drove to the south and up the slope to the high road which was the southern boundary of the Woodlake Ranch. He drove along that road looking to the north down the slope until he came to a point where he could see Miguel Castillo laying down in the grove about eighty to one hundred yards away. Marcello turned off the truck's motor after about ten minutes and waited another ten before honking his horn to rouse Miguel.

During these twenty minutes Marcello began to fill out his daily time sheets which he had not completed since the morning. About a minute before he honked the horn, Marcello saw Jose Silva, Miguel's irrigation partner, about thirty yards from where he was sitting in his truck. Silva was walking from the west to the east and was trying to signal Miguel by whistling as he himself was walking at an angle up the slope toward the truck. "Miguel Castillo finally looked up and saw the pickup there and got up, laughing, shaking the dirt off his clothes, shirt and pants and started walking up," Marcello said. Castillo and Silva met about ten yards from the truck and walked towards it together. Marcello noticed as he was looking towards Miguel that the wind was blowing into his face from the north to the south and away from where Miguel had been laying down. This fact told him that Miguel probably did not hear his truck motor's idle when he first arrived.

At first, upon reaching the truck, both Miguel and Jose Silva continued laughing and began to drink water--then Marcello spoke up. He asked Castillo what was happening that he was laying down sleeping. Miguel said he was just resting. Marcello told him that to lay down he didn't think it was right. Jose attempted to but into the conversation; Marcello told him to shut up. Both Miguel and Silva got angry and Castillo said, "you are a shitty foreman; you

don't have the power to run me out for being laying down."

Marcello countered, "look I think I have the right with all the warnings that I gave you, I have the right to fire you."

Marcello was upset that after laying down for twenty minutes Miguel came to the truck laughing with Jose Silva. "You still come in here making fun of it." Marcello was concerned that the irrigation work, so badly needed in that block, was not being done.

After this argument Marcello transported both men to the Woodlake reservoir where they met Juan Orona, who had parked the tractor there, and Porfirio Monteon. Since Monteon's car was parked at the reservoir and Orona was riding with him, Marcello took the other two across Highway 65 to where Jose Silva's car was parked.

All the men got out of the truck. Miguel asked Marcello not to mention this incident to Martin, but Marcello said he would. He said, "well, Miguel, how many times do you want me to shut my mouth and I gave you several warnings and now, I caught you when you were laying down." Miguel asked if he were going to be fired; Marcello responded that he didn't know and would talk to Martin first.

At that point both Jose and Miguel became angry again and Miguel threatened, "if I'm going to fall, someone else will fall with me." An argument ensued between-Marcello and Jose and Miguel concerning what would happen to Respondent's agricultural employees should "Immigration" be called and

advised that certain of the workers were illegal aliens. The argument ended with Jose telling Marcello to forget about it, he and Miguel were only joking. Marcello did not take it as a game. The workers left in Jose's car.

When questioned by the hearing officer, Miguel Castillo stated flatly that there was no conversation at all between he and Marcello when the men got out of the truck.

Marcello called Martin on the two-way radio shortly after the incident to explain what happened; both met between two of the Jasmin ranches to discuss the matter. Martin suggested the Jasmin meeting because he "didn't want it said over the radio." After learning what happened Martin went to the office and "saw Jim Cleland there and [he] told him about the situation and [Cleland] advised [him] to let the man go."

Later that evening Marcello went to Martin's house, again told him what happened and asked what should be done, "fire Miguel or what." Martin said, "Yes, you should fire him right away-right in that moment." Martin then decided to send Raymond Quesada at noon the following day to deliver to Miguel his final paycheck and the message that he had been fired. Martin assigned Quesada for this job because Martin was so close to Miguel that he felt that Castillo would probably have convinced Martin to give him his job back. Martin felt that Miguel would have the same influence with Marcello. The next day Raymond Quesada delivered the

check to Miguel as planned. Quesada did not tell Miguel why he was fired; that information Miguel found out later in the day from a secretary in Respondent's office. "The secretary told my wife that because they found me that I was sleeping."

DISCUSSION OF ISSUES AND CONCLUSION

This case presents no novel or contested legal issues regarding the alleged unfair labor practice. The dispute is basically factual; the central issue being one of credibility concerning the "laying down" incident of April 11th. I credit the testimony of Marcello Mendoza in this regard and discredit that of both Miguel Castillo and Jose Silva. My observation of Marcello's demeanor, i.e., the conviction borne by the modulation of his voice while testifying during the final day of the hearing, is one of the reasons for believing his version of the incident. Nevertheless, my factual determinations are not based solely on such testimonial inferences but also upon inferences derived from the evidence itself as contained in the exhibits and transcripts of the hearing. See generally, Penasquitos Village, Inc. v. N.L.R.B., 565 F.2d 1074 (9th Cir. 1977).

Miguel Castillo denied that he had been laying down in the grove on the day in question; rather, he stated that he had just sat down for about one-half minute after waiting around for several more, when he heard the horn blast of Marcello's truck and saw him wave with his hand from the road at the south side of Woodlake.

Jose Silva, the agricultural employee who was teamed with Castillo, said that Miguel did not lay down at any time that day.

Miguel's denial is coupled with an explanation which relies heavily upon the presence in the immediate vicinity of fellow-worker Juan Orona driving a company tractor. According to Jose Silva, Marcello had instructed both he and Miguel to wait when they caught up with Juan's tractor so that the tractor could pass and Jose and Miguel could then reverse the hoses without their being laid out in the path of the oncoming tractor and ripped to shreds.

The problem with this version of the afternoon's events lies in the contradictory tale told by Juan Orona's Daily Time Register (Respondent's exhibit L). As described in Respondent's brief,

[t]he daily time register was prepared by each employee and occasionally with the help of his family or assistant foreman. This document was the basic record used to compute each worker's pay

On page two of Orona's time register, the entry for "4/11" indicates that Orona was "Discine Traytor", i.e., "discing with the tractor" on the Sales 63 ranch from 6:00 a.m. to 4:30 p.m. Orona's wife Maria testified that she made this entry at her husband's direction when he came home at the end of work that day. Mrs. Orona said that her husband's understanding of where he was working was usually based upon information received from the company's foremen.

Although Jaun Orona's testimony is quite confusing, in spite of awkward attempts at clarification by all three lawyers present, nowhere does he either directly or by clear implication deny the correctness of his daily time register with which he was confronted. Since Juan Orona was not working on the Woodlake ranch, as his daily time register indicates that he was not, the credibility of Castillo and Silva must suffer insofar as they rely upon the tractor's presence to explain their claimed momentary respite in the grove.

Yet Orona's register is not the sole evidence weighing against Castillo's and Silva's version of what happened. Respondent introduced additional credible evidence in the form of testimony from Marcello that the two tractors which the Respondent owned, during the time Miguel was employed, were not capable of discing on the hilly southern slope of Woodlake ranch. Marcello, with eight years experience as a tractor driver, testified without contradiction that not until after Miguel's departure did the company purchase a big "9000" tractor with the capacity of pulling discs up those slopes. In the face of these combined pieces of evidence the General Counsel has failed to show by a "preponderance of the testimony" that it was more likely than not that Juan Orona was discing with a tractor on the south side of the Woodlake ranch in the late afternoon of April

11, 1977.

Miguel himself admitted that, in anger, he told Marcello immediately after being accused of laying down and prior to getting into the foreman's truck for a ride to his friend's car and the trip home, "[t]hat I accept to be fired if it was necessary." If Miguel were not, in fact, laying down for the extended period of which he was accused, it is not probable that he would utter such a spontaneous statement. The fact that he admitted to this angry utterance is persuasive evidence that he was, in fact, laying down on the job.

Another fact which militates against the strength of Miguel's credibility is the contradiction between his and Martin's version of their February 1977 conversation in Martin's pickup truck. There is little sense to have a private out-of-the-way meeting for the purpose related by Miguel, *supra* at page 9; whereas a private meeting is more consistent with Martin's testimony that he took the opportunity to reprimand Miguel and warn him about future transgressions. This damage to Miguel's credibility cannot be ignored when considering his credibility on the "laying down" issue.

The fact of Miguel's status as an illegal alien was known to Martin in advance of his hiring Miguel in the late winter of 1977. That Martin was contravening an acknowledged company policy was revealed at the hearing. Martin's ambivalent

feeling about hiring Miguel was also evident, supra at pages 9 and 10. Furthermore, the several warnings for slothfulness which were given to Miguel Castillo by Martin, Marcello and Ramon Quesada were not contradicted by any of the witnesses called by the General Counsel.

The fact that the managerial responsibilities of the Woodlake ranch had been recently acquired by the Respondent and that the groves had up until then not been properly cared for is well supported in the transcripts. This circumstance of course would tend to make the Respondent's supervisors more concerned than might usually be expected to see that the irrigation work on that ranch was accomplished with alacrity.

The combination of these factors: to wit; Martin's expressed ambivalence based both on Miguel's status as an illegal alien and the prior incidents of slothful performance; the special need to irrigate the Woodlake ranch with dispatch and especially the unique circumstances of Miguel's April 11th transgression, is cogent evidence that the Respondent had a legitimate reason to terminate Miguel.

Nevertheless, can it be said that Respondent's act of termination was contrary to the Act in that Respondent did discriminate against Miguel in regard to his tenure with Golden Valley Farming in order to discourage membership in the Union?

The General Counsel argues that "there can be no doubt

that Respondent had knowledge of Castillo's union activities and support." He points to Miguel's assertion that he visited the homes of fellow employees Fernando Cortez and Raphael Gomez for the purpose of discussing the union "[s]o maybe that way we can get a raise or better wages, yes." Neither the General Counsel nor Respondent's attorney asked Cortez, during his testimony, whether Castillo had ever made such a visit, nor did Cortez indicate that such had occurred. On the other hand, Raphael Gomez denied that Castillo, while employed by Respondent, had ever talked with him about the union at Raphael's home or at work. I did not find his testimony credible in this regard. I make this judgment considering my observation of his demeanor and Miguel's testimony to the contrary.

However, none of the supervisors admitted being informed of Miguel's union membership or activities by these or any other witnesses or workers. Moreover, this record does not support any conclusion or inference to be drawn from the testimony, that it was more likely than not that Respondent had knowledge of Castillo's home visits in support of the Union. Therefore, the General Counsel's allusion to the Small Plant Doctrine as applicable in this regard is not well taken. The doctrine has no application to off-hour, off-the-premises meetings. See Bill's Coal Company, Inc. v. N.L.R.B., 493 F.2d 243, 247 (10th Cir. 1974).

The General Counsel attempted to establish the anti-

union animus of Respondent's supervisor Jim Cleland by calling forth testimony that a pro-Proposition 14 sticker had been ripped from the bumper of Fernando Cortez' car upon a visit to Cleland's private ranch. But Cortez did not recall being immediately present when the incident occurred; he could not state for certain who did it. The culprit's identity did not long remain a mystery, for Benny Cannella, a friend of Cleland's and presumably both a staunch opponent of Proposition 14 and an advocate of private property rights, admitted interfering with those of Cortez while visiting Cleland's ranch, when he said he tore from that bumper a "Vote Yes on Proposition 14" sticker! Thus, this incident cannot support a finding that it was more likely than not that Jim Cleland or the Respondent harbored an anti-union animus.

Insofar as Martin Mendoza is concerned, the conflicting evidence could, at best, support an inference that he knew from the pro-union bumper sticker on Miguel's car, the sight of Miguel's Union authorization card and an application of the "Small Plant Doctrine" to the "bad water confrontation" between Miguel and Marcello that Castillo harbored pro-union sentiments. Even though Martin probably became aware in February 1977 (if not earlier), as the General Counsel claims, that Miguel stood for the Union, I am not convinced by the requisite degree of proof that his assent to Marcello's firing of Miguel was an unfair labor practice.

The only fact which the General Counsel could arguably put forth as support for a charge that Martin Mendoza harbored anti-union sentiments would be his assent to the firing of Miguel in relation to when he became aware of Miguel's pro-union status. Two situations are here relevant. First, the General Counsel himself asserts that Martin knew of Miguel's pro-union status upon initial hiring when Miguel showed Martin his Union authorization card, approximately two months prior to Miguel's dismissal. Second, the General Counsel points out that within a week after Miguel placed a pro-union sticker on the bumper of his car he was terminated. However, no one can deny that it was immediately after Miguel was found laying down on the job that Martin assented to his termination. The only reasonable inference that can be drawn from these facts is that the most influential factor behind Martin's assent was not an anti-union animus, but a belief, based on the report to him that Miguel had been caught laying down in the grove, that Castillo was loafing on the job to an impermissible degree.

Marcello's anti-union animus was obvious from the record. He did not categorically deny Miguel's assertion that, with regard to the "bad water confrontation", he had been heard to say to Miguel "why [you] want the union just to get better water if [you're] going to get a sack of flour for \$20.00?" and that Porfirio Monteon, the recognized

leading union sympathizer, could "be put out of work."
Indeed, Marcello freely admitted to his dissolutionment with the Union based on his desire not to involve himself further with what he believed to be Union-sanctioned criminal activity. However, the fact that the supervisor who fired Miguel had anti-union sentiments does not of itself prove that the firing was in furtherance of that motive.

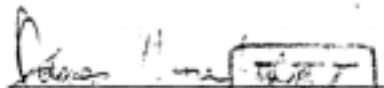
On balance, while Martin felt that Miguel's firing was without the prerequisite three warnings, a feeling disputed by the combined number of warnings given by Martin, Marcello and Raymond Quesada, the circumstances of Miguel's laying down on April 11th, the numerous warnings for sloth, the acute need to irrigate the Woodlake ranch with dispatch, Miguel's spontaneous angry utterance and the other factors bearing on Martin's assent convince me that the General Counsel has not proven by a preponderance of the testimony that it was more likely than not that Miguel was fired because of his alleged Union membership and/or union activities, See Valhi, Inc., aka Southdown Land Company, 4 ALRB No. 1. In sum, Miguel's statement at the time of his initial confrontation with Marcello over his laying down, that "I accept to be fired if it was necessary," was not so much the words of a poor ne'erdoowell as the angry utterance of a proud man caught napping.

THEREFORE, upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to

Section 1160.3 of the Act, I hereby recommend that the allegations of the complaint charging violations by Respondent of Section 1153(a) by interfering with, restraining and coercing Miguel Castillo because of his concerted activities and support for the Union, and of Section 1153(c) by discriminating against Miguel Castillo in regard to the tenure of his employment to discourage membership in the Union, be dismissed.

Inasmuch as the outcome of this case was in doubt until the final day's testimony, I recommend that no attorney's fees be awarded to the Respondent, although they should recover their costs.

Dated: March 29, 1978

A handwritten signature in dark ink, appearing to read "James Moore King", written over a horizontal line. The signature is somewhat cursive and includes a date "3/29/78" at the end.

JAMES MOORE KING
Administrative Law Officer