

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ALBERT C. HANSEN, dba)	
HANSEN FARMS,)	
)	Case No. 77-CE-35-M
Respondent ,)	
)	
and)	
)	4 ALRB No. 87
ANTONIO VILLASENOR,)	
)	
Charging Party.)	
_____)	

DECISION AND ORDER

On January 13, 1978, Administrative Law Officer (ALO) Barry J. Bennett issued his attached Decision, wherein he recommended that the complaint in this proceeding be dismissed in its entirety. Thereafter, the General Counsel and counsel for the Charging Party each filed exceptions and a supporting brief and Respondent filed a reply brief.

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.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO, and to adopt his recommendation that the complaint be dismissed in its entirety.

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: November 1, 1978

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Albert C. Hansen, dba
Farms (Villasenor)

Case No. 77-CE-35-M Hansen
4 ALRB No. 87

ALO DECISION

charging Party, Antonio Villasenor, was employed by Respondent as a counter and loader of green onions. On August 11, 1977, he was discharged after receiving a fourth warning slip, under a system where four warning slips within the same year was grounds for termination. The basis for the fourth warning was Villasenor's 100-dozen counting error in his own favor. Villasenor's previous warning slips were the result of an unexcused absence (June 14), leaving his counting punch at home (June 22), and a 30-dozen counting error, also in his own favor (June 28).

Relatively few counting errors resulted in warning slips. Those that were detected could result in an oral admonition only, and at least two did. The two counting errors for which Villasenor received warning slips were relatively large. He had made other such errors for which he did not receive written warnings.

The ALO found that Villasenor was engaged in concerted activities during the relevant period and that Respondent had knowledge, without necessarily knowing the details of his opinions, that Villasenor was actively discussing unions with other members of his crew.

Although he believed the timing of Villasenor's receipt of warning slips suggests a causal connection, the ALO found that the General Counsel had not established a prima facie case. The ALO's decision in this regard rested largely upon the fact that, although the other punchers had made substantial counting errors that did not result in written warnings, the General Counsel failed to produce evidence demonstrating that the errors were detected by Respondent's office personnel. Such detection would have to occur in order to trigger the warning system carried out by Respondent's supervisors and foremen.

The ALO recommended that the complaint be dismissed in its entirety.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALO, and adopted his recommendation 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.

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

STATE OF CALIFORNIA

_____))
In the Matter of:))
ALBERT C. HANSEN, dba))
HANSEN FARMS,))
Respondent,) ase No. 77-CE-35-M
and))
ANTONIO VILLASENOR,))
Charging Party.))
_____)

Robert Farnsworth, Esq., of Salinas, California
for the General Counsel

Abramson, Church and Stave, by Arnold B.
Myers, Esq. of Salinas, California
for the Respondent

Antonio Villasenor, pro per for the Charging Party

DECISION

Statement of the Case

BARRY J. BENNETT, Administrative Law Officer: This case was heard before me in Salinas, California on November 21, 22 and 23, 1977. The complaint in this matter was issued by the Regional Director of the Salinas Regional Office on October 20,

1977 to the Respondent, and the Complaint and Notice of Hearing^{1/} was served on Respondent by mail on October 21, 1977. The Complaint alleged that Albert C. Hansen, dba Hansen Farms, Inc. (hereinafter the "Respondent"), by its supervisor and agent Gilbert Lopez, violated Sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter the "ALRA"). The complaint is based on a charge filed by Antonio Villasenor on August 16, 1977.

At hearings held on the dates above mentioned, the General Counsel and Respondent appeared through counsel. The Charging Party was present and entered an appearance on his own behalf. All parties were given the opportunity to and did produce, examine and cross-examine witnesses and produce exhibits relevant to these proceedings.^{2/} At the close of hearings the parties were apprised of their right to file briefs in this matter, and both the General Counsel and the Respondent did so.^{3/}

1/ The signature and date pages of the Notice of Hearing were missing from General Counsel's Exhibit 1. The Respondent waived its objection to this defect, and the documents were received in evidence.

2/ Mr. Villasenor, who is not an attorney and does not speak or understand English, did not produce or examine witnesses, nor did he produce exhibits, though given the opportunity to do so. All questions, testimony and colloquies between counsel and the Administrative Law Officer were translated for Mr. Villasenor.

3/ At the close of the hearings, the Respondent requested that the Administrative Law Officer make his copy of the record of this matter available to it. The Administrative Law Officer requested the opinion of the Executive Secretary with regard to Respondent's request, and was advised, by letter dated December 5, 1977, that he could not do so. The Respondent's request was premised on its assumption that the General Counsel would receive a free copy of the record prior to the issuance of this Decision. Apparently this assumption is not valid, however.

Upon the testimony given at hearings, the exhibits presented and upon ray observations concerning the demeanor and credibility of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

The General Counsel's Complaint alleged, the Respondent admitted, and I find that Respondent is a sole proprietorship engaged in agriculture in Monterey County. I therefore find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the ALRA.

The Complaint of the General Counsel alleged, Respondent on information and belief admitted, and I find that Antonio Villasenor was an agricultural employee within the meaning of Section 1140.4(b) of the ALRA.

II. The Alleged Unfair Labor Practices

The Complaint alleges that Respondent violated Section 1153(a) and (c) of the ALRA by discharging Villasenor for engaging in protected concerted activity and has failed and refused to reinstate him.^{4/} The Respondent in its Answer admitted the supervisory status of Gilbert Lopez ^{5/} but denied Lopez's agency relationship with Respondent and denied all allegations of wrongdoing. At hearing Respondent moved for nonsuit, at the close of General Counsel's **case**, and also requested that the Administrative Law Officer award costs and fees against the General Counsel in favor of Respondent, based on what counsel for Respondent referred

4/ There was no testimony given regarding any demand for reinstatement by Villasenor or anyone on his behalf. This factor is not relevant to other aspects of this matter.

5/ At the close of hearings, the General Counsel and Respondent parties stipulated to the supervisory status of Jesus Lopez, one of Respondent's foremen.

to as "harassment by the General Counsel."

A. The Respondent's Operations

The Respondent raises, inter alia, green onions. By stipulation of the parties, it was agreed that the onions are picked mechanically and left on the ground, whereupon "bunchers" shake dirt from the onions and place the onions in bunches according to size, each bunch being wrapped in a rubber band. The bunches are then piled in dozens. At that point, persons employed as "punchers" or "counters" count the dozens of bunches and record the number of dozens counted on green cards supplied by Respondent to each buncher. The cards (Joint Exhibit One) consist of two identical halves, arranged so that if one punches a number on one-half of the folded card, that number will be punched on the other half. In that fashion both the bunchers and the Respondent's office have the same record of how many bunches have been assembled .6/ In addition to punching the number of dozens on each card, the puncher keeps a written tab on the back of the card. Thus each time a puncher, or counter, counts the number of dozens a person has bunched, the puncher both writes that number on the card, adds to the written total already on the card, and punches the new subtotal. To provide identification, each buncher has his or her name on that day's card and each puncher is assigned a letter which he or she writes next to each number of dozens of bunches on the back of the card.

B. Villasenor's Employment

Villasenor was employed by the Respondent during the 1976 and 1977 onion season. During 1977, at least, he worked as a puncher, and also did some loading.

On August 11, 1977, Villasenor was fired by Respondent's supervisor Gilbert Lopez allegedly for punching 172 dozens

6/ The bunchers are paid according to how many dozens of bunches they assemble. The punchers are paid by the hour.

on a card when the final total should have been 142. The Respondent had a warning slip system whereby employees would receive warning slips, or tickets, for various infractions; upon the receipt of a fourth ticket in the same year, an employee was fired.

Villasenor had received three previous tickets during the 1977 season. On June 14, 1977, he received a warning slip, from Gilbert Lopez, for an "unexcused absence from work." On June 22, 1977, Villasenor was ticketed, again by Gilbert Lopez, for "unsatisfactory work" in that Villasenor apparently had left his card punch at home.^{7/} On June 28, 1977, Villasenor was ticketed by Gilbert Lopez for "punching too many [sic] doz. on a employee's card, not paying attention to his job." From the evidence submitted (Employer's Exhibit 4), it appears that on June 27, 1977, Villasenor had punched "186" dozen on a card when he should have punched only "86."

Villasenor was also active, in 1977, in talking to his fellow workers about their need for a union. He spoke with other workers in the fields on many occasions and was an active, at least vocally, proponent of unionism. Regardless of whether Respondent or its agents knew of Villasenor's activities (see infra), there is little question that he did often talk to his fellow employees on the subject of unionization.

III. Presentations of the Parties

The General Counsel alleged in its Complaint and endeavored to show through testimony that Villasenor's discharge was based, in whole or in part, on his pro-union activity. It was Villasenor's testimony, corroborated to some extent by other witnesses, that Respondent's foreman Jesus Lopez was in Villasenor's vicinity when Villasenor was espousing the cause of unionism. As the General Counsel would have us believe, Jesus Lopez overheard Villasenor talking about unions, reported those conversations to supervisor Gilbert Lopez, and the discharge of Villasenor was

^{7/} Punchers used a punch supplied by Respondent — the punch was distinctive, and its peculiar incision was the only hole recognized for payment purposes.

then arranged.

In further support of the General Counsel's contentions, witnesses testified that the Respondent's policy with regard to mistakes made in punching numbers on cards was that such errors would not be made the subject of warning slips or tickets. Errors were frequently made, on almost a daily basis, and were dealt with by supervisory personnel, who pointed out the errors and urged the punchers to be more careful. Villasenor himself stated that he frequently made errors, but that he was not given any warning slips until 1977 when, and only after, he began urging his fellow employees to consider unions.

The Respondent's supervisory witnesses, Gilbert and Jesus Lopez, denied any knowledge of Villasenor's union advocacy or activities, acknowledged that many punching errors were not treated as "ticketable" offenses, but claimed that the two mistakes for which Villasenor was ticketed were egregious errors and required discipline, even discharge on the issuance of the fourth warning slip.

IV. Discussion and Conclusions

At the close of hearings, the Administrative Law Officer stated to the parties that, in order to prove its case, the General Counsel would have to sustain its burden of proof as to each of four factual elements:

1. That the Charging Party engaged in protected concerted activity;
2. That the Respondent knew of such activity;
3. That the Respondent acted in a discriminatory manner toward Charging Party; and
4. That there was causal connection between the Respondent's discriminatory act and Charging Party's concerted activity.

For purposes of clarity, each of these elements will be discussed separately.

1. Villasenor's Concerted Activities

As indicated above, I am convinced that Villasenor did, in fact, speak to other workers about unions on several occasions. Villasenor so testified and the Respondent did not challenge him on cross-examination. While Villasenor did state that he neither wore union insignia^{8/}, passed out union literature nor made speeches to assembled groups of employees, his testimony that he did engage in numerous private conversations with other employees, in the fields, is credited.

2. Respondent's Knowledge of Villasenor's Activity

In support of the General Counsel's contention that Respondent was aware that Villasenor was actively promoting the benefits, to employees, of unionization, Villasenor testified that supervisor Jesus Lopez was present on more than one occasion when Villasenor spoke to other employees about unions. Villasenor stated that Jesus Lopez overheard him (Villasenor), and that "many times....we talked with him." Villasenor denied speaking to workers in 1976 about unions at all, and denied talking on that subject while workers were present. On cross-examination, Villasenor repeated his assertion that Jesus Lopez heard him talk about unions. Villasenor added a recollection, not mentioned in the Complaint or in his previous testimony, that Gilbert Lopez had told Villasenor, in April, 1977, to "get" some workers and that either the workers or Villasenor, it was not clear which, should not be "Chavista".

Corroborating Villasenor's testimony, General Counsel witness Frias, an employee of Respondent, testified that he had spoken with Villasenor about unions and that Jesus Lopez had been present. On cross-examination, Frias repeated his assertion that Jesus Lopez was in the vicinity, checking bunches, while Villasenor and Frias were discussing unions. Employee Manzo further corroborated this testimony, as did employee Perez Gutierrez.

Respondent, for its part, produced Gilbert Lopez and Jesus Lopez, the two supervisors alleged to have been

^{8/} Witness Luis Perez Gutierrez, called by the General Counsel, testified, on cross-examination and during examination by the Administrative Law Officer, that Villasenor wore a union button, with "a small eagle" on it, to work. Villasenor did not attempt to rebut this apparent inconsistency.

management's active agents in this matter, and both men flatly denied knowing anything about Villasenor's union sentiments or activity. Respondent witness Sisneros recalled conversing with Villasenor about unions, while foremen and supervisors "probably" were nearby.

Based on the foregoing, and crediting all the testimony produced by both parties on this issue, it is my conclusion that Respondent's supervisor Jesus Lopez, and, therefore, the Respondent was aware, without necessarily knowing the details of Villasenor's opinions^{9/}, that Villasenor was actively discussing unions with other members of his crew.

3. The Alleged Act of Discrimination

The General Counsel contested neither the general applicability of Respondent's 4-warning system nor the specific warnings given Villasenor for missing work and for leaving his punch at home. The heart of this issue, which becomes the heart of this decision, then, is whether Respondent's issuance of warning slips to Villasenor for punching errors amounts to a discriminatory act or acts.

It was not disputed at hearing that mistakes on the punch-cards were generally dealt with by Respondent's supervisors on the day following the date of the error – the only exception would occur when one of the bunchers would notice a mistake on his or her half of the card and bring it to someone's attention immediately. Normally, errors were called to supervisor Gilbert Lopez's attention by office clerical employees in Respondent's main office. These clerical employees routinely checked the cards^{10/} for errors in addition or in punching and, when they found errors, would notify Gilbert Lopez on his routine morning visits to the office. Lopez then took photostats of the erroneous cards, discussed them with his foremen, and the offending puncher was then contacted. It is at this evidentiary point that the parties differ.

^{9/}There was testimony that Villasenor did not advocate any particular union in his discussions.

^{10/} There was no testimony concerning these checks – consequently we do not know whether they were spot checks or card-by-card, etc.

Villasenor, and several witnesses for both parties, testified that not all counting or punching errors were dealt with as subjects for discipline. If such mistakes had always been cause for the issuance of a warning slip, Villasenor stated, everyone could have been issued "five or seven tickets", and presumably fired. In 1976, Villasenor recalled, he had made just as many punching errors, had not talked to workers about unions 11/, and had not been given any warning slips. Numerous witnesses testified, from their own experience and incidents that they had observed, that the bulk of purchasing errors were treated as matters for counselling, not discipline, and that warning slips were infrequently given for such mistakes.

From this testimony, the General Counsel contends, an inference of discrimination naturally flows. Since many punchers err but few were ticketed other than Villasenor, we are urged to ascribe a motive to the selective use of discipline, particularly in light of the sequence of warning slips so soon after Villasenor began his active pro-union campaigning.12/

Not so, claims the Respondent. Respondent's supervisors testified that they had, in the past, given out warning slips to employees for punching errors -- they could remember no names, however, and only one witness (Coronel) was produced who had received such a slip. General Counsel's witness Luis Perez did admit, on cross-examination, however, that Gilbert Lopez had threatened to fire him at one time, apparently for errors in punching; Perez was demoted to the buncher position. Villasenor also stated that Gilbert Lopez gave out tickets for mistakes. The Respondent contended that, like other punchers, Villasenor had many -mistakes which resulted in counselling only, and not discipline.13/ The reason for the use of discipline in the two incidents involving Villasenor, the Respondent submitted, was that errors of 100 dozen and 30 dozen were large and serious

11/ Witness Luis Perez disputed this fact, testifying that Villasenor had talked about unions in 1976, but that he had been more secretive.

12/ Villasenor testified that he began talking about unions in June, presumably of 1977. The warning slips began to issue on or about June 14.

13/ Villasenor never refuted Respondent's contention that he had been cautioned many times about mistakes.

errors^{14/}, requiring sterner measures.

Both parties produced punch cards as exhibits. The General Counsel introduced a series of cards which purported to show that other punchers had made mistakes equal to or greater than Villasenor's 30-dozen error. The Respondent then introduced a number of cards, admittedly compiled by Gilbert Lopez for purposes of the hearing, which purported to show that Villasenor had made numerous errors which were not the subject of discipline. All such documents were admitted, despite the contention of Respondent that none of the cards was competent evidence unless it could be shown that any of them had been brought to Gilbert Lopez's attention by the office clericals who checked the cards each morning. Respondent argued that only those punch cards which were shown to Gilbert Lopez by the office staff could possibly have precipitated either counselling or discipline, so that literally dozens of cards with mistakes on them might have "gotten by" the office clericals and thus would not have been the subject of supervisory comment of any sort.

In a sense, this entire case pivots on that missing evidence. I frankly find it difficult to accept Gilbert Lopez's loss of memory concerning the names of any employees to whom warning slips were given for punching errors. Given the fact that Respondent apparently maintained files containing copies of the warning tickets, it also seems significant that only one ticket was produced, other than those given to Villasenor, in which an employee was given a formal warning for a punching error. ^{15/} These evidentiary failures, under other circumstances, might have to be construed adversely to the party in possession of the missing information.

14/ Gilbert Lopez testified that the choice between counselling and disciplining employees because of punching errors was made based on the seriousness and/or frequency of errors, with some accounting given to whether the error may or may not have been intentional, i.e., designed to "give away" Respondent's money.

15/ Respondent witness Coronel received a warning slip from Jesus Lopez for punching one dozen over. (Employer's Exhibit 8).

See Gyrodyne Co., 170 NLRB 236 (1968), rev'd and rem. sub nom United Auto Workers v. NLRB, 419 F.2d 686 (D.C. Cir., 1969), suppl'd. 185 NLRB 934 (1970), remanded 459 F.2d 1329 (D.C. Cir., 1972), suppl'd. 203 NLRB No. 164 (1973).

However, one only gets to the point of considering the taking of those particular adverse inferences if one assumes that the General Counsel has made out a prima facie case. It appears that that has not happened.

In order to show discrimination, as such, it is axiomatic that one must show that the subject has been treated differently from others in the same situation. In the instant circumstances, if other punchers had made daily mistakes of 50 or 100 dozen, but none of those mistakes had been caught by the office clerical personnel assigned to that task, the fact that the errant punchers had not been disciplined would be of no avail to the General Counsel. What we do know is that Villasenor's mistakes were detected, perhaps because of their magnitude, and he was disciplined. We know nothing about the detection system -- we have no reason to believe, nor was it alleged or argued, that special attention was directed at Villasenor's cards, and the fact that his other mistaken cards were apparently ignored belies any theory of selective review. In the absence of information about how cards were examined and which cards were in fact brought to Gilbert Lopez's attention, it does not aid the General Counsel to produce cards with large mistakes on them -- unless it could be shown that Gilbert Lopez knew about large and/or frequent errors made by punchers other than Villasenor and did not discipline the mis-feasing punchers, no discrimination has been shown.

This is a difficult decision, as it is my opinion that Villasenor engaged in protected concerted activities, that supervisor Jesus Lopez knew about those activities, and the timing of Villasenor's receipt of warning slips suggests a causal connection. See, e. g. Florida Steel Corp., 215 NLRB No. 23 (1975), enf'd. in pertinent part 529 F.2d 1225 (5th Cir., 1976). However, it is also my firm belief that the General Counsel's failure to produce evidence concerning whether or not the Respondent was apprised of the mistakes of other punchers precludes me from finding that Villasenor was discriminated against

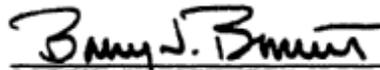
by Respondent. That hiatus in the General Counsel's case cannot, in my opinion, be bridged by inferences when there is no reason to believe that competent evidence was unavailable.

Based on all the foregoing, I make the following:

CONCLUSIONS AND RECOMMENDED ORDER

That the Complaint, in its entirety, be dismissed.^{16/}

DATED: January 13, 1978.



BARRY J. BENNETT,
Administrative Law Officer

^{16/} Respondent urges the award of costs to it. I see no basis on which to make such an award. Pandol & Sons, 3 ALRB No. 29 (1977).