

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SUN HARVEST, INC.,)	
)	
Respondent,)	Case No. 79-CE-25-OX
)	
and)	
)	
UNITED FARM WORKERS OF)	6 ALRB No. 4
AMERICA, AFL-CIO,)	
)	
Charging Party.)	
_____)	

DECISION AND ORDER

On July 25, 1979, Administrative Law Officer (ALO) Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, the General Counsel and the United Farm Workers of America, AFL-CIO (UFW) ^{1/} timely filed exceptions with supporting briefs to the Decision of the ALO.

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

The Board has considered the record ^{2/} and the attached Decision in light of the exceptions and briefs and has decided to

//////////
//////////

^{1/} On November 6, 1979, the UFW filed a motion to withdraw its exceptions to the Administrative Law Officer's Decision. That motion is granted.

^{2/} Apparently through inadvertance, the ALO failed to admit General Counsel Exhibits 1(a) - (f) into evidence. These are the formal documents admitted at the commencement of each unfair labor practice hearing and we deem them admitted into evidence here.

affirm the rulings, findings, ^{3/} and conclusions ^{4/} of the ALO and to adopt his recommended Order.

At the commencement of the hearing, the ALO dismissed Paragraph 5(a) of the Complaint, which alleged that Respondent violated California Labor Code Section 1153 (a) by recruiting strike replacement workers without informing them of the strike in progress at Respondent's fields. Counsel for the General Counsel excepts to the ALO's dismissal of this allegation because it prevented her from developing a factual record upon which to argue that such conduct violated the Agricultural Labor Relations Act (ALRA).

As the ALO observed, there is no precedent on the issue of whether the alleged conduct constitutes an unfair labor practice. However, we do not believe that the lack of precedent justifies the ALO's dismissal of the allegation at the commencement of the hearing. The Board is periodically presented with novel issues of law and should have the benefit of fully developed records when deciding questions of first impression. Therefore, Administrative Law Officers should not exclude evidence in support of an allegation in a complaint merely because it relates to a

^{3/} General Counsel excepts to the ALO's credibility resolutions. To the extent that such resolutions were based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. *Adam Dairy dba Rancho Dos Rios* 4 ALRB No. 24 (1977) ; *El Paso Natural Gas Co.*, 193 NLRB 333, 78 LRRM 1250 (1971); *Standard Dry Wall Products*, 91 NLRB 544, 26 LRRM 1531 (1950).

^{4/} General Counsel also excepts to the ALO's failure to find that Respondent violated the Act by interrogating and threatening its employees. The ALO's resolution of the credibility issues requires that these allegations be dismissed.

novel theory of law if the theory reasonably could be accepted by the Board. Without commenting upon the merits of General Counsel's theory in this case, we do not consider the theory so unreasonable that evidence based upon it should have been excluded. We note that the alleged conduct is unlawful under other statutes Csee U.S.C. Section 2045 (b) (7), and California Labor Code Sections 970(d), 973 and 1696(3}) and may be unlawful under the ALRA, as well.

We will not, however, order the hearing reopened for the purpose of taking evidence on this allegation. The Charging Party and the Respondent have apparently settled their differences; the Charging Party withdrew its exceptions to the ALO's Decision. In view of this development, we do not feel the purposes of the ALRA would be furthered by requiring Respondent to litigate the issue at this time.

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: January 21, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

CASE SUMMARY

SUN HARVEST, INC. (UFW).

6 ALRB No. 4

Case No. 79-CE-25-OX

ALQ DECISION

The ALO concluded that the General Counsel did not prove by a preponderance of the evidence that Respondent violated the Act by interrogating employees, by threatening to discharge them for meeting with UFW representatives, or by discharging employee Arturo Sandoval for meeting with UFW supporters.

BOARD DECISION

The Board adopted the ALO's recommended order of dismissal, but held that the ALO erred in dismissing one paragraph of the complaint early in the hearing because there is no precedent which establishes that the conduct alleged therein constitutes an unfair labor practice. The paragraph alleged that Respondent violated Section 1153(a) by failing to notify replacement workers that a strike was in progress. Noting that novel legal issues occasionally arise, the Board held that the ALO should not have dismissed the allegation merely for lack of a legal precedent, but should have permitted the General Counsel to develop a full factual record as to the issue, upon which findings and conclusions could be made. As the parties have apparently resolved their differences, the Board held that it would not effectuate the purposes of the Act to reopen the hearing and require Respondent to litigate the novel issue.

ORDER

The Board dismissed the complaint 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



SUN HARVEST, INC.;)
)
 Respondent)
)
 and)
)
 UNITED FARM WORKERS OF AMERICA, AFL-CIO,)
)
 Charging Party)
 _____)

Case No. 79-CE-25-0X

APPEARANCES:

Elise Manders, Esquire, for the
General Counsel

Stacy Shartin, Esquire, of
Seyfarth, Shaw, Fairweather & Geraldson,
for the Respondent. ^{1/}

BEFORE:

Matthew Goldberg, Administrative Law
Officer

DECISION OF THE
ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

A charge alleging violations of Sections 1153(a), (c)

^{1/} The Charging Party did not enter an appearance at the
hearing.

1 and (e) of the Act was filed on April 2, 1979,^{2/} by the United Farm Workers of
2 America, AFL-CIO (hereafter referred to as the "Union"). It was served on the
3 same date on Sun Harvest, Inc. (hereafter referred to as the "Respondent").

4 The complaint in this case, based on the aforementioned charge, was
5 issued by the General Counsel for the Board on April 23. After amendment at
6 the hearing, it alleged that Respondent had engaged in certain violations of
7 Sections 1153(a) and (c)^{3/} of the Act.

8 Copies of the Complaint and Notice of Hearing were duly served on
9 Respondent. In its answer, Respondent essentially denied that it committed the
0 unfair labor practices alleged.

1 A hearing in this case was held before me in Salinas on May 16.
2 Both the General Counsel and the Respondent appeared through their respective
3 representatives. Each had full opportunity to introduce evidence, to examine
4 and cross-examine witnesses, and to submit oral arguments and briefs.

5 Based upon the entire record in the case, including my observations
6 of the demeanor of witnesses while each testified, and having read the briefs
7 submitted since the close of the hearing, I make the following:

8 FINDINGS OF FACT

9 A. Jurisdiction

1 1. The Respondent was, and is, at all times material, an
2 agricultural employer within the meaning of Section 1140.4(c) of the Act.

3 2. The Union was, and is, at all times material, a

4 ^{2/} All dates refer to the year 1979 unless otherwise
5 noted.

6 ^{3/} The original complaint contained what may be inferred as a
7 typographical error, namely, that the acts alleged therein fell within the
8 ambit of Section 1154(a)(1). General Counsel also
9 alleged in its complaint that Respondent, through its agents, committed an
0 unfair labor practice by recruiting "workers for the purpose of replacing
1 striking employees" without informing them that there was a strike in progress.
2 Upon motion by Respondent, this allegation was stricken from the complaint, as
3 General Counsel was unable to cite any authority for the proposition that such
4 acts would, as a matter of law, constitute an unfair labor practice.

labor organization within the meaning of Section 1140.4(f) of the Act.^{4/}

B. The Unfair Labor Practices Alleged

1. Facts Essentially Not In Dispute.

Arturo Sandoval, the alleged discriminatee, was hired in McFarland by labor contractor "Romulo"^{5/} on March 25 or 26. He traveled with Romulo and five other workers to Oxnard to work under the auspices of the Respondent on its celery operation located there.

Sandoval was employed as a loader. Despite the fact that he had no prior experience, he was not criticized for his work. Romulo, "Jimmy,"^{6/} and "friends" instructed Sandoval how to do his job. While working for Respondent, Sandoval and many of his co-workers were housed in the Ambassador Motel, located in Oxnard.

Sandoval worked a total of five days for Respondent , from Monday, March 26, through Friday, March 30. During the course of his tenure Respondent was involved in a labor dispute or strike, with the Union. The Union had pickets stationed both at the job site and at the Ambassador.

Saturday and Sunday of that week were days off for the celery harvest workers. On Sunday, Arturo Sandoval went to a room at the Ambassador occupied by Union representatives, including Roberto Garcia and Roberto de la Cruz, and other volunteers and friends of the Union. After spending several hours in this room, Sandoval returned briefly to his own room, picked up his jacket and announced to the workers sharing his room ^{7/} that the Union was having a "carne asada" that afternoon and that they were all invited. No one from the room returned with Sandoval to where the Union was holding the barbecue.

Sandoval remained at the carne asada for approximately

^{4/} The jurisdictional facts were admitted by Respondent in its answer.

^{5/} Romulo was later identified to be Romulo Medina Lomboy. Respondent denied in its answer that Romulo was its supervisor and agent within the meaning of Section 1140.4 (j) of the Act.

^{6/} "Jimmy" Casabar was and is a foreman working for Romulo, He was not alleged in the complaint to be a supervisor.

^{7/} Nine other employees slept in their room, which parenthetically contained two beds. The record is unclear as to how many of them were present when Sandoval made his announcement.

two to three hours. When he came back from it, he became separated from the Respondent, and ceased to be its employee. Sandoval was paid the following day in cash for his labors. He stated that despite all, he would like to return to work for Respondent.

2. The Source Of The Controversy.

(a) The Alleged Discriminatee's Version of the Facts;

The manner in which Sandoval ceased employment with Respondent is the central issue in dispute. According to him, after he returned to his room following the carne asada that fateful Sunday, Romulo entered and asked Sandoval and his roommates who had "gone with the Union." Sandoval spoke up, and admitted that he had. Romulo grabbed him, saying that if he wanted to go with the Union he could get out right then, that the Company did not want him to talk with the Union. Romulo asked Sandoval if he had talked with his "friends" (or roommates) about the Union. Sandoval said no, he had just invited them to the barbecue.

Romulo left briefly, returning to Sandoval's room to tell him to get out, and to pick up his check the next day.

On cross-examination, Sandoval modified his version of the facts somewhat. He stated that Romulo entered his room only once, and, upon learning that Sandoval had "gone with the Union," pulled him out of the room into the hallway, where a large group of Filipino workers gathered around the two. Although he did not understand what these workers were saying, Sandoval testified that they looked as if they were excited and angry with him, personally.

While in the corridor, Romulo allegedly asked why Sandoval had gone with the Union, telling him "don't go with the Union," and "go with the Union if that's what [he] wanted," that the Company did not want workers talking with the Union. After Romulo inquired whether Sandoval had talked with his friends about the Union, Romulo went back in the room, leaving Sandoval in the hallway. Four or five minutes later, Romulo came out of the room, snapped his fingers and pointed toward the door, indicating to Sandoval that he had been fired

At a later point in his testimony, Sandoval amplified this account still further. He added that Romulo stated if he wanted to "be with the strike," he had to leave, but Romulo did not exactly say workers would be fired if they went to talk with the Union.

Sandoval testified that he speaks neither English nor Ilocano, Romulo's mother tongue. He stated that when Romulo spoke to him, the contractor spoke in Spanish. As will

later appear, this testimony is of prime significance,

(b) Respondent's Version:

Romulo testified that he lives in Delano. In the two months that he and his crew were working in Oxnard, he would visit his home in Delano each weekend. On the particular Sunday in question, Romulo came back to the Ambassador from Delano about 6:00 or 7:00 p.m. Upon his return, he learned from his foreman, Jimmy, that Sandoval had quit.

Romulo denied that he was told by the Company that workers should not or could not be allowed to talk with the Union, or that he saw Sandoval talking with the Union before he quit.^{8/} He further noted that he believed Sandoval quit because he was unhappy with his pay.

Romulo testified that he cannot speak Spanish, despite the fact that many workers of Mexican origin are employed in his crew. He professed a total inability to speak the phrases in Spanish which Sandoval alleged were made that Sunday. When Romulo needs to communicate with his crew members, or with Les Dikkenbauch, Respondent's Director of Celery Harvesting and Processing, he testified that he speaks in English.

Foreman Jimmy Casabar stated that he, like Romulo, would return to his home in Delano each weekend while the crew was working in Oxnard. On the weekend which figures centrally in these events, he did not make this journey with Romulo, but rather utilized separate transportation. When he came back to the Ambassador that Sunday, Sandoval came to his room and asked for his wages, stating he was going to quit. Romulo was not then present. Either at that time or on the following day, Sandoval told Jimmy the reason he was quitting was because the "pay was too cheap."^{9/}

Jimmy testified that he has known Romulo for four years, and that Romulo speaks little, if any, Spanish. When Jimmy spoke to Sandoval, he spoke in English.

3. Analysis And Conclusion.

The General-Counsel has the-burden -of proving, • by a preponderance of the evidence, that Respondent has committed the unfair labor practices alleged. (A.L.R.A.11160.3;

^{8/} It is undisputed that following his separation from Respondent, Sandoval returned to the room where the people from the Union were.

^{9/} Sandoval denied that he complained about his pay either to Romulo or to Jimmy.

S. Kuramura, Inc., 3 ALRB No. 49 (1977).) Faced with the difficult task of resolving a directly contradictory factual presentation, I have concluded to determine the issue of Sandoval's separation in favor of the Respondent.

This determination is made in spite of the fact that it is believed that Romulo's credibility is open to serious question. His demeanor while testifying was observed to be suspect: pregnant pauses preceded many of his answers, as if he were considering what might be the proper response. His steadfast denials that he understood any Spanish strained this Hearing Officer's credulity: it is difficult to believe that a contractor who employs Spanish-speaking workers and functions with them on a day-to-day basis can say little more in their language than "si" or "porque." This is particularly so where, as here, Romulo's native tongue, Ilocano, contains words which are sufficiently similar in sound to their Spanish equivalents and which may provide a basis for cross-communication between speakers of the two languages. 1J)/ Upon examination by this Hearing Officer, Romulo denied being able to understand Spanish words such as "trabajo," "contrato," and "horas," despite the fact that these words are nearly identical in sound to ones in Ilocano which convey the same meaning.

The crux of this matter lies in corroboration. No individuals were produced to substantiate Sandoval's version of these events notwithstanding the assertion that Romulo allegedly made damaging remarks in the presence of numerous witnesses. On the other hand, both Romulo and Jimmy supplied mutually corroborative accounts that Sandoval had quit his job. Although I found Romulo not to be entirely candid, that finding cannot be used as a means for wholly discounting the testimony of both Romulo and Jimmy, and utilizing Sandoval's version of the facts as the basis for a finding of an unfair labor practice.

Furthermore, the account provided by Sandoval was not entirely consistent. His testimony was substantially altered on cross-examination, particularly in reference to the exact location (room as opposed to hallway) where Romulo spoke with him. Significantly, the only other witness called by the General Counsel, Tony Tejada, a volunteer worker for the Union, testified that he was present at the Ambassador when Sandoval visited the Union adherents' room and attended the barbecue. Tejada stated that he had come to Oxnard to aid in enlisting worker support for the strike. He spoke with Sandoval on the Sunday in question, who told him that he would try to talk about the Union with his fellow workers. Apparently Union representatives were successful in convincing Sandoval to cast his lot with them in the strike, as Tejada testified that Sandoval also mentioned to him, quite significantly, that he was "going to quit," that "he'd cooperate with

¹⁰ Off the record, this Hearing Officer was told by the Ilocano translator that some of the words which would be spoken in that language would sound much like Spanish.

us" and stop being a strike-breaker. (Emphasis mine.) In the face of such testimony, I cannot credit Sandoval's representations to the effect that he was terminated by Respondent.

CONCLUSIONS OF LAW

It is concluded that the General Counsel has not, by a preponderance of the evidence, demonstrated that Respondent in this case has violated the Act. Based upon the credited testimony, I find that the alleged discriminate, Arturo Sandoval, was not fired from his job, but rather left Respondent's employ voluntarily, ^{11/}

RECOMMENDED ORDER

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

Dated: July 25, 1979

AGRICULTURAL LABOR RELATIONS BOARD

By: Matthew Goldberger

^{11/} Respondent also argued in its brief that even if Sandoval's account of his separation from employment were credited, Respondent could not be held accountable for any unfair labor practices under either of two theories advanced: General Counsel did not adequately establish that Romulo was acting as its agent in the circumstances complained of, and that the alleged discriminatee was discharged for engaging in unprotected activities. Concerning the former, under §1140.4 (c) of the Act, an "employer engaging [a] labor contractor" such as Romulo "shall be deemed the employer for all purposes under this part." This section has been construed as conferring liability on employers for unfair labor practices committed by labor contractors engaged by them. Whitney Farms, Inc., 3 ALRB No. 68 (1977); Vista Verde Farms, 3 ALRB No. 91 (1977). In regard to the latter contention, testimony was presented at the hearing to the effect that the Union took pictures of individuals at the Ambassador and enlisted the aid of Sandoval in identifying strike-breakers residing there. Respondent argues that such acts constitute unlawful surveillance and an unfair labor practice, and that discharging Sandoval for engaging in this conduct would not therefore itself constitute an unfair labor practice. It is unnecessary to decide this particular issue, as Respondent's version of the operative facts herein has been credited. It should be noted, however, that no evidence appears in the record that Romulo or Jimmy had any knowledge of Sandoval's participation in the alleged surveillance scheme.