Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PORTER BERRY FARMS, Respondent, and PIEDAD ARAGON, Charging Party.	)	Case No. 79-CE-139-SAL 7 ALRB No. 1

DECISION AND ORDER

On February 14, 1980, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent each filed timely exceptions and a supporting brief. Respondent also filed a reply brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the ALO's rulings) findings, and conclusions,[1/] as modified herein.

Respondent excepts to the ALO's ruling granting the General Counsel's motion to amend the complaint to allege a threatening speech on August 8, 1979, and photographic surveillance

[1/] The ALO concluded that Respondent did not violate section 1153 (c) and (a) by its refusal to rehire Piedad Aragon. As no exceptions to this conclusion were filed, we affirm the ALO's conclusion. The ALO also concluded that the August 8 speech of Respondent's agent Jose Sanchez did not violate section 1153(a) since the speech did not contain a threat of reprisal or a promise of benefit. As no exceptions to this conclusion were filed, we affirm it.

on August 11, 1979, as violations of section 1153(a). We find this exception to be without merit. Once the Board's jurisdiction has been invoked by the filing of a charge, its General Counsel is free to make full inquiry under its broad investigatory power in order to properly discharge its duty of protecting public rights. NLRB v. Fant Milling Co. (1959) 360 U.S. 301 [44 LRRM 2236]. Where, as here, the charge and the original complaint include an alleged violation of section 1153(a), the complaint may be amended to include additional violations of section 1153(a), so long as the parties receive adequate notice of the new allegations. See NLRB v. Raymond Pearson, Inc. (5th Cir. 1957) 243 F.2d 456 [39 LRRM 2679]. As Respondent was given adequate notice and opportunity to defend against the new allegations, we conclude that the amendment of the complaint to include additional violations of section 1153(a) was proper.

The General Counsel has excepted only to the ALO's conclusion that Respondent did not violate section 1153(a) of the Act by engaging in photographic surveillance of its employees on August 11, 1979. We find no merit in this exception. Respondent's conduct in photographing a United Farm Workers of America, AFL-CIO, march, in which several of its employees participated, was isolated in nature and would not tend to interfere with the section 1152 rights of the employees. The conduct therefore does not rise to the level of illegal surveillance and does not violate section 1153(.a). See Mitch Knego (Apr. 3, 1977). 3 ALRB No. 32.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural

Labor Relations Board hereby orders that the complaint in this matter be, and it hereby is, dismissed in its entirety. Dated: January 7 , 1981

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

MEMBER RUIZ, Dissenting:

I agree with the majority's analysis and conclusion affirming the ALO's ruling on the amendments to the complaint. However, I dissent from the majority's conclusion that Respondent's surveillance of its workers was de minimis and does not warrant the imposition of a remedy.

On August 8, 1979, Jose Sanchez, Respondent's agent, made a speech to the assembled employees of Porter Berry Farms during working hours, in which he told them that the ranchers did not want them to participate in the upcoming UFW march. On August 11, only three days later, Sanchez photographed the UFW supporters marching by the Porter Berry fields in the presence of Respondent's employees. I find that, under these circumstances, Respondent's action in photographing the march in the presence of several Porter Berry employees, particularly after its anti-UFW speech, cannot be characterized as de minimis. I conclude that Respondent violated section 1153(a) by creating the impression that it engaged in

photographic surveillance of its workers. Such conduct reasonably tends to interfere with, restrain, or coerce employees in the exercise of their organizational rights.[1/] Merzoian Brothers Farm Management Co., Inc. (July 29, 1977) 3 ALRB No. 62, review den. by Ct. App., 5th Dist., September 28, 1979; 0. P. Murphy Co., Inc. (Dec. 27, 1978) 4 ALRB No. 106, review den. by Ct. App., 1st Dist. Div. 4, April 19, 1979, hg. den. June 14, 1979, cert. den. 444 U.S. 942, 62 L.Ed.2d 308, 100 SCt. 297. I would therefore issue an order designed to remedy the effects of Respondent's unlawful conduct.

Dated: January 7, 1981

RONALD L. RUIZ, Member

[1/] The majority's reliance on Mitch Knego (Apr. 3, 1977) 3 ALRB No. 32, is misplaced. In that case, a supervisor interfered with an evening conversation between employees and union organizers in a house shared by the supervisor and the employees. The Board based its conclusion that the alleged misconduct was de minimis largely on the fact that the incident occurred in a casual atmosphere. Because the misconduct in the instant case did not occur in a similar context, the Knego decision is inapposite.

CASE SUMMARY

Porter Berry Farms

7 ALRB No. 1
Case No. 79-CE-139-SAL

ALO'S DECISION

The ALO found that Respondent did not violate section 1153 (c) and (a) by refusing to rehire a worker on or about May or June 1979. At the opening of the hearing, the ALO granted General Counsel's motion to amend the complaint to allege that Respondent unlawfully threatened its employees on August 8, 1979, and that Respondent engaged in unlawful surveillance of its employees on August 11, 1979. In his Decision, the ALO concluded that Respondent did not make a threat of reprisal and that, although Respondent's conduct in photographing a union march at Respondent's property created an impression of surveillance, the violation was de minimis. Accordingly, the ALO recommended dismissal of the complaint in its entirety.

BOARD DECISION

The Board affirmed the ALO's conclusion concerning the refusal to rehire, as no exceptions thereto were filed. The Board found that the ALO's granting of the motion to amend the complaint to add section 1153(a) allegations was proper, since the charge and original complaint included a section 1153(a) allegation and the parties had received adequate notice of the new allegations. The Board affirmed the ALO's conclusion that Respondent's conduct in photographing the march was de minimis, and dismissed the complaint in its entirety.

DISSENT

Member Ruiz dissented from the majority's conclusion that Respondent's conduct in photographing the march, shortly after its anti-union speech telling the workers not to participate in the march, was de minimis. Member Ruiz concluded that such conduct interfered with the employees' section 1152 rights and warranted a remedial order.

* * *

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD.

PORTER BERRY FARMS Respondent and PIEDAD ARAGON Charging Party	)	Case No. 79-CE-139-Sal

APPEARANCES :

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On Behalf of the United Farm Workers

DECISION

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: This case was heard before me in Watsonville, California, on September 5, 1979. Corn-plaint issued July 25, 1979, alleging that Respondent, Porter Berry Farms , violated Sections 1153 (a) and (c) of the Agricultural Labor Rela-tions Act, herein called the Act, by discriminatorily refusing to rehire Piedad Aragon on or about May 11 and June 1, 1979. The complaint re-suited from a charge filed by Aragon on June 5, 1979. The charge and the complaint were duly served upon Respondent. The United Farm Workers motion to intervene was granted.

During the course of the hearing, General Counsel was granted leave to amend the complaint to allege two additional violations of Section 1153 (a): threats to employees if they engaged in concerted activity, and unlawful surveillance of its employees. A First Amended Complaint incorporating the amendments was later filed and served upon Respondent.

All parties were given full opportunity to participate in the hearing. Respondent and the General Counsel filed post-hearing briefs in support of their respective positions.

Upon the entire record, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Porter Berry Farms is engaged in agriculture in Santa Cruz County, California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

At all times material Piedad Aragon was an agricultural employee within the meaning of Section 1140.4(b).

II. The Employer's Operations

Respondent is a strawberry grower in Watsonville, California. George Tanimasa has been Respondent's ranch foreman since 1954. Arnulfo Organista was, at all times material, the crew foreman. Each is a supervisor within the meaning of the Act. [1/] Organista is directly responsible for hiring strawberry pickers. Tanimasa is Organista's supervisor and participated in the decision not to rehire Aragon.

Respondent employs eight year-round workers. During the strawberry harvest season, which generally runs from April to October, its work force reaches a level of 70 to 80 workers.

When hiring seasonal workers, Respondent does not follow a seniority system. It attempts first to hire more qualified workers. Organista contacts workers by phone or by personal visits to ascertain their availability. From time to time Tanimasa and Organista confer regarding the qualifications of individual workers.

Aragon is not customarily among the first workers hired be cause she is regarded as an average or below-average worker. In 1978, the season started the week ending May 6, Aragon began work the week ending May 27 and worked until the week ending September 30. The picking season ended the week of November 4.

For the last five years Aragon has not been hired immediately upon notifying Respondent that she was ready to return. It was usual for her to have to wait a week or two before she was put to work.

[1/] Labor Code Section 1140.4(j)

III. Previous Union Activity At Respondent's

In 1970 there was a strike at Porter Berry Farms. Aragon was among the 60 or so employees then working who walked off the job. When the strike was over, all striking employees were returned to work. There was a time lapse of about a week before Aragon returned to work. It appears that she went to Oxnard during the interval between the end of the strike and her return to work. The witness acknowledged that several persons named by Respondent's counsel as strikers in 1970 were returned to work and have continued to work for Respondent.

There has been no organizational activity at Respondent's farm since 1970. No representation petition has ever been filed, nor has Respondent previously been charged with any unfair labor practice. No notice of intent to take access has ever been filed, and no union has ever taken access.

Aragon testified that in 1975 about the time the Agricultural Labor Relations Act was enacted she got into an argument with a fellow worker about the UFW. Tanimasa spoke to her about the incident and told her not to talk to the workers about the Union. Aragon denied having spoken to the workers about the UFW. She told Tanimasa that the workers were free to vote for the UFW.

On or about May 6, 1979, Aragon and other workers employed by Respondent were among more than 100 pickets engaged in picketing the packing shed of Crosetti Brothers in Watsonville. Aragon testified that more than 50 flags were carried by the pickets. While she was on the Crosetti picket line, Aragon observed Dominga Organista, brother of the crew foreman, drive by on the highway.

Aragon has. been a member of the UFW since 1975. Her services on their behalf have been limited to picketing.

IV. The Refusal To Rehire

On May 7, 1979, Aragon telephoned Tanimasa between 6:30 and 7:00 p.m. to say she was ready to go to work. Tanimasa told her it would probably be a week or two. He said he would alert Organista that she was ready to return and he would be in touch with her. Shortly thereafter Tanimasa telephoned Organista to relay the information regarding Aragon.

Later in the evening of May 7, Organista drove to Aragon's home in his pickup. He honked, she came outside and got into the truck. Aragon opened the conversation by asking whether Organista had learned from the newspaper that she and her husband had been arrested for going into the fields at Crosetti Brothers. [2/] After telling Organista about the arrest, she said she was ready to go to work and asked when she could expect to start. He told her in about three weeks. She responded that this was too long. Organista suggested that she find something

[2/] Organista denied having seen the newspaper. He admitted that Aragon told him her husband had been arrested for picketing on behalf of the UFW.

else. She said she could not do that because she had no car. He responded that that was her problem. Aragon got angry and told Organista to "go fuck himself" or, according to Organista, to "fuck the job." [3/]

After his conversation with Aragon, Organista drove to Tanimasa's home to relate what had happened. He told Tanimasa that Aragon responded "La chingada tu trabajo" when he told her it would be about two weeks before he could hire her. Tanimasa said that he would not have anyone working to whom the job did not mean any more than that. He regarded the remark as very disrespectful to a crew foreman. Organista conceded that after his conversation with Tanimasa he had no intention of hiring Aragon.

On June 1 Aragon called Organista asking for her job, she said she needed the job and would he please give her a job. Organista responded that since she had told him "la chingada tu trabajo," he could not give her job back. She asked whether he was going to be a crew foreman all his life and closed the conversation with the statement: "You wait until we get that union on that ranch." [4/]

V. The Events Of August 8, 1979

Joe Sanchez is employed as the manager of the Strawberry Growers Association. Respondent is one of the Association members. Sanchez advises Association members regarding personnel and labor relations matters. The record is confused with respect to what Sanchez told the workers regarding his status. General Counsel's witness, Velasquez, testified that Sanchez said he was a representative of the workers. He did not testify that Sanchez asserted he represented the growers. [5/]

On August 8, in the presence of Organista and Tanimasa, Sanchez spoke to the assembled Porter Berry workers, telling them:

> . . . Cesar Chavez was crazy, they didn't want us to march in the name of Cesar Chavez, that the ranchers didn't want us to, the union of ranchers. . . . That they had always worked with us to help us get raises, but that they didn't

[3/] Organista testified that Aragon's response was "La chingada tu trabajo" which was translated as "fuck the job." Aragon testified she said "La chingada" which the interpreter translated as "go fuck yourself" or "go fucking him."

[4/] Aragon testified the conversation took place on June 6.

[5/] Following Velasquez' statement, the General Counsel couched a question in terms of Sanchez having said he was a representative of the growers which was asked and answered without objection. In view of Velasquez' testimony regarding Sanchez' statements on that occasion, it is unlikely that he stated he was a representative of the workers. I do not credit Velasquez' statement that Sanchez said he was a representative of the workers.

want us to go with Cesar Chavez. [6]

At the close of work that day approximately 16 workers went to the situs of a UFW march in Watsonville.

VI. The Events Of August 11. 1979

As of August 11, Jose Velasquez was identified as a UFW supporter. During the 1979 picking season he consistently wore UFW buttons on his cap while at work, and when he began work in the summer of 1979, he asked for and was given time off from work in order to testify on behalf of the UFW in court proceedings involving the picketing at Crosetti Farms.

On the morning of August 11 Velasquez left work to meet a march of UFW mushroom strikers for the purpose of bringing them to Porter's fields. He hoped that Porter workers would see the marchers, stop working and join the march. When the marchers came to the Porter fields, nine workers left work to join the march. All are still employed by Porter. Organista and Tanimasa were present when the workers left the fields.

Joe Sanchez was also present taking pictures. He followed the UFW march from field to field taking pictures. His stated purpose was to obtain evidence of anything which he regarded as a violation of the Agricultural Labor Relations Act, so that he could file charges on behalf of the Association. Sanchez denied taking pictures of any Porter employees leaving the fields to join the march. [7] He testified that he received no instructions from Respondent regarding his picture-taking activities.

DISCUSSION AND CONCLUSIONS

I. The Refusal To Hire

To establish that Respondent failed or refused to rehire Piedad Aragon in violation of Sections 1153 (c) and (a), the General Counsel has the burden of showing that such failure or refusal was based on Respondent's knowledge that she supported the UFW or had engaged in activity on its behalf, [8] and that there is a causal connection.

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[6] Testimony of Velasquez. Sanchez though called to testify by Respondent was not questioned about his statement of August 8. Thus, Velasquez' testimony stands uncontradicted and is entitled to be credited for the purpose of proving what Sanchez said.

[7] This testimony was contradicted by Velasquez. Sanchez' testimony regarding his activities of the day was not controverted. His presence at Porter Berry Farms as the marchers went by is consistent with those activities. I credit Sanchez' testimony that he did not take pictures of Respondent's employees.

[8] Louis Caric & Sons. 6 ALRB No. 2 (1980).

between the failure or refusal to rehire and Aragon's activity. [9] The General Counsel has failed to meet either burden.

The evidence upon which the General Counsel relies to prove Employer knowledge is the following: participation in a 1970 strike, a brief 1975 argument regarding the UFW, participation in a 100-person picket line, and the revelation of her arrest for UFW activity made when she asked for her job.

Aragon participated in a strike of Respondent's operation in 1970, a strike in which all Porter's employees seem to have joined. When the strike terminated, all strikers, including Aragon, were rehired. There is no evidence that she was any more visible during the course of the strike than any other worker. Thus, there is no reason why Organista or Tanimasa should have a particular recollection of Aragon in terms of Union activity. [10] There is no evidence of any reprisals directed toward the strikers. It speaks of the weakness of the General Counsel's case to seek to prove knowledge of Aragon's Union or protected/concerted activities by reference to an incident nine years old in which she was a face in the crowd.

She engaged in no "activity" thereafter until 1975 when she had an argument with a fellow worker about the UFW, after which Tanimasa told her she should not talk to the workers about the UFW. She denied having done so. No claim is made regarding any other Employer response to her conduct.

While Aragon was talking to Organista about her rehire, she said she had been arrested for picketing at Crosetti Farms. Notwithstanding this revelation, Organista told her she could come to work in about three weeks, a time frame not inconsistent with her employment in prior years. [11] Becoming dissatisfied with the time-table suggested by Organista, she told him to go fuck himself or to fuck the job. Organista did not withdraw the employment offer at that time. It was not until later that evening that Tanimasa, upon hearing of Aragon's reaction, told Organista she should not be rehired. There is no evidence that Organista related to Tanimasa that Aragon had-been arrested for UFW activity at Crosetti's. To summarize: the evidence of Employer knowledge of Aragon's Union activity, at best, is knowledge imparted by

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[9] Tenneco West, Inc.. 6 ALRB No. 3 (1980).

[10] Although producing evidence from Aragon that she picketed one day at the Crosetti shed in Watsonville, no evidence was presented that her participation on the picket line of some 100 persons was observed by any supervisor or management representative of Perry Farms; nor was evidence presented which warrants an inference that Respondent otherwise became aware of her participation.

[11] Even if one credits Aragon's controverted testimony regard ing her arrest and regards it as establishing Employer knowledge of Union activity, the General Counsel has not made his case. It is undenied that thereafter there was discussion regarding when she would be called to work.

Aragon that she had been arrested for picketing.

Since there is no independent evidence of Union animus on the part of Respondent and since Respondent had been free from any union activity for nine years, a conclusion that rested the failure to rehire Aragon on her arrest rather than her opprobrious remark to Organista would be sheer speculation. Furthermore, the General Counsel's theory of pretext overlooks the fact that the job offer was not withdrawn until sometime after Aragon rejected it. Respondent's explanation for its failure to rehire Aragon is plausible and is sufficient to establish that its action did not violate the Act.

II. Independent Section 1153(a) Conduct

The General Counsel was permitted during the course of the hearing and over Respondent's objections to amend the complaint to allege two counts of independent Section 1153 (a) conduct. In each instance the conduct is attributed to Joe Sanchez whom General Counsel contends acted as an agent of Respondent.

"The burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority." [12/] The General Counsel established that Sanchez is the manager of the Strawberry Growers Association of which Respondent is a member, and that the Association advises its members regarding personnel and labor matters. On occasion Sanchez speaks to Respondent's workers regarding insurance benefits or other benefits. He does so with Respondent's approval. The statements Sanchez made to workers on August 8 were made during the course of an authorized meeting. Supervisors were present who did not disavow the statements. Respondent is bound by Sanchez' statements even though there is no evidence the statements were specifically authorized or that Sanchez spoke the truth.

We turn now to Sanchez' statements of August 8, 1979. In substance, he said Chavez was crazy and that the ranchers did not want the workers to march with Chavez. Unless this utterance can be said to amount to a threat of reprisal or promise of benefit, it cannot be found to be evidence of an unfair labor practice. [13/] In evaluating Sanchez' statement, one must consider the absence of current organizational efforts at Porter Berry Farms, and the absence of any history of such efforts by the UFW, and the absence of evidence of Employer animus to ward the UFW or any other union. In such a context, Sanchez' words cannot reasonably be said to amount to more than an expression of Respondent's preference for not wanting to deal with Chavez. Respondent may communicate its specific views about the UFW, so long as the communication does not lead the listener to conclude he would suffer reprisals by following Chavez or alternatively would enjoy benefits by rejecting the UFW. [14/] Sanchez' statements of August 8, 1979, were not

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[12/] Int'l Longshoremen's and Warehousemen's Union, 79 NLRB 1487, 1509 (1948).

[13/] Labor Code Section 1155.

[14/] N.L.R.B. v. Gissel Packing Co., 395 U.S. 815--continued

violative of Section 1153 (a). I shall recommend dismissal of Paragraph of the First Amended Complaint.

Paragraph 5 alleges surveillance of Respondent's employees; the proof offered related to photographic surveillance.

Sanchez testified credibly that he took no pictures of Respondent's employees while photographing the marchers proceeding past Porter Berry Farms. It is reasonable to conclude that his activities were Association activities from which all its members would benefit and that he was not acting as an agent of Respondent when taking pictures on the llth. However, that conclusion is not dispositive of the question of whether his picture taking at Respondent's may be attributed to Respondent or whether it violated the Act.

Three days earlier Sanchez had addressed the assembled workers in a context in which he was understood to be speaking for the management's position and to be acting as Respondent's agent. He now appears on the premises taking pictures. Absent any overt disavowel of his actions by Organista or Tanimasa who were present, it is reasonable to conclude that Respondent's workers again regarded Sanchez as a management representative, present for the purpose of recording their participation in the UFW march. Thus, the picture-taking on its face amounted to surveillance or the impression of surveillance which could reasonably be expected to interfere with the Section 1152 rights of Respondent's workers. Such conduct takes on the appearance of a violation of Section 1153 (a) [15/] However, because the incident occurred in an atmosphere otherwise untainted by Employer antagonism toward the UFW, in the absence of any other Respondent conduct violative of the Act and on only one occasion, the conduct of August 11 was de minimis and does not warrant the imposition of a remedy. [16/]

[14/](continued) -- (1969); Southwire Co. v. N.L.R.B., 65 LRRM 3042 (5th Cir. 1967).

[15/] See R. D. Goss. Inc., 203 NLRB 1173 (1973), holding em-ployer photographing of employees' peaceful picketing violative of the National Labor Relations Act Section 8 (a) (1); Radio Industries, Inc. 101 NLRB 912, 914-(1952), pictures of lawful, peaceful picketing cannot be justified; N.L.R.B. v. Rybold Heater Company. 408 F.2d 888, 891 (6th Cir. 1969), holding it insufficient for an employer to merely claim pictures were taken for use in litigation when not actually so used for such purpose; cf. Hilton Mobile Homes. 155 NLRB 873, 874, enf'd. in part 387 F.2d 7 (8th Cir. 1967); Stark Ceramics. Inc.. 155 NLRB 1258, 1269 (1965), enf'd. 375 F.2d 202 (6th Cir. 1967).

[16/] Mitch Knego. 3 ALRB No. 32 (1977); cf. George Lucas & Sons, 4 ALRB No. 86 (1978). The analysis and opinion of the National Labor Relations Board in American Federation of Musicians. Local 76, 202 NLRB No. 80, 82 LRRM 1591, 1592-1594 (1973), provides an extended statement which also is authority for dismissal of the allegations of Paragraph 5 of the First Amended Complaint.