

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LAWRENCE SCARRONE,)	
)	
Respondent,)	Case No. 79-CE-71-D
)	
and)	
)	
UNITED FARM WORKERS)	7 ALRB No. 13
OF AMERICA, AFL-CIO,)	
)	
Charging Party)	
_____)	

DECISION AND ORDER

On July 11, 1980, Administrative Law Officer (ALO) Michael K. Schmier issued the attached Decision in this proceeding. Thereafter, the General Counsel timely filed exceptions and a supporting brief.

The Board has considered the record and the ALO's Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent consistent herewith.

General Counsel has excepted to the ALO's finding that he failed to meet his burden of proof and to the ALO's recommendation that the complaint be dismissed in its entirety. We find merit in these exceptions, as we find sufficient evidence to support our independent conclusion that Respondent violated Labor Code section 1153 (a) by its discharge of employees Ruben Contreras and Rosa Valencia, husband and wife, because they had engaged in concerted activities protected by section 1152 of the Act.

It is undisputed that Respondent had knowledge of a one-day work stoppage engaged in by its field workers over a wage dispute in November 1978, but did not learn that strike participants Ruben Contreras and Rosa Valencia were still in its employ until two or three days before it discharged them on June 10, 1979.

The couple was employed in Respondent's onion fields by labor contractor Hubert Ogden prior to and on the day of the work stoppage in November 1978, Ogden's last day of work. Thereafter, they continued to perform various field tasks in Respondent's employ under the direction of Ogden's successor, labor contractor Silvestre Tapia, eventually commencing work in Respondent's onion-packing shed in early June of 1979.

During a visit to the shed on or about June 7, Ogden called Lawrence Scarrone's attention to Valencia's parked car, stating that it belonged to the woman who had caused the "trouble" in the field. Acting on this new information, Scarrone reported Ogden's observation to Tapia. Tapia testified that Scarrone said Ogden had just informed him that there were two people working in the shed with whom he had had problems during the onion planting. Tapia attempted to assure Scarrone that the employees' work performance was all that mattered. Subsequent conduct of Tapia indicates that he viewed Scarrone's concern as more than casual. Thus, on Thursday, June 7, or Friday, June 8, Tapia apprised Valencia of the incident, telling her that Scarrone had just informed him that Ogden had seen and recognized her that morning as the leader of the

strike.^{1/}

It is not clear whether onion-shed manager John Scarrone (Lawrence's son) found fault with the work of Contreras or the work of some other worker on that day or the following day. In any event he admonished one onion-shed employee several times about the manner in which he was loading onions, finally instructing Tapia to ". . . give him something else to do."

Believing that John Scarrone had ordered him to discharge Contreras, and not wishing to offend Contreras' feelings, Tapia formulated a plan by which to dismiss Contreras from Respondent's employ without incident. Thus on the following Sunday, June 10, 1979, Tapia drove to Contreras' house and offered him employment elsewhere with Tapia's brother, also a labor contractor. Tapia admittedly fabricated an excuse for the proposed transfer, telling Contreras that he needed to move some people out of the shed due to reduced workforce requirements. He offered Valencia similar work, knowing, as he said, that the two employees were dependent upon each

^{1/}Valencia testified that Tapia told her Scarrone intended to fire her because of her involvement in the strike. Tapia denied making such a statement, testifying instead that Scarrone told him that as long as Valencia and Contreras did their work they would not be fired. This statement clearly suggests that Scarrone was considering, and discussing, whether to discharge the two employees, without any reference to Contreras' job performance in the onion shed. The ALO credited Tapia's version, but not without serious reservations. Based on our independent review of the record, we disagree with the ALO's statement that neither version is inherently more reliable. Valencia's version is corroborated by the fact that she and Contreras were in fact summarily 'terminated two days later. Moreover, Tapia's testimony is put in doubt by the fact that he later lied to Contreras about needing to reduce the workforce. We therefore credit the testimony of Rosa Valencia and find that Tapia told Valencia that Scarrone intended to fire her for her strike activities six months earlier.

other for transportation to work. The couple accepted and commenced working in the new assignment on the following Monday.

Labor Code section 1152 guarantees agricultural employees the right, inter alia, to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Labor Code section 1153(a) makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in section 1152.

As with the other types of violations of section 1153(a), a concerted-activity discharge does not require proof of the actual effect on employees (i.e., their perception of the employer's action) or of the employer's motive in effecting the discharge, although evidence of motive is certainly admissible and is never irrelevant. With respect to section 1153(a) allegations which do not involve discriminatory conduct of an employer, the General Counsel, to establish a prima facie case, need prove only that the employer engaged in conduct (e.g., threats, interrogation, or surveillance) which reasonably tends to interfere with, restrain, or coerce employees' in the exercise of their rights under the Act. However, a section 1153(a) discharge for engaging in concerted activity must be proved by establishing the same elements as in proving a section 1153(c) discharge for engaging in union activity because they are essentially identical violations tried under separate sections of the Act. Both involve employer discrimination against one or more employees based on the employees' involvement in an activity protected by section 1152 of the Act, including union

activity, which is, of course, one form of protected concerted activity, (the second one described in section 1152). Moreover, both require the same remedies: reinstatement, backpay, posting of notices, etc.

Accordingly, in order to establish that an employer violated section 1153(a) of the Act by discharging or otherwise discriminating against one or more employees with respect to hire, tenure, or working conditions, the General Counsel must prove by a preponderance of the evidence that the employer knew, or at least believed, that the employee(s) had engaged in protected concerted activity^{2/} and discharged or otherwise discriminated against the employee(s) for that reason. United Credit Bureau of America, 242 NLRB No. 138, enf'd March 10, 1981, 4th Cir. [106 LRRM 2751, 2753, 2754]; Mid-America Machinery Company (1979) 238 NLRB 537, 543; Super Valu Stores, Inc. (1978) 236 NLRB 1581, 1590.

On the basis of the record evidence in this matter, we find that Valencia engaged in protected concerted activity when she acted as spokesperson for other employees in presenting their demands for higher wages, and that she and Contreras engaged in protected concerted activity by participating in the work stoppage to support the employees' wage demands in November 1978. See Shelley & Anderson Furniture Co. v. NLRB (9th Cir. 1974) 497 F.2d 1200 [86 LRRM 2619] We find also that Respondent had knowledge of their protected

^{2/} In some situations it is possible to find the activity to be concerted in nature, even where an employee ostensibly acts alone. See Foster Poultry (May 19, 1980) 6 ALRB No. 15; Miranda Mushroom (May 1, 1980) 6 ALRB No. 22; Alleluia Cushion Co. (1975) 221 NLRB 999 [91 LRRM 1131].

activities; Respondent was informed, apparently for the first time, on or about June 7, 1979, that Rosa Valencia and Ruben Contreras were active participants in concerted activity in November 1978. Based on the timing and abruptness of their discharge, two or three days after Respondent was so informed, Tapia's remark to Valencia about Respondent's intentions to discharge her because of her involvement in the work stoppage, and Respondent's unconvincing explanation of the reason for the discharges we conclude that Respondent discharged the two employees because of their protected concerted activities and thereby violated section 1153 (a) of the Act.

Respondent argues that it discharged Ruben Contreras because of his incompetent stacking of onion sacks. However, the evidence of Contreras' incompetence is unconvincing, as Scarrone could not clearly identify Contreras as the employee he admonished for bruising the onions. Moreover, Scarrone testified that he instructed Tapia only to give the employee some other work to do, indicating that the employee's job performance was not so unsatisfactory as to warrant discharge. As Tapia was clearly Respondent's agent and acted, rightly or wrongly, at its direction, Respondent is liable for Tapia's action in discharging Contreras and Valencia. Vista Verde Farms v. A.L.R.B. (1981) 29 Cal.3d 307. We find Respondent's defense to be pretextual and insufficient to rebut the General Counsel's preponderant evidence that Respondent discharged the two employees because of their protected concerted

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activities, in violation of section 1153(a) of the Act.^{3/}

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Lawrence Scarrone, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any concerted activity protected by section 1152 of the Act.

b. In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act.

a. Immediately offer to Rosa Valencia and Ruben Contreras full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

b. Make whole Rosa Valencia and Ruben Contreras for any loss of pay and other economic losses they have suffered as a

^{3/}We find it unnecessary to pass on the General Counsel's contention that involvement by the UFW in the furtherance of the work stoppage at Valencia's behest merits, finding a violation of Labor Code section 1153(c) discharge as well. There is no probative evidence to establish that Respondent had knowledge of the Union's peripheral role in what appears to have been a protected concerted activity initiated by employees alone. Moreover, the finding of an additional 1153(c) violation would add nothing to our remedy herein.

result of their discharge, reimbursement to be made according to the formula stated in J. & L. Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

c. Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back-pay period and the amount of backpay due under the terms of this Order.

d. Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

e. Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during November 1978 or at any time during the period from June 4, 1979, until the date on which the said Notice is mailed.

f. Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period and places(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

g. Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property

at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

g. Notify the Regional Director in writing, within 30 days after the issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: June 17, 1981

RONALD R. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging two of our employees on or about June 10, 1979, because they protested our wage rate. The Board has told us to cost and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farmworkers these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to discharge Rosa Valencia and Ruben Contreras because they participated in a concerted protest against our rate of pay for onion-field work on or about November 7, 1978. WE WILL NOT hereafter discharge or lay off any employee for engaging in such concerted activities.

WE WILL reinstate Rosa Valencia and Ruben Contreras to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their discharge.

Dated:

LAWRENCE SCARRONE

By: _____
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question about your rights as farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. Our office is located at 627 Main Street, Delano, California, telephone number is (805) 725-5770.

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Lawrence Scarrone

Case No. 79-CE-71-D

7 ALRB No. 13

ALO DECISION

The ALO found that the General Counsel had failed to prove by a preponderance of the evidence that, as alleged in the complaint, Respondent had discharged two employees because they had engaged in a protected work stoppage in order to dispute Respondent's rate of pay. Accordingly, he recommended that the complaint in this matter be dismissed in its entirety.

BOARD DECISION

The Board rejected the ALO's aforesaid finding and recommendation, concluding that Respondent violated Labor Code section 1153(a) by its discharge of the two employees two or three days after it learned that they had led and participated in the work stoppage some seven months earlier. The Board based its conclusion on the timing and abruptness of the discharge, a supervisor's statement that Respondent intended to fire one of the employees because of her protected activity, and the unconvincing nature of Respondent's defense.

REMEDIAL ORDER

The Board ordered Respondent to cease and desist from discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment, because he or she has engaged in any protected concerted activity and, further, directed Respondent to offer the discharged employees reinstatement and backpay, without prejudice to their seniority or other rights or privileges, and to post, mail, and publish a remedial Notice to Employees.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the Agricultural Labor Relations Board.

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD^{1/}

* * * * *

In the Matter of: *

LAWRENCE SCARRONE, *

Respondent *

and *

UNITED FARM WORKERS OF AMERICA, AFL-CIO *

Charging party *

* * * * *

Case No. 79-CE-71-D



Nicholas F. Reyes and Manuel M. Xelgoza, Esq.
 on the brief, of Fresno, California for
 the General Counsel

King, Eyherabide, Anspach, Friedman & Robinson,
 by Arthur I. Pearl, Esq. of Bakersfield,
 California for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL K. SCHMIER, Administrative Law Officer: This case was heard before me on May 14 and 15, 1980 in Bakersfield, California; all parties were represented. The charge was filed by the United Farm Workers of America, AFL-CIO (herein called "UFW") on June 27, 1979. The complaint^{2/} issued February 28, 1980, and alleges

^{1/}Herein called the Board.

^{2/} The complaint was amended by the General Counsel at the hearing.

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violations by Lawrence Scarrone, (herein also alternatively called "Respondent" or "Lawrence") of Sections 1153(a) and (c) of the Agricultural Labor Relations Act (herein called the "Act"). Copies of the charge and complaint were duly served on Respondent. The parties were given the opportunity at the trial to introduce relevant evidence, examine and cross-examine witnesses and argue orally, briefs in support of their respective positions were filed after the hearing by all parties and a reply brief, pursuant to record stipulation, was submitted by Respondent.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent is a grower engaged in agricultural operations in Kern County, California, as so admitted by Respondent. Accordingly, and as also admitted by Respondent, I find that Respondent is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

Further, as admitted by Respondent, the UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4 (f) of the Act; and I so find.

II. The Alleged Unfair Labor Practices

The complaint as amended at the hearing alleges that Respondent interfered with, restrained, or coerced its employees in the exercise of their rights guaranteed by Section 1152 of the Act in violation of Section 1153 (a) of the Act and discriminated in regard to the hiring or tenure of employment to discourage membership in a

labor organization in violation of Section 1153 (c) of the Act on or about June 10, 1979, through Silvestre Tapia, a labor contractor, by changing the terms and conditions of employment and discriminatorily discharging Rosa Valencia and Ruben Contreras because of their leadership in the October 1978 onion strike and activities in support of the UFW.

Respondent denies that it engaged in any unlawful activities.

III. The Facts

Respondent operates a farm in Arvin located in Kern County. In addition to growing fields, Respondent operates a packing shed to process and pack the vegetables it grows. Lawrence Scarrone, and his son John Scarrone, herein called John, both admitted to be supervisors within the meaning of the Act, work the farm. For the four years since coming out of college, John's major responsibility has been running the packing shed whereas Lawrence's major responsibility is directing operations in the fields.

When workers are periodically needed to plant or pick crops, they are obtained through a labor contractor, a common practice. Respondent merely informs the labor contractor how many workers are needed and the labor contractor supplies them. Specific workers, are normally neither identified nor selected.

In the fall of 1978, Herbert Ogden, herein called Ogden, an admitted labor contractor, supplied workers for the Kern County farm of Mario Scarrone, herein called Mario, Lawrence's brother. Then in November 1978, Ogden supplied workers to Lawrence for the November planting.

At both farms onions were planted in rows of equal length. However, Marie's rows contained more onions per row. Because there

were less onions per row to plant, the piece rate for workers to plant one row at Lawrence's farm (\$13.50 per row) was less than the piece pay rate at Marie's farm (\$17.50 per row). There was less planting work per row at Respondent's (Lawrence's) farm. Nevertheless, apparently this distinction was not clear in the minds of Ogden's crew when they transferred from one farm to the other. It was evident to the recently transferred crew members, however, that the piece rate per row was \$4 per row less at Lawrence's farm than at the farm of his brother. The crew members decided to protest this difference. This led to a one day work stoppage or strike in November 1978.

The strike was led by Rosa Valencia, a woman with a long history of activism in UFW conflicts and organizations.

The testimony concerning the strike, essentially undisputed, for the most part came from Rosa Valencia, herein called Valencia^{3/}, General Counsel's major witness. The strike was a one day affair involving some 300 workers who wished to protest the low rate of pay for planting a row of onions. Valencia testified that her husband helped her organize the strike, but his role therein, if any, is unclear from this record. Valencia testified that as a result of the one day strike, the onion planters no longer needed to transport the planting boxes containing the onion plants out to

^{3/}Valencia testified her real name was Josefina Flores and that she has also used the name Lupe Cortez. She testified that she was married to the other alleged discriminatee, Ruben Contreras who, when called as a rebuttal witness for the General Counsel, testified that his real name was Elias Basurto and that he also used the name Roberto Cortez. Use of different names is a common practice among farm workers in California. The names used at Respondent's farm, as alleged in the complaint will be used herein.

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the fields. After the strike, this work was performed by other workers. The record reflects no change in Respondent's row rate subsequent to the strike.

The day following the strike, labor contractor Ogden ceased working for Respondent. However, most of Ogden's crew, including Valencia and Contreras, continued work that day under a new labor contractor, Silvestre Tapia. Only a few new workers were brought in when Tapia took over.

Valencia and Contreras continued working for Respondent under Tapia performing various other farm activities on a variety of vegetables between November 1978 and May 1979. At the end of May 1979 or in early June, Valencia and Contreras were transferred from the fields to Respondent's packing shed under direction of Lawrence's son, John. On an unknown date, during their first couple of weeks working in the packing shed, Ogden, the former labor contractor, on a visit to the farm, told Lawrence that a car parked outside the packing shed belonged to the person who had caused the strike some six months earlier. A few days later, on Thursday, June 7, 1979 while Valencia was working in the packing shed grading onions on the onion belt, Valencia saw Ogden come into the shed. She testified that he appeared to look at her from a close distance of about ten feet for more time than one could hold her breath and then went upstairs to Respondent's office in the shed with a large window overlooking the shed operations. There, Valencia testified he talked to Lawrence.

Soon thereafter, Valencia testified she told her husband. "I think I'm going to get fired because I saw Hubert [Ogden] talking to Mr. Scarrone."

Later that day, Valencia had a conversation with Tapia in Spanish. That the conversation took place is undenied. However, the words used in that conversation are very important to the disposition of this case. Other than Valencia and Tapia, there were no other witnesses to the conversation.

The first time Valencia testified as to the conversation she said: "Silvestre Tapia came, and he spoke to me. And he said, you know, that Hubert [Ogden] recognized you. And he doesn't want you working here." Subsequently, Valencia went over her recollection of the conversation several times. Each time the substance of the testimony remained essentially similar but the details varied. Some of these renditions will be discussed, infra, to juxtapose them to Tapia's renditions. However, both agree that Tapia then assured Valencia that she had nothing to be concerned about as long as she continued her good work performance.

The next day, Friday June 8, John told Tapia to take an employee off the job of onion sack stacking because the employee was throwing the sacks too roughly, bruising the onions and causing them to bleed.^{4/} John never knew the name of the employee but identified him by the color of his shirt. Tapia thought the employee John identified was Contreras. Tapia persuaded John to allow the worker to finish the day.

Two days or so later, Tapia drove up and parked near the curb in front of the home of Contreras and Valencia, there he talked to Contreras. Tania intended to transfer Contreras to a

^{4/} John testified that he directed that Tapia change the worker's job, not remove him.

different job so as to satisfy John's complaint about handling the onion sacks too roughly. The transfer was to the crew of Tapia's brother, working on a different farm. Tapia testified that he did not wish to offend or hurt Contreras' feelings and therefore decided not to tell Contreras about the complaint concerning rough handling of the onion sacks. Attempting to be diplomatic, Tapia merely told Contreras, he wanted to move some people, including Taoia's son and daughter from the shed to the crew of his brother Refugio because Refugio's crew did not have enough people. Because there was but one car shared by the two spouses, Taoia knew that the transfer of one practically required the transfer of both.

IV. Discussions and Conclusions

The issues of this case are ones of fact regarding, in part, the motivation or reasons underlying the change in work place for Contreras and Valencia. Simply put, part of the question is whether Respondent was motivated by anti-union sentiment or desire to retaliate for strike activity some six months earlier or to preclude such future activity as protected by Section 1153(c) of the Act. The other part of the analysis does not require a finding of intent to discriminate for the test to find a violation of Section 1153 (a) is whether the action tends "to interfere with the free exercise of employee rights under the Act." Cooper Thermometer Co., 154 NLRB 502, 503, n.2 59 LRRM 1767. The General Counsel concentrated on attempting to prove the former, which if found would carry along the later. He did not establish persuasive independent evidence as to the latter alone.

This analysis essentially centers on whether the General

Counsel has carried his burden of proof. On making this judgmental balance on the basis of the record, regardless of suspicion, if the evidence does not clearly point in the favor of either party, then Respondent prevails because of the General Counsel's inability to carry his burden.

The facts in this case are close making the resolution unusually difficult. Were clear determinations of lack of credibility easily forthcoming, much assistance would be lent. With the feel lost in translation, assessment of this is made more difficult. It is noted that there are situations where two renditions of facts are close enough to corroborate each other generally, but diverge unintentionally at critical points not due to a desire to conceal, but rather because of the background and sentiments of the witness. In other words, some persons often truly believe that they hear or see something slightly different than the reality of the occurrence because of their background or position. Lacking the intent to deceive, their renditions are more difficult to analyze than those who are being deceitful because they properly give the impression of being honest witnesses.

At the outset, there are some troubling suspicions, which may have in part prompted issuance of the complaint. Lawrence Scarrone testified that Ogden indeed told him he had recognized the car belonging to some strike leaders. The record does not reveal whether Respondent linked this car to Valencia or Contreras. Scarrone, corroborated by Ogden and Tapia, responded that there was no problem as long as the people did the work. Yet the timing is troublesome in two ways. First, on Thursday June 7 Ogden sees and recognizes Valencia, as the strike leader, a fact which Tapia

confirms. The next day, Friday June 3, John Scarrone tells Tapia to remove Contreras, Valencia's husband, from the job of moving onion sacks because he is throwing them around too roughly. Tapia complies by removing Contreras to his brother's crew effective the following Monday, June 11. The fact, known to Tapia that the husband and wife share one car practically meaning that a transfer of one necessitates a transfer of the other, would accomplish Valencia's claim that Ogden wanted to get rid of her. But the second question is if Respondent were bent on an illegal course, why would it wait over six months to discharge such a widely known UFW proponent as Valencia? Her identity was not unknown to Respondent before and were Respondent interested, her identity could have been easily ascertained. Other nuzzling record questions remain. Contreras denies that John Scarrone criticized his handling of the onion sacks (yet he does admit bruising onions causing wetness). John testified he criticized an employee whose identity he did not know. Was this a pretext? Perhaps Contreras was not the employee John criticized. Perhaps Tapia got the workers confused. The resolution of these issues is not apparent from the record. That the circumstances are highly suspicious is undeniable. Being unable to resolve them definitively from the record, the remaining analysis is of the conversation between Tapia and Valencia referenced above regarding Herbert Ogden's recognition of Valencia as the leader of the strike six months earlier.

Valencia's differing renditions of the conversation are troublesome. The first time she mentioned it she testified that Tapia told her that Hubert recognized her and did not want her

working there.^{4/} Later she testified that Tapia said that "Hubert had just arrived, and he spoke with Mr. Scarrone, and they want for me to fire you because you are a striker, number one, and he recognized you." Valencia testified Tapia told her he could not do it because she was a good worker and had worked with him a long time. Valencia testified the conversation was at lunch time in the vineyards across from the packing shed. They were sitting together with a floor lady named Celia and with Contreras. Neither of these two were called to testify about this conversation.

Tapia testified that Lawrence Scarrone told him that there were two people working in the shed that caused the problems with the onions. Scarrone told him there were many others like that and, as long as they did their jobs, it did not matter to him. Then Tapia testified about the conversation with Valencia. Tapia put the conversation at 4:30 or 5 p.m., around quitting time, not at lunch. Tapia's English, the tongue in which he testified was poor and his account was quite garbled. However, I credit his testimony that he did not have lunch with Valencia that day as she testified, but rather, that he talked to her at quitting time. Tapia testified that he told Valencia that Hubert Ogden had come to talk to Lawrence and told Lawrence that two people who caused the onion strike were working in the shed. [Apparently,

^{4/} At the time of the conversation, 'the record does not indicate Ogden had any responsibility on behalf of Respondent regarding the packing shed workers.

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this was related to him by Lawrence]. Taoia testified that he told Valencia that Lawrence then told him that if these persons like to do the work, "you can have them over here, no problem." Tapia denied telling Valencia anything about being fired. In response to a query from the undersigned, Tapia denied telling Valencia he could not fire her because she was a good worker, but he did testify that he told Valencia he did not "want to fire you guys just because [of the strike]." However, this was only in response to Valencia's question. "Then she— said you want to fire us? I said no, why?" Later Tapia again confirmed this. After he related this matter to Valencia she said to him "you say you want to fire us just because Hubert said that." Taoia said no. The question arises, was Valencia, a time tried UFW proponent, sophisticated enough intentionally to lead Tapia toward saying the "magic words" which might constitute a violation of the Act. The suspicion runs high against both sides -- that the respective fact recapitulations are slightly bent in order to accomodate understandable self serving positions. If the conversation took; place, as Valencia put it, at lunch time, why were other witnesses not called to corroborate its content, or at least the clearly visible aspects of their propinquity. Although Tapia's confused testimony makes it suspect because of an understandable need to protect his principal, I not only credit his testimony as to the time of the conversation, but also his testimony that it was Valencia who first broached the subject of firing. Juxtaposing this to Valencia's

^{5/} Transcript page 162, line 5, second word, and line 19, last word, are hereby corrected by substitution of the pronoun "she" in lieu of "he".

first testimonial rendition of the conversation then fits . Tapia told her Hubert Ogden recognized her as a former strike leader and Scarrone said no problem. Whether acting out her fear or a plan, she manipulated the conversation toward talk of being fired If this were not the case, it would have been most difficult for Tapia to face Valencia and Contreras when he subsequently transferred them to his brother's crew. The reason he gave them, an admitted "white lie" to save hurt feelings, would have made him look ridiculous in their eyes had he really just told Valencia that Respondent wanted to fire them for protected strike activity. Thus, I conclude, not without serious reservation,^{6/} that Tapia's rendition is the more reliable.^{7/}

In any event, analysis of the foregoing facts as well as my impressions of the witnesses, leads to the conclusion that, suspicions and timing aside, I conclude that as a matter of fact and of law that the General Counsel has not met his burden of proof.

Upon the basis of the entire record and the findings of fact and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

The complaint shall be, and hereby is, dismissed in its

^{6/} Complaints in difficult cases such as this are properly issued as the matters should not be administratively resolved but rather, resolution is better fostered on the basis of a complete record.


^{7/} That neither rendition is reliable is also possible.

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entirety.

Dated: July 11, 1980

A handwritten signature in cursive script that reads "Michael K. Schmier". The signature is written in black ink and is positioned above a horizontal line.

Michael K. Schmier
Administrative Law Office