El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

NEUMAN SEED COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE-71-EC 7 ALRB No. 35

DECISION AND ORDER

On January 27, 1981, Administrative Law Officer (ALO) Brian Tom issued the attached Decision in this proceeding. Thereafter, Respondent timely filed an exceptions and a supporting brief. As the ALO recommended that the complaint herein be dismissed, Respondent excepts only to the ALO's denial of its request for an award of attorney's fees and litigation costs against the General Counsel.

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 and to adopt his recommended Order.

Respondent contends that an award of fees and costs is needed as a deterrent to the prosecution of meritless and vexatious charges. Respondent bases its request on prior decisions of this Board where we indicated that the standard for an award of attorney's fees and costs to an exonerated respondent would be whether the complaint was so clearly lacking in merit that

prosecution of the case could be characterized as frivolous. S. L. Douglass (July 26, 1977) 3 ALRB No. 59; Joe Maggio (June 15, 1978) 4 ALRB No. 37; Golden Valley Farming (Oct. 23, 1978) 4 ALRB No. 79; Tenneco West (May 27, 1981) 7 ALRB No. 12. In the most recent case concerning an award of attorney's fees and costs, we declined to make such an award on the grounds that the complaint was issued with reasonable cause to believe the allegations therein were true and that "the conduct of the litigation by the General Counsel ... was not frivolous." Tenneco West (May 27, 1981) 7 ALRB No. 12.

Although in each of the aforementioned cases we have made a determination as to whether attorney's fees and costs were warranted, and consistently found that they were not, the Board has not resolved the question of whether it has the authority to make such an award. Rather than continue to entertain requests for attorney's fees and costs under these uncertain conditions, we have decided that we should now resolve the question of whether the Board has authority to award fees and costs against the General Counsel to a respondent who is exonerated of all unfair labor practices alleged in a complaint. For the reasons set forth below, we conclude that this Board does not possess such authority.[1/]

The general rule in this state regarding the availability

[1/]Contrary to the position taken by Members Song and McCarthy in their concurring opinion, we decline to address the related question of our authority, under section 1160.3 of the Act, to award fees and costs against a respondent as remedies for unfair labor practices. See Western Conference of Teamsters (July 21, 1977) 3 ALRB No. 57. We believe the question of our inherent power as a tribunal to award fees and costs is different enough from the question of our power to award them under our explicit remedial authority to require us to defer any reconsideration of that issue until it is appropriately before us.

of an award of fees and costs is expressed by statute:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements as hereinafter provided. Code of Civil Procedure section 1021.

Traditionally, two different kinds of authority have been relied upon to create exceptions to section 1021 -- the "equitable" powers of a tribunal and its power to supervise its own processes. As we shall see, no definitive California authority has yet recognized an exception to section 1021 that operates as a sanction against losing parties. The judicially created equitable exceptions (an award from a "common fund", "substantial benefit", or "private attorney general") are based upon a policy of recompensing beneficent conduct, rather than of sanctioning improper conduct. For example, in D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, the Supreme Court described the origins of the "common fund" and the "substantial benefit theory" in this way:

> [A]ppellate decisions in this state have created two non-statutory exceptions to the general scope of section 1021, each of which is based upon the inherent equitable powers of the court. The first of these is the well-established "common fund" principle: when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund [Citations] .... The second principle, of more recent development, is the so-called "substantial benefit" rule: when a class action or corporate derivative action results in the conferral of substantial benefits, whether of a pecuniary or non-pecuniary nature, upon the defendant in such an action, that defendant may, in the exercise of the court's equitable discretion, be required to yield some of those benefits in the form of an award of attorney's fees. Id. at 25.

Similarly, the "private attorney general" exception is based upon the principle that when it is inequitable for the author of certain kinds of benefits to bear the entire cost of their production, the courts have inherent power to award fees in order to subsidize his efforts. Serrano v. Priest (1977) 20 Cal.3d 25, 46-47.

In D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, the Supreme Court appeared to suggest that sanctioning "vexatious or oppressive conduct" might be a further equitable exception to the general rule against awarding attorney's fees,[2/] but specifically declined to consider the issue. Id., at 27. Although at least one appellate court has construed the court's language in D'Amico as recognition of such an exception, see e.g., Save El Toro Assn. v. Dayo (1979) 98 Cal.App.3d 544, 555, we think it clear from the case itself as well as the high court's reference to it in Bauguess v. Paine (1978) 22 Cal.3d 626, that D'Amico does not establish any such principle.

> In D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 27, this court declined to consider a further equitable extension to the rule regarding attorney's fees. That case raised the issue of whether one who has been required to litigate because of "vexatious or oppressive conduct" of another party may be awarded attorney's fees to penalize that party, absent statutory authority. (Emphasis added.) Ibid., Bauguess v. Paine at 637, fn. 7.

In Bauguess v. Paine, supra, 22 Cal.3d 626, the Supreme Court once again declined to directly address the question reserved in D'Amico. Bauguess concerned the question whether a trial court

[2/] The federal courts have recognized such an exception. See e.g., Alyeska Pipeline Service Co. v. Wilderness Society (.1975) 421 U.S. 240.

had any power to award attorney's fees as a sanction for alleged misconduct of counsel at trial. Noting the two sources of power which have been utilized to justify awarding of attorney's fees (the equitable powers described above and the court's general supervisory powers) the Court observed that it has "moved cautiously in expanding the [equitable] non-statutory bases on which such awards may be based," 22 Cal.3d at 636, and that the fees-as-sanctions awarded by the trial court did not fit within any of the already recognized equitable exceptions. So far as the court's inherent supervisory authority was concerned, the court was emphatic in rejecting that as a basis for such an award: "It would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute." Ibid, at 639.

Courts of appeal, sensitive to the Supreme Court decision in Bauguess v. Paine, have generally read it as not permitting an award of fees as sanctions. Thus, in Olson v. Arnett (1980) 113 Cal.App.3d 59, 68, the court rejected the contention that a party is entitled to attorney's fees upon proof that the losing party acted in bad faith:

> Respondents also cite the power asserted by federal courts to award attorney's fees in a case where the losing party acted in bad faith, vexatiously, wantonly, and for oppressive reasons. (Hall v. Cole (1973) 412 U.S. 1, 5 [136 L.Ed.2d 141, 153-154, 95 S.Ct. 1612].) However, this doctrine does not prevail in California. Young v. Redman (1976) 55 Cal.App.3d 827, 834, 838-839 [128 Cal.Rptr. 86]; Bauguess v. Paine (1978) 22 Cal.3d 626, 634, 638-639 [150 Cal.Rptr. 461, 586 P.2d 942]; Twentieth Century-Fox Film Corp. v. Harbor Ins. Co. (1978) 85 Cal.App.3d 105, 114 [149 Cal.Rptr. 313]; Coalition for L.A. County Planning etc. Interest v. Board of Supervisors (1977) 76 Cal.App.3d 241, 246,

> fn. 3 [142 Cal.Rptr. 766]; Metzger v. Silverman (1976) 62 Cal.App.3d Supp. 30, 37 [133 Cal.Rptr. 355].)

In Yarnell & Associates v. Superior Court (1980) 106 Cal.App.3d 918, 922-23, the court concluded that a trial court could not award attorney's fees as sanction for filing a frivolous motion:

> The theory of Bauguess is that it would be unnecessary and unwise to permit trial courts to use fee awards as sanctions where not authorized by statute. If attorney conduct is disruptive of court process, the court may punish by contempt. When acting under its contempt powers, the court must act within procedural safeguards. 'The use of courts' inherent power to punish misconduct by awarding attorney's fees may imperil the independence of the bar and thereby undermine the adversary system.' (22 Cal.3d at p. 638.) Clearly, the Bauguess reasoning applies to any sanction occasioned by attorney conduct, whether denominated 'attorney's fees' or merely 'sanctions.'

See also People v. Silva (1978) 114 Cal.App.3d 538 (Bauguess v. Paine precludes award of attorney's fees as sanctions for filing vexatious motions).

It is clear from the preceding discussion that the question of the power of a California tribunal to award attorney's fees as a sanction for vexatious litigation is, at best, an open one. However, with respect to the award of fees sought against the General Counsel in this case, whatever doubts about our authority were generated by the D'Amico-Bauguess line of cases are sufficiently reinforced by independent statutory reasons for us to conclude that such an award is beyond our power. To this point, our discussion has simply assumed that our inherent powers as a tribunal are equal to those possessed by the courts, but we must recognize that administrative agencies can only act within the

scope of their delegated powers.

> It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. [Citations] An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. Ferdy v. State Personnel Bd. (1969) 71 Cal.3d 96, 103-104.[3/]

Pursuant to Labor Code section 1160.3 we have been granted the authority to adjudicate unfair labor practices. Although that authority includes the discretion to give concrete content to the catalog of unfair practices enumerated in the Act, Republic Aviation Corp. v. NLRB (1943) 324 U.S. 793 [16 LRRM 620], we still may issue orders, after notice and upon hearing, only against persons who have been found to have committed unfair labor practices. Under our statute, only "agricultural employers" or "labor organizations" can commit unfair labor practices. Accordingly, we do not believe we have authority to issue an order against a party who not only has not been found to have committed an unfair labor practice, but being neither an agricultural employer nor a labor organization, is not definitionally capable of

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[3/] Consumers Lobby Against Monopolies v. Public Utilities Comm. (1979) 25 Cal.3d 891 does not compel a conclusion to the contrary. In that case, a bare majority of the Court held that the Public Utilities Commission had the authority to award attorney's fees under the common-fund exception to Code of Civil Procedure section 1021 to the same extent as a court. It found such authority, however, through an examination of the entire range of the Public, Utilities Commission's power including its broad grant of general authority to "do all things" necessary and convenient to the regulation of public utilities, Public Utilities Code section 701, as well as its specific authority to make reparations to aggrieved ratepayers, Public Utilities Code section 734.

committing one.4/

This problem also extends to enforcement: our orders are not self-enforcing, Utah Copper Co. v. NLRB (10th Cir. 1943) 136 F.2d 405 [12 LRRM 797]; NLRB v. Ford Motor Co. (5th Cir. 1941) 119 F.2d 326 [8 LRRM 656], but require court proceedings to effectuate them. Because the Board may issue orders only against persons who have committed unfair labor practices, it is questionable whether we can issue an enforceable order against any party whose actions are not proscribed by Labor Code section 1153 or 1154.

Given the foregoing circumstances, we conclude that this Board does not have authority to make the award of attorney's fees and litigation costs against the General Counsel, as requested by Respondent, and therefore we hereby dismiss its exception to the ALO's Decision.

ORDER

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

Dated: October 27, 1981

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

4/ We note that awards of attorney's fees against federal agencies including the NLRB are now specifically authorized in certain circumstances by the Equal Access to Justice Act, P.L. 96-481. The need for such legislation confirms our conclusion that the power to make such awards is not easily drawn from the bounds of a specific remedial statute.

MEMBERS SONG and McCARTHY, Concurring:

We agree with the majority's conclusion that this Board does not have the authority to award attorney's fees against the General Counsel. However, we doubt whether this Board has the authority to award attorney's fees against a respondent. Section 1021 of the Code of Civil Procedure provides that attorney's fees are not recoverable in the absence of a specific statutory exception. We do not believe that the general remedial authority granted to the Board in Labor Code section 1160.3 is sufficiently specific to create an exception to section 1021. The difference between this Board's enabling legislation and that of the Public Utilities Commission suggests that Consumers Lobby Against Monopolies v. Public Utilities Comm. (1979) 25 Cal.3d 891, cited by the majority, would not compel a contrary conclusion. Absent more persuasive argument, we would consider reversing the conclusion reached by the Board on this issue in Western Conference of Teamsters (July 21, 1977) 3 ALRB No. 57.

Dated: October 27, 1981

ALFRED H. SONG, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Neuman Seed Company (UFW)

7 ALRB No. 35
Case No. 79-CE-71-EC

ALO DECISION

The alleged discriminatee, Rosas, had refused to work at a particular field which he claimed was subject to a strike by the Union. There was no picket line at the field, nor were there any other objective signs that a strike was in progress when Rosas declined to work the field. Following this incident, Rosas was absent from work for several days. He was then discharged on the grounds that he had refused a work assignment and had been absent from work for several days without notification to the company.

The ALO dismissed the complaint in its entirety, finding that: (1) even if Respondent knew of Rosas' claim that the field was being struck, it knew that such claim was false and that there was no apparent reason for thinking otherwise; (2) there was no indication of anti-union animus on the part of Respondent; and (3) there was no causal connection between the refusal to work the field and the discharge. The only exception to the ALO's decision was one based on Respondent's claim that it was entitled to an award of attorney's fees.

BOARD DECISION

The Board addressed the question of its power to award attorney's fees. Noting that a general policy against the award of fees is expressed by statute, California Civil Procedure section 1021, the Board first considered whether the award sought against the General Counsel fit any of the recognized exceptions. It concluded that, although it is still an open question, there is at present no judicial authority permitting an award of fees as sanctions. With respect to an award of fees against the General Counsel, the Board held that it did not have authority under the statute to make such an award. Members Song and McCarthy, concurring, expressed doubt that this Board has authority to award attorney's fees against a respondent, on the basis that the remedial authority granted in section 1160.3 of the Act is not sufficiently specific to create an exception to Code of Civil Procedure section 1021.

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

NEUMAN SEED COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE-71-EC

APPEARANCES:

William G. Richardson, California,
for the General Counsel

Chris A. Schneider, California,
for the Charging Party

William F. Macklin, California
for the Respondent

DECISION

STATEMENT OF THE CASE

Brian Tom, Administrative Law Officer: This case was heard by me on June 19 & 20,1980 in El Centro, California. The hearing was held pursuant to a complaint and notice of hearing issued March 20, 1980, and duly served on the Respondent, Neuman Seed Company. The complaint is based on charges filed on August 7, 1980 by United Farm Workers of America, AFL-CIO (hereafter "UFW"). The complaint alleges that the Respondent violated

1153 (a) and (c) of the Agricultural Labor Relations Act (here after the "Act").

All parties were represented at the hearing and were given *a* full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs in support of their respective positions after the close of the hearing.

At the close of General Counsel's case, the Respondent made a motion to dismiss the complaint. I took the motion under submission. Said motion is hereby denied.

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:

FINGINGS OF FACT

I. JURISDICTION

Respondent, Neuman Seed Company is a corporation engaged in agriculture in Imperial County, as was admitted by the Respondent. Accordingly, I find that Respondent is an agricultural employer with the meaning of Section 1140.4 (c) of the Act.

The UFW is an organization representing agricultural employees within the meaning of Section 1140.4 (f) of the Act, as was admitted by the Respondent, and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The complaint alleges that the Respondent violated Section 1153 (a) and (c) of the Act by the discriminatory discharge of Ezerquiel Rosas (hereafter "Rosas").

Respondent generally denies each and every allegation alleging a violation of the Act. Respondent essentially contends

that the discharge was for cause.

A. PRELIMINARY FACTS

The Respondent is a corporation primarily engaged in the production of onion and lettuce seed for sale to other companies. Respondent's main office is in El Centro. In addition to seed production, Respondent also grows some melons and some leaf type vegetables. At the peak of its season, Respondent employs approximately 60 to 70 workers. Respondent operates in both Imperial and Riverside Counties.

Rosas has been employed by Respondent since 1976 permanently as a tractor driver. At the time of his discharge, he was employed as a general laborer. I find him to be an agricultural employee within the meaning of Section 1140.4(b) of the Act.

Brian Conway (hereafter "Conway") began work with the Respondent in October of 1978 as tractor foreman. Sometime in January of 1979 he was promoted to Production Manager. As such he was in charge of all production of seed for the company. He has the authority to hire and fire employees as well as to assign their work. I find him to be a supervisor within the meaning of Section 1140.4 (j) of the Act.

B. THE TERMINATION

Rosas testified that he was employed by Respondent since 1976. On March 22, 1979, Rosas along with two other employees, Ramon Martinez and Manual Duran refused to work at a field known as Pampas 7. Rosas, Martinez and Duran all testified that their refusal to work in Pampas 7 on March 22 was because they believed

it was on strike. Rosas & Martinez based their belief on unidentified companions who told them the field was on strike. Duran testified that David Martinez, whom he identified as the employee's negotiator, told him not to enter Pampas 7 because it was being struck by the union. There is no further evidence in the record as to whether there was in fact a strike on Pampas 7, who was striking or who it was directed against, if anyone.

At the time these three workers chose not to enter Pampas 7 there were no union pickets or representatives at the field. Rosas testified that to his knowledge Neuman Seed was not on strike. After they refused to work on that date, they informed Rafael Solis, their immediate supervisor, of their reasons for not working, and Solis arranged for them to be transported back to Calixico.

On the following day, March 23, all three workers returned to work and all worked a full day. They all also received a written notice from Conway reprimanding them for not accepting a work assignment.

On March 24th Martinez and Duran worked a full day. Rosas did not work on that day. Rosas testified that he arrived twenty minutes late to the pick-up point in Calexico because of a delay in crossing the border. He testified that after he discovered that the crew had left, he went to the closest field to locate them, but they were not there. He made no further effort to locate them or to notify the company that he would not be able to work that day. He testified that when he missed work in the past he was not required to notify the company.

On March 25th, Sunday, Rosas did not show up for work even

though his crew was scheduled for work that day. When a crew is scheduled to work on a Sunday, they are notified during work on Saturday. He testified that as a field hand he rarely worked on Sundays. He testified he did not call the office on Sunday to ask if there was work because it was closed.

On March 26, Rosas again missed his crew at the pick-up point because unbeknownst to him the crew was scheduled to leave at 4:30 that morning because they were working in Calipatria, an hour's drive away. On this day, he testified that he called his supervisor Solis to advise him of his problem. He was informed that the crew was working in Calipatria. Because Rosas had left his car on the Mexican side of the border, he estimated that he would only be able to work 5 hours if he had to return to Mexico to get his car and drive to Calipatria. The record is unclear as to whether Rosas actually told Solis he would not work that day because of his transportation problem.

On Tuesday, March 27, 1980 Rosas received a message, through Duran, from Solis that he should report to the shop at 7 a.m. He reported to the shop, but there was only a mechanic present. At approximately 9 a.m. he overheard a conversation the mechanic had with Conway over the phone asking Rosas to wait at the shop until Conway appeared. Rosas waited until 1 p.m. but Conway never appeared. Later that same day around 7 p.m. Rosas called Conway and was informed that he was being terminated.

Conway testified that he decided to terminate Rosas for the following reasons: (1) Rosas' absence from work and his failure to notify the company; (2) Rosas' involvement in a prior incident at work where he and others were allegedly working at a "snail's

pace"; and (3) for his involvement in what Conway refers to as the "Pampas problem".

C. DISCUSSION OF THE ISSUES AND CONCLUSION

It is concluded that the General Counsel has not shown, by a preponderance of the evidence, that Respondent, in discharging Rosas, violated the Act.

In order to establish a prima facie case of discriminatory discharge in violation of Section 1153 (a) and (c) of the Act, the General Counsel must establish that the employee was engaged in union activity, that Respondent had knowledge of the employee's union activity, and that there was some connection or causal relationship between the union activity and the discharge. Jackson & Perkins Rose Co. 5 ALRB No. 20.

Contrary to the General Counsel's assertion, the extent of Rosas' involvement in union activity is not at all clear from the record. It appears that he was a member of the union four years immediately prior to his dismissal. There is also evidence that he was a delegate to a union convention in Salinas and had served as a representative of tractor drivers in contract negotiations. With regard to these last two activities, however, there is no evidence as to when they took place or how prominent a role Rosas played. Though his participation would appear to have been more active than that of the discriminatee in J.G. Boswell Company 4 ALRB No. 13, cited by the General Counsel, the extent of his union activities is at best ambiguous.

It is also far from clear whether Rosas' refusal to work at the Pampas 7 field in the afternoon of March 22, 1979 constituted

protected concerted activity. The field, in fact, was not being struck. Furthermore, Mr. Rosas testified that to his knowledge the Neuman Seed Company was not on strike on March 22nd nor had it ever been on strike in the past. He himself never observed pickets at Pampas 7, but he had been informed by a co-worker that the field was being struck. The identity of Rosas' informant is not revealed on the record.

The General Counsel suggests that the absence of a picket line at Pampas 7 should not be used to discredit the worker's belief in the struck status of the field. She argues that given the agricultural setting, it cannot be assumed that picket lines would be established "at every field on every day of a strike". According to the workers' own testimony, however, they knew that Neuman Seed employees were not striking the whole company but believed only Pampas 7 was on strike. Under these circumstances, the absence of a picket line seems substantially more discrediting than the General Counsel would allow.

Whether or not Rosas was engaged in concerted union activity, it must be established that the Respondent had knowledge of it. Conway, Production Manager for Neuman Seed, who terminated Rosas on his own authority, testified that he was unaware of any union involvement on the past of Rosas until August, 1979. Though the General Counsel offered no testimony directly controverting Conway on this point, he argues that knowledge of Rosas' union activities may be inferred from the record as a whole, citing S. Kuramura, Inc. 3 ALRB No. 49. It should be noted, however, that in Kuramura there were few employees, the employer's wife was in daily contact with them and had discussed the union with

some and the employer himself had been observed photographing visiting union personnel. The facts in the instant case are not nearly so compelling.

Brian Conway started working for Neuman Seed in October, 1978. He became Production Manager in January, 1979. As noted earlier, the record is devoid of any evidence as to when Rosas participated in the contract negotiations. There is also no evidence that Conway had participated in such negotiations prior to March 22, 1979 or that he had significant direct contact of any kind with the workers or the union. Thus, there is no evidentiary basis from which to infer Conway's knowledge of Rosas' prior union activity.

The General Counsel would also infer that Respondent had knowledge of Rosas' involvement in concerted activity at Pampas 7 on March 22nd. This, of course, begs the question discussed supra of whether Rosas refusal to work in Pampas 7 did, in fact, constitute such protected activity. Assuming, arguendo, that it did, can Respondent's knowledge then be inferred? Conway admitted being told of the Pampas incident by his foreman, Rafael Solis, but could not recall being told why the men refused to work. Mr. Solis did not testify on this point, but I am inclined to share the General Counsel's doubts that Conway could remain ignorant of his employees' reasons for refusing a work assignment.

Whether Respondent had knowledge of Rosas' union activity need not be determined as I find no connection or causal relationship between such activity and Rosas' discharge. Lacking evidence of any anti-union animus on the part of Neuman Seed, apart from the Pampas 7 incident to be discussed infra and in light of Rosas'

absence without notice to his employer for a 3 or 4 day period and his admission that he had been regularly reprimanded orally by Conway in the past, I find that Rosas was discharged for good cause and not in violation of the Act.

Even though there is evidence to support a justifiable ground for discharging an employee, a violation of the Act may nevertheless be found where the union activity is moving cause behind the discharge or where the employee would not have been fired "but for" his union activities. S. Kuramura, Inc. 3 ALRB No. 49.

The General Counsel raises several points from which, it is argued, one can infer that Rosas' discharge was discriminatorily, motivated. It is pointed out, for example, that Production Manager Conway never gave Rosas a chance to explain his absences prior to firing him. Had Rosas had a previously unblemished work record, his precipitous discharge might indeed raise a question as to the Respondent's motivation. But, by his own admission, Rosas had received "daily" oral complaints about his work from Conway.

The General Counsel also argues that Conway was inconsistent in listing his reasons for firing Rosas and such inconsistency is indicative of discriminatory intent. An examination of the record, however, reveals that Conway's reasons were, in fact, quite consistent, being separate instances of Rosas' unreliable performance. A reference to the "Pampas problem" as a factor in Rosas' discharge is not inconsistent with the charge of unreliability. Even if Conway knew of Rosas' claim that the field was being struck, he also knew that such a claim was false and that there was no apparent reason (e.g. pickets) for thinking otherwise.

Thus, Rosas' refusal to work in the field might reasonably been viewed by Conway as further evidence of Rosas' unreliability.

The timing of the discharge, coming so soon after Rosas' refusal to enter Pampas 7, might be considered, as the General Counsel argues it should, valid circumstantial evidence to prove a discriminatory discharge. The cases cited by counsel in support of this position, however, all involve fact situations where the existence of protected union activity was not really disputed and there was no history of unsatisfactory performance by the discharged employee. Such is not the case here. In addition, shortly after Mr. Rosas' refusal to work at Pampas 7, he remained away from the job for 3 or 4 days without notifying his employer. Rather than infer that Rosas' discharge was exclusively based on the March 22nd incident, which may or may not have constituted union activity, it is far more reasonable to infer that he was discharged because he was not a good worker. Such a conclusion is further supported by the fact that Rosas' two co-workers, who also refused to work in the Pampas 7 field, remain in Respondent's employ.

Union activism does not provide ironclad protection against discharge. If an employee violates established rules or policies and has been previously reprimanded for unsatisfactory performance, he cannot be surprised if his employer dismisses him. In the instant case, it is uncertain whether Rosas understood Respondent's intended policy with respect to notifying the company in cases of lateness. The wording of the instructions, which Rosas acknowledged receiving, is subject to different interpretations. But even assuming Rosas did not violate an express company

policy, he was aware that his employer was dissatisfied with his work. He had received numerous oral complaints as well as a written reprimand for his failure to work on March 22nd.

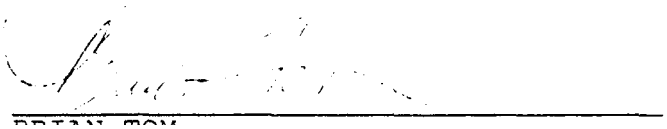
Given these ample grounds for dismissal and the absence of any indication of anti-union animus on the part of the Respondent, I find that Rosas' discharge did not constitute violations of Sections 1153 (a) and (c) of the Act.

Respondent also raises as an issue that Neuman Seed Company should be awarded reasonable costs of litigation and attorney's fees. After reviewing the various authorities cited by respondent in his brief, I find no basis for such an award. Accordingly the request for attorney's fees and costs is denied.

RECOMMENDED ORDER

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

Dated: January 27, 1981



BRIAN TOM
Administrative Law Officer