

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

DEL MAR MUSHROOMS, INC. ,)	
)	
Respondent ,)	Case No. 79-CE-204-SAL
)	
and)	
)	
UNITED FARM WORKERS OF)	7 ALRB No. 41
AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

On January 26 , 1981, Administrative Law Officer (ALO) Ron Greenberg issued the attached Decision and recommended Order in this proceeding. Thereafter, General Counsel timely filed exceptions and a supporting brief, and Respondent filed a reply brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order. We agree with the ALO's conclusion that the General Counsel failed to establish a prima facie case that Respondent violated Labor Code section 1153 (c) and (a) . Jackson and Perkins Rose Company (Mar. 19 , 1979) 5 ALRB No. 20 ; Verde Produce Company (Sept. 10 , 1981) 7 ALRB No. 27 .

Respondent alleges that the General Counsel's exceptions

to the ALO's Decision were frivolous, and Respondent therefore requests reimbursement of the costs and attorney's fees it incurred responding to General Counsel's exceptions. We recently concluded, in Neuman Seed Company (Oct. 27, 1981) 7 ALRB No. 35, that this Board does not have authority to make an award of attorney's fees and litigation costs against the General Counsel. We therefore deny Respondent's request.

ORDER

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

Dated: November 16, 1981

JOHN P. MCCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Del Mar Mushrooms, Inc.
(UFW)

7 ALRB No. 41
Case No. 79-CE-204-SAL

ALO DECISION

The ALO concluded that Respondent did not violate the Act by discharging employees Daniel Rangel, Antonio Rangel and Pedro Garcia. Although there was evidence that the three employees had engaged in union organizing activities, the ALO found that General Counsel failed to establish a prima facie case of a section 1153(c) and (a) violation because there was insufficient evidence that Respondent had knowledge of such union activity, and also insufficient evidence that the discharges were based on the employees' union activity. The ALO found that the discharges resulted from a breakdown in employee-management relations rather than anti-union animus,

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALO and ordered that the complaint be dismissed in its entirety. Based on its decision in Neuman Seed Company (Oct. 27, 1981} 7 ALRB No. 35, the Board denied Respondent's request for the attorney's fees it incurred responding to General Counsel's exceptions to the ALO's decision.

* * *

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

* * *

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

DEL MAR MUSHROOMS, INC.,)
)
)

Respondent,)

and)
)

UNITED FARM WORKERS OF)
AMERICA, AFL-CIO, —)
)

Charging Party)
)

Case No. 79-CE-204-SAL



APPEARANCES:

Jose B. Martinez, of Sacramento,
California, for the General
Counsel

Patricia J. Rynn, Marion
Quesenberg, Dressier, Stoll,
Quesenberg, Laws and Barsamian,
Newport Beach, California, for
the Respondent

DECISION

STATEMENT OF THE CASE

RON GREENBERG, Administrative Law Officer: This case was heard before me in Salinas, California, on September 24, 25, 26, 29, 1980. On August 24, 1979^{1/} a complaint issued based on a charge filed against Respondent, alleging violations of

^{1/} Unless otherwise stated, all dates refer to 1979.

Sections 1153(a) and (c)^{2/} of the Agricultural Labor Relations Act (hereafter the "Act"). By answer filed November 6, Respondent denied committing any violations of the Act.

All parties were given full opportunity to participate in the hearing. The General Counsel and the Respondent filed post-hearing briefs.

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

FINDINGS OF FACT

I. Jurisdiction

Del Mar Mushrooms, Inc., is a corporation engaged in growing mushrooms in Monterey County, California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The UFW is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employees concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The UFW is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. Respondent's Operations; Background

The work force is broken down into two main categories: the picking crew, and the outside crew, or general labor crew.

2/ All statutory references herein are to the California Labor Code unless otherwise specified.

Although presently expanded to about 52 workers, there were considerably less at the time of the alleged discharges.

In the years beginning in 1977 with the hiring of Dave Distefano as general manager there was a rather complete change in the complexion of management. Salvador Favela, who began working at Del Mar as a general laborer in 1971 and worked himself up to grower in 1976, was in charge of the whole plant for the two years prior to Dave's taking over in 1977. At that time, his position was changed to that of production manager, and he reported directly to Dave. The foremen of the outside crew and the picking crew continued, however, to report directly to Sal.

Sal Favela testified that Joe Nuno was more of an "all-around man" for much of 1977, and Sal doubted very much that Joe was titled "assistant general manager" at the time. According to Sal, the picking foreman might have reported directly to Joe by the time Sal left in 1979, but not as early as 1977.

Dave testified that Joe was a part-time worker at Del Mar when Dave arrived there. When Joe graduated from high school, Dave wanted him as a liaison with the workers. The process of expanding Joe's powers was a gradual one, and continued despite appearances of worker resentment towards Joe. Dave felt that dealing with such resentment was just one more thing a man had to deal with if he were to have authority.

Joe, however, testified that when he finished school, Dave and Sal offered him a full-time job as a supervisor, foreman and assistant grower. He claimed that Daniel

Rangel was the main instigator in the workers resentment towards him. Joe said that he had no doubts that he was a supervisor since 1977 and that both the picking and outside foremen would report to him. He said that Art Distefano and he had divided Sal's responsibilities when the latter left^{3/} although no general meeting was held to so inform the workers.

Antonio Rangel had been foreman of the outside crew and he testified that he reported to Sal while he was foreman. When Sal left, he reported to Joe who maintained the same system of directing Antonio verbally as had Sal.

Waldo Martinez was placed over Antonio on July 4. Dave testified that Waldo was brought in because of plant modernization and expansion.

Dave testified that Respondent had a very bad mushroom disease problem and was determined to train the men to combat it. They attempted rigid control measures—the picker was to leave mushrooms in the house in which they were picked, then brush their feet and dip their trays in a solution upon leaving a house. Dave said that he started these procedures within a year after he came to Del Mar. He held several general meetings with the workers concerning these measures and he was prepared to fire a worker depending upon how many times he was warned. Men were verbally reprimanded almost every day. Dave said

3/ Sal Favela's demeanor as a witness revealed deep seated resentments between him and Del Mar management. His allegiance was with the rank and file workers, not management.

that he had fired three or four men for sanitation reasons, particularly for not changing their clothes. He instituted a three-warning system sometime in June or July. Dave recalled installing four new dipping pans. There were some foot pans already there. Dave indicated a policy of paying pickers for partially filled baskets to encourage them not to take them out of a house. There was evidence that management had instituted a policy of controlled observation in the houses to insure that these procedures were being followed.

Joe testified that the new procedures were about 1½ years old when Pedro Garcia was fired. Because workers were afraid of getting "ripped off" for partially filled baskets, they instituted a policy of paying in full for half-baskets when workers were moved to different mushroom houses. Joe said the policy of not moving mushrooms began in 1978, and the policy of dipping the trays a little before that. He said that Sal held some general meetings about these new procedures. Joe testified that there was no previous dipping policy.

Sal testified that the dipping techniques had been in operation since he started in 1971. He said that the policy of not transferring mushrooms began around 1976 when they began paying by the piece-rate. He testified that the innovations to combat the disease problem introduced by the new owners consisted of putting caps on the mushrooms, adding two new dipping barrels, and adding the pay incentives for leaving the baskets inside.

III. The Alleged Discriminatory Discharges A.

A. Daniel Rangel

Daniel had worked 3-4 years at Del Mar, first as an hourly worker, and then as a forklift operator, a job with more responsibility. He had never been disciplined, nor warned, nor told that his work was unsatisfactory.

Joe said that Daniel was a good worker, but a bit lazy, and that occasionally Sal had that problem with him. Joe testified that Sal, in his presence, verbally reprimanded Daniel a few times for Daniel to be a little more careful with the machine. Joe testified that he reprimanded Daniel once or twice for the same reason. He was never personally warned about urinating in public. A general warning about urinating was given two or three times to the crew. Dave Distefano testified that Daniel was a very good and reliable worker, and that he never had any problems with him.

Daniel testified that he had known Joe for a few years before Joe had become a supervisor. He had lived in the house owned by Joe's mother for two years; and Joe had been an hourly co-worker.

Joe testified that he had gotten along fine with Daniel when they were co-workers, but when Joe was promoted he felt Daniel's responses became very sharp whenever Joe gave him an order. Daniel would joke and get the others laughing when Joe gave an order, and would say things like "Who are you?" and "What do you do here?", making fun of Joe. It happened all the time whenever Joe gave an order and it was very uncomfortable.

Joe said that Sal had made it clear to the workers that he was Sal's assistant, and had authority over them, and that doubts as to his position were not the reason Daniel talked to him like that.

Daniel testified that on the day of the incident, he had started work at 5:00 a.m. and quit at 11:30 p.m. At 10:45 p.m., the entire hourly crew was returning from the house where they were working to leave equipment at the office, and that he was walking about fifteen feet ahead of the rest of the crew. Joe passed him by and told the rest of the crew to return to work. Daniel said that the crew was in front of the number six house, and he was in front of number four, when Joe stopped the crew. Daniel said that after Joe passed him, he looked into the dining area from the doorway to see that the bathroom was filled with 6-8 pickers who finished prior to the general labor crew. He then walked toward the fence and urinated there. He testified that he had to go very badly and there were no women or children on the premises. The fence was about thirty feet from house number two, and the other bathroom that was available to the workers was behind number seventeen. As he walked toward the fence he heard Joe tell the rest of the crew to return to work. He understood that he was also supposed to return to work. After he urinated and while zipping up his pants, Joe approached him and said that Daniel should not be urinating there. Daniel said Joe spoke louder than normal, and he told Daniel to follow him to the office. There he told Daniel to come the next day for his check. Daniel left and

met Antonio, told him that he had been fired, and then Antonio confronted Joe. After Antonio and Joe argued for ten minutes, Joe called Dave to come down.

Arturo Flores, a member of the outside crew, testified that when Joe approached the crew and told them to go back to work, they were not all in one group but spread out, and only those in front were personally told to return. He had not yet turned back when he heard an argument develop below house number two, between Daniel and Joe.

The approximate timing of the incident as testified to by Daniel was corroborated by Flores, an hourly worker, Antonio, foreman of the general labor crew, and Francisco Perez, a picker, who said the picking crew had finished at about 10:00 p.m.

However, Joe testified that it occurred about 5:30-6:00 p.m. but later changed his testimony and placed it about 8:30-9:00 p.m. This latter time was corroborated by the general manager, Dave.

Joe testified that Daniel was only five feet away from the rest of the crew when he passed him. Joe said he met the rest of the crew in front of number three, and he spoke loudly enough to the crew in asking them to return to work so that Daniel could hear. The crew turned back but Daniel kept on walking, and Joe felt that unless he told Daniel personally, Daniel would claim not to have heard. Joe said he approached Daniel in front of number two. Joe testified that Daniel could not have seen that the bathroom was filled because Daniel was closer to the fence than the doorway when he approached him. Joe further stated that Daniel could not have had

enough time to look inside and return to where he was when Joe saw him. Joe said that Daniel refused to go back to work, and when Joe asked why not, Daniel said simply that he would not go. According to Joe, Daniel then tried to urinate on him from two feet away. Joe was shocked and asked Daniel why he did that and Daniel said because he felt like it. Joe testified that Art Distefano was walking by at that moment when Joe asked Daniel again why he had done it. This time Daniel claimed that "the restrooms were occupied." Joe said Art then checked the bathroom in the dining area to see that four or five pickers were there washing their hands, but checked the bathroom in back and it was empty. Art returned and asked what was wrong, and Joe explained what had happened to him. The pickers had gathered around, and the rest of the general labor crew had turned around and started walking back. Everybody started laughing and Joe fired Daniel.

Joe testified that he and Art walked to the office to call Dave while Daniel stood outside. Antonio, who had along with the rest of the general labor crew turned around after Joe had asked them to return to work, had gotten as far as house number seven or eight. They turned around and came back when they saw the discussion between Daniel and Joe. Joe testified that at first Antonio said nothing. However, when Joe came back out of the office, Antonio confronted him.

Both Antonio and Joe testified that Antonio challenged Joe's ability to fire Daniel for "that" (Antonio) or

"that reason" (Joe). Both stated that Joe said he could fire both the Rangels if he wanted to. Joe and Antonio agree that Antonio then challenged Joe to go ahead and do it.

Antonio testified that Joe braced himself as if he wanted to fight Antonio, with his fists cupped and hands raised. Joe denied this, saying that he wished things would stop because of the gathering crowd.

Joe also testified that neither Rangel went back to work, because everyone had finished by then, and that Dave told everyone simply to go home.

Dave testified that he was told on the phone that there was a "problem", so he came down. When he got there, he saw a congregation of men with Daniel and several men coming up from their cars. He stated he knew that there was a confrontation with Joe. He first testified he decided to cool things down and told everybody to go home, except those who were still working. However, he later testified that he told the Rangels to go home after the incident, and that they did so. Dave later clarified that he told everyone at the scene of the incident to go home.

Daniel testified that Dave told him to return to work that evening, which he did for another fifteen minutes. Antonio also testified that he returned to work after the argument, as did Arturo Flores.

The Daily Time Sheet (Resp. #1) indicates that both Antonio and Daniel worked 18 hours on June 27, the day of the urinating incident, consistent with Daniel's testimony, starting at 5:00 a.m. and finishing at 11:30 p.m. All company witnesses

deny that either Rangel worked such a long day.

Joe testified that Daniel did not come in at 5:00 a.m. that day, but rather 7:00 a.m., and that he did not work 18 hours. As noted above, both Joe and Dave placed the confrontation around 9:00 p.m. and testified that both Rangels left rather than going back to work. Joe testified that he felt the time records of that day concerning the Rangels were wrong, distinguishing "paid for" time from actual work time. He said that it was the responsibility of the foreman, Eulogio Garcia, to fill in the time sheet. Joe testified that the foreman relied upon what the employee told him and what the foreman himself could verify. Joe testified that this time sheet was the only one reflecting the time a worker started and when he finished. Joe also testified that the incident itself lasted 1½ hours.

Dave testified that a foreman has discretion to award workers for good work by adding hours to their time sheet. He did not find it "odd" that the Rangels would be awarded extra hours the night of the incident, although he knew that they did not go back to work. Dave said that he should have questioned his foreman about rewarding the Rangels that night with extra hours, but he did not.

Daniel testified that the next day he worked until about 5:00-5:30 p.m., when Joe came out and told him to follow him to the office. Daniel testified that at the office Dave handed an envelope to Joe, who gave it to Daniel saying that it was his check and that he was fired. Joe gave as the only

reason that Daniel was uncooperative and that they did not want any more problems with him.

Joe testified that Dave told Daniel the next day that he would not stand for insubordination. Joe told Daniel that what he had done was unjustified. Joe said that Dave asked Daniel if he remembered what he had done the previous evening, to which Daniel said no. Daniel was given an explanation.

Dave also testified that Daniel was given an explanation as to why he was fired. Dave testified that after Joe explained what had happened he wanted to see Daniel the next morning. He talked it over with Art, and was quite irritated that Daniel had urinated outside because of health inspections, sanitation concerns, and because they had had a problem with the men using a neighbor's property as a restroom. According to Dave, it was not only the urination but its combination with the refusal to go back to work that Dave found intolerable and why he terminated Daniel. Joe and Dave further disputed Daniel's ability that night to see that the bathroom was filled.

Daniel testified that the bathroom was twenty feet from the doorway of the dining room, was lit, and he could see six to eight pickers inside. As noted above, Joe claimed that Daniel simply did not have time to look inside and get back to the spot where he urinated. Daniel claimed that the bathroom door was broken, and that he could see into the bathroom from a distance greater than the dining area. Joe denied that the door was broken, testifying that it had a spring lock that automatically closed. Dave corroborated this and said that he

was very conscious about keeping the door working because of a previous citation he had received. He stated that he personally used it two to three times a day. Health regulations require a self-closing door.

Joe admitted that in a previous hearing he had testified that Daniel had urinated in front of the dining area, but now was testifying that Daniel urinated in front of number two. Dave denied having said that Daniel urinated in front of the dining area, as he had written in G.C. #8. Daniel testified that it was common practice to urinate outside, including foremen, naming Ramon Crotez and Joe, who he said did so frequently. Manuel Espira testified that he had been caught by Joe urinating in the mushroom house and was told that he would be fired if he did so again. Joe corroborated this testimony. Jorge Flores testified that he saw men, including Dave, Joe and Chet Frangipini, the owner, urinate outside, and he saw Dave urinate into the compost pile used for the mushroom beds. Dave denied ever urinating in the open at the plant.

B. Pedro Garcia

It is undisputed that Pedro was a good worker. Dave said he was the best picker. However, there is contradictory testimony concerning whether he was warned or reprimanded about failing to follow proper sanitation procedures. Pedro testified that he had never been reprimanded. He stated that on one occasion his new foreman, Santos Aguilar, had questioned him about carrying some baskets from outside number twelve into number ten, and told him not to. Pedro then explained to Santos

where he got the baskets and Santos dropped the subject. Sal testified that he had never reprimanded Pedro or had any problem with him concerning the policy of dipping his tray.

Joe testified that Pedro had been warned about not dipping his tray properly by his foreman. Dave testified that Pedro was reprimanded several times. Moreover, Dave said that verbal reprimands were given practically every day and hence were common.

Pedro testified that on the day of the alleged incident he had left house number thirteen with Jesus Cano and someone else and went to number ten. He picked up extra baskets outside number 12, stacked them inside one another in his tray, but had no mushrooms. He had dipped his tray before placing the baskets in them. Joe passed them a little before they entered house number ten without saying anything.

Jesus Cano testified that he had followed Pedro out of number thirteen the day Pedro was fired, and that neither he nor Pedro carried anything in their trays. Pedro picked up some baskets outside of number thirteen but he did not know where. According to Cano, Joe passed by about six feet away and said nothing. Jesus said Art Distefano was not there, and he did not recall seeing a spraying rig. Jesus indicated that it was between 7:00 and 8:30 p.m. when they left number thirteen and went to number ten.

Joe testified that around 6:00 p.m. he and Art were working on the spray rig that day outside number ten. Pedro was walking from the general area of number twelve toward number ten. The spray rig was five to ten feet in front of number ten.

Pedro was alone and had four full baskets of mushrooms in his tray.

Joe said that Art and he confronted Pedro and asked him why he was carrying the mushrooms. He said nothing and they asked him to return them to the house he got them from. He refused and Joe told him that he would fire him because he had been previously warned. Pedro again refused and Joe asked him to follow him to the office.

Dave testified that he was told that Pedro had carried four full baskets out of a house. Although acknowledging that he would remember the difference between 3/4 and four full baskets, he could not recall his statements in G.C. #9, that Pedro had carried only one basket 3/4 filled, and that house number thirteen was under controlled observation by foremen. He indicated that possibly the incident occurred at 6:00 p.m. He could not recall having stated, as he did in G.C. #9, that Jesus Valesquez (Cano) and Stephen Moreno were with Pedro at the time.

Pedro's accounts of the events surrounding his discharge are both different from everybody else's and confused. He recalled an incident where Santos observed him, Efraim Ochoa, Antonio and others talking about organizing for a union. Santos allegedly passed by the equipment warehouse at noon, about six feet from the door, while they held this meeting. When this happened is unclear. First, Pedro testified that it was just before, probably the day before, he was discharged. However, as he elaborated the incident, he seemed to testify that he

was discharged that very day. Then on cross-examination he explicitly said both incidents occurred on the same day. He testified that the men continued to talk for 15-20 minutes after Santos had passed by and that, "Afterwards, during the working hours, I got up and was going to my work. As I was leaving to the work, he called me, and he was about ten meters away at a distance." Santos gave him no explanation and took him to the office. Art, Dave and Joe were in the office and he was discharged.

Ochoa testified that around the 9th or 10th of July, Santos passed by while he, Pedro and Antonio held a meeting at around 12:05 p.m. in the warehouse about the union. Similarly, Antonio indicated that once he had been overheard by Santos around noon at the warehouse while the union was being discussed. Santos denied ever hearing Pedro talk about the union, or any of the other workers. He also could not recall the date or time that Pedro was fired.

Dave testified that he explained to Pedro that he had been warned before and that he had been insubordinate in refusing to return to work. Dave said that it was Pedro's refusal to bring the mushrooms back, his insubordination, and not his failure to dip, which led to discharge. However, in G.C. #9, Dave gave as his reason for terminating Pedro his bringing mushrooms out of the house, and other reasons not brought up during the hearing. Insubordination was not mentioned.

Joe testified that when he and Art brought Pedro to the office they told Dave what had happened, and that Dave proceeded to explain to Pedro why he was being discharged.

Pedro testified that after Santos told him to go to the office, Joe, Art and Dave were there with an already prepared check when he arrived. Art informed him that he was discharged without explaining why. Art said "Go with that motherfucker", (Sal) "he has work for you." After replying that he would work wherever he wanted to, he was told by Joe that he was uncooperative and that he had to be gotten rid of. Pedro testified that Joe said it was not beneficial to them to keep him, because he would not cooperate with them. Pedro asked for further explanation but got none, except that Joe said they wanted "to get rid of all the old workers", and they would all be discharged too. Joe denied that anyone indicated that they wanted to get rid of the old workers, as did Dave.

Pedro also testified that shortly before his discharge, he had been singled out on one occasion as the only picker denied overtime, an unusual occurrence. Sergio told him to go to the office, where Joe was, around 4:30 p.m. There Joe said the "boss" gave orders for Pedro to be denied overtime because they did not want to pay him extra, although the others were allowed to work.^{4/}

C. Antonio Rangel

Antonio testified that he worked at Del Mar for 2½-3 years, working as a general laborer for the first 1½ years.

4/ Francisco Perez testified that he remembered when Pedro, who was in his crew, was the only one stopped from working overtime, and that there were plenty of mushrooms left to be picked on that day. He recalled the time to be 7:30-8:00 p.m., because he specifically remembered asking for dinner that night.

Santos testified that he never remembered Perez asking about dinner. He also did not recall any instruction to keep Pedro from getting overtime.

Dave testified that as far as he knew no one gave orders to curtail Pedro's overtime.

He claims to have had no disagreements with Joe about work after Joe replaced Sal as his direct supervisor. He was never disciplined or given any notices. He was then promoted to foreman by Sal and Dave. In the office, Sal asked him if he could help with the workers for there was a problem filling the boxes. Antonio testified that Art, Dave and Sal were in the office, but not Joe. Antonio told Sal that he could not read or write. Sal was translating this conversation for Dave and Art, and he informed Antonio that it did not matter that he was illiterate. He said that he received his orders verbally from Sal in the morning. He was neither given any notices nor did anyone complain of his work. Joe gave Antonio his orders after Sal left, and he maintained the same system as Sal. There were never any disagreements between Joe and Antonio. Antonio testified that he was demoted, although kept at the same salary level, and that the reason given was his illiteracy and the problems it caused. He was replaced by Waldo, whom he was to help train.

Sal testified that he was responsible for promoting Antonio. He had discussed it with Dave, but could not recall discussing it with Joe. He could only recall that he and Dave were in the office when Antonio was promoted, Antonio mentioned that he was illiterate which Sal already knew and this was translated for Dave. Sal said he gave Antonio his orders for a day on the night before. The reason he gave for choosing Antonio to be promoted was that Antonio was older than the rest of the crew and older Mexican people are respected by their peers. When Antonio gave an order, nobody would talk back to him. Sal testified that the reason he wanted a new

outside foreman was to get someone who would relay his orders and could relate to the crew.

Dave testified that he was unaware at the time that Antonio was promoted that he was illiterate. He stated that he probably discovered it sometime in 1978. He said that it was the work practice for the grower foremen to tell Antonio what was to be done. His job was "like a pusher, a lead man." Antonio had no responsibilities for bookkeeping. Dave said Waldo was hired because he knew there would be problems getting the older workers to understand the new procedures and someone was needed to give the workers direction. Antonio kept the same responsibilities as before and was not demoted, nor was his pay reduced. Waldo had much more knowledge and training than Antonio; Antonio was not involved in training Waldo. Dave further testified that as far as he knew no one ever said anything to Antonio about his illiteracy.

Dave said that while Antonio was a good worker and foreman, he had problems with several employees. Antonio was forceful with his crew, "gung-ho." Dave testified that Antonio was informed on July 4, that Waldo would be his superior. Dave testified that he tried to explain everything to Antonio so that he would not feel that he was being demoted. Dave felt Antonio was excited about getting someone he could speak to.

Joe testified that Sal consulted him about Antonio's promotion, and that he, Sal, and Dave were in the office when Antonio was promoted. He said that Antonio was enthusiastic about the promotion which he got because he was a "pusher."

His illiteracy was not mentioned at that meeting, and it never caused any problems. There were complaints against Antonio by some members of his crew because he was verbally abusive, and Art, Emeliano Ortiz and Mr. Monroy all asked to be moved because of it. According to Joe, he learned from some workers that Antonio had no influence on the men after hours, and in fact, was considered "crazy" by some of them. Joe was also informed that Antonio was too loud with the men and did not know how to reprimand them. Joe thought that Antonio was demoted and that this occurred four to six weeks after the urination incident. Joe did not know who was responsible for demoting Antonio.

Waldo testified that he started working on July 4. Antonio testified that he never had a dispute with Waldo until the day he was discharged. That day, Waldo told him to hurry up and Antonio responded that he was not working at the piece rate. Antonio said he started work that day at 7:00 a.m. and that the men had just started to work when Waldo approached him. Waldo had stopped in the doorway and told Antonio in a strong voice that they had to "get with it."

Waldo testified that he was preparing to start casing the houses that morning and that he looked for Antonio but could not find him. After going to the office to pick up a lamp, he went back to the house where Antonio was standing in the doorway. He told Antonio that only six men and not nine were needed for the job and that six men could do it in six hours. Antonio responded that it would take eleven or twelve hours. Waldo told Antonio he would teach him how six men

could do it in six hours and Antonio said it would run into overtime whether Waldo liked it or not. Antonio reacted with a bad attitude and his voice was rough and mad when Waldo told him to do the job in six hours. Waldo took Antonio to the office. Waldo testified that he had already removed the extra men and prepared them to case number thirteen because he came upon Antonio and told him to hurry up. Art, Dave and Joe were at the office when Waldo brought Antonio there.

Dave testified that Waldo had come to the office that day looking for a light and Waldo said that he could not find Antonio. Dave told him that if there was any trouble to bring Antonio to the office. However, Dave testified that Antonio asked Waldo to bring him to the office because he objected to the work speed up. Dave said that Chet, Abe Fratkin, Joe and Art were at the office.^{5/} Joe and Antonio testified that Ralph Crosso also was present.

Antonio said that Waldo called him to the office and Joe told him he was fired. Antonio asked why and Joe said only that he had had a lot of problems with him, but he did not say what kind of problems. Antonio said that he became very angry at this, but did not tell him that he was quitting. He could not remember if he had asked for his check. He then left the office and hung up his lamp and hat outside. Chet then arrived

5/ Dave could not recall saying that all the men were just standing around when Waldo found Antonio and had done so for 1½ hours as indicated in G.C. #7, but felt that he would have been justified in saying so.

and spoke to Antonio through Waldo telling him to "go with God", and that Sal was his God. Antonio did not know what he meant. Afterwards, he waited for the secretary to come and write his check as Dave had instructed him. She arrived around 8:00 a.m. Antonio said that he was never told that he was fired because of his job. Antonio denied that they had tried to calm him down or find out where he had been when Waldo was looking for him.

Waldo said that he explained to Dave what had happened when he brought Antonio into the office. That took about three minutes and then Waldo left for a while. When he returned, Dave was trying to explain things to Antonio and Antonio replied that if they did not like his work, they should give him his check. Waldo did not hear Dave fire', him. Antonio was angry and yelling and, as Waldo went back into the office, Antonio was leaving after demanding his check. Antonio left the office and went to where the workers were, got in his car, and drove off.

Joe testified that he was right outside the office when Waldo brought Antonio in and Antonio was angry. Nobody could settle him down and he was saying that if nobody liked his work, they could write his check out. Dave and Chet tried to calm him down, asked him what was wrong, but he would not listen. Antonio said three or four times that they should write his check out if they did not like his work. He then walked out and came back in and said it again. Dave complied and wrote his check. Antonio never said what was wrong.

Dave said that when Waldo brought Antonio in, Waldo did not

have time to explain what had happened, but went outside to cool things down. All Antonio would say was "if you don't like my work, give me my check." Dave testified that he did not want to because he was a good worker. Chet also tried to talk to him, but to no avail. So the third time Antonio said it, Dave agreed because he could not talk with him. Antonio went out and waited for the secretary to return. Meanwhile, Waldo explained to Dave what had happened about the six men-six hour argument, and that Antonio said that he would take 10-12 hours whether Waldo liked it or not. Antonio said that they should go to the office.

Dave said that Antonio quit and was not terminated. Although Antonio's time ticket (G.C. #4) stated "Term., paid", and his employment record {G.C, #5) said "Terminated 7/10/79", Dave denied it meant anything, stating that the terminology of the secretary was beyond his control.

Betty Bobeda, the secretary, testified that she used the word "terminated" whenever it meant that someone no longer worked there and used the word "quit" sometimes if someone quit.^{6/}

6/ G.C. #6, which was Pedro's time ticket the second time he worked at Del Mar, says "quit", which is how Pedro left work the second time.

IV. Evidence of Concerted Activity and Employer Knowledge

Daniel, Pedro, and Antonio testified to talking to other employees during breaks about the need for a union. Daniel and Antonio testified that they talked specifically to Emeliano Ortiz about the union. Pedro and Antonio testified to having distributed authorization cards. Pedro said he and Antonio took the lead in these discussions. The gist of these discussions was that the new management was treating them badly. Antonio specifically mentioned the ill treatment by Joe.

Ochoa testified that the three were recognized as organizers by the rest of the workers, and that he talked to all three of them about the union.

Arturo Flores testified that Antonio and Daniel, who were in his crew, were union organizers and that he talked with them about the union.

Francisco Perez testified that Pedro talked at various times to the pickers about the union, and said Pedro distributed union buttons to him and other workers shortly before Pedro was fired. However, he claimed that Pedro did this a few days before the election, but then indicated an inability to remember any of the exact times for various events at issue. He was sure, however, that this pro-union activity was before Pedro was fired. He further testified that Ochoa worked for the UFW.

Sal testified that he discussed the union with Dave, Chet and Joe. He further testified that after he had left Del Mar employment, he called Dave up and told him that the workers had come to him talking about a work stoppage to bring him back. He said there were three such meetings with Antonio the spokesman

at the first and Pedro at the second. He arranged a meeting with Dave at the Pancake House in Watsonville and informed him that the men, including foremen Antonio and Eulogio Garcia, were talking about going union, as well as striking.

All company witnesses denied any knowledge of union activity, as well as any discussions about unions at all prior to the successful UFW campaign in August.

Joe denied knowing that Pedro, Antonio, or Daniel were engaged in union activities, and testified that the first time he heard about the union was when Ochoa mentioned it in the confrontation at the chemical shop.

Waldo said that Antonio never mentioned the union to him nor talked about the need for organizing. The first time he knew anything about the union was after Antonio left when he saw someone wearing a pin. He said he did not know what management's policy was with regard to the union, and that Dave never talked to him about it, nor did Joe.

Santos testified to not knowing how the company felt about the union and that no supervisor ever told him that the union was bad. He did know that Pedro was a spokesman and he never heard the men talk about the union. Neither Dave nor Chet ever talked to him about the union and he never learned about it until the election.

Dave denied any anti-union motivation in firing Daniel or Pedro. He knew of no organizational effort prior to the discharges and did not consider either of them as spokesmen for workers' rights, adding that they did not have the ability.

He learned of the organizing campaign only when papers were served on him, at which time he noticed UFW buttons for the first time. As far as he knew, none of his foremen or managers had ever made any remarks about the union, and he had nothing against the union, considering it inevitable. He could not recall talking to any foremen, Art, Joe or Sal about the union.

Emilio Ortiz testified that neither Antonio nor Daniel ever talked to him about the union even though he was in their crew. He did not recall them organizing, complaining about working conditions, or handing out authorization cards. He never talked to Joe about the union, and never heard anyone in management talking badly about the union.^{7/}

Joe testified that Daniel was quiet and not the organizing type, did not consider Pedro a spokesman, and he knew that Antonio had no influence on the men outside of his position as foreman.

Sal testified that Pedro and Antonio were outspoken in meetings at work and would speak out if they felt something was wrong.

Pedro claimed that when Santos came in as their new foreman, a general meeting was held, at which time the men were told that they had three weeks to prove they could do the work under the new conditions. Joe told everyone that they did not know

7/ However, Ortiz was the first cousin of Joe's mother and lived in Joe's mother's apartment. He talked to Joe, Dave and the lawyer Rynn before testifying. He also testified that he only talked to Joe about work.

how to work. Joe and Santos denied these alleged occurrences.

Francisco Perez testified that once he had been warned by Santos about putting a mushroom bag on the mushroom bed just before Pedro was fired. Santos told him that the next time he did it, he would be fired, and that had it been Pedro, he would have been fired. Joe claimed he was the one who had reprimanded Perez, that he did not mention Pedro's name and that Santos was not even there. Santos further testified that Joe told him about this incident.

Ochoa testified that sometime late in July or in August, prior to the election, on the day he wore the union button for the first time on his collar, he and Joe had a confrontation in the chemical room over whether or not he was wasting time. He claimed that he was repairing a sprinkler, and when he told Joe this, Joe responded that he had heard rumors about the union. Ochoa testified that he asked Joe why he was upset and Joe said the union would have to jack him off to get in. Joe made a motion with a flashlight imitating masturbation and then hit Ochoa on his helmet and jumped back as if to fight. However, it ended when both men laughed and left.

Joe testified that late in July he had observed Ochoa in the chemical room where the nozzles for the sprinklers were kept, and saw him there again ten minutes later. Since it was not Ochoa's regular duty to fix them, Joe confronted him. After questioning Ochoa, Joe told him to hurry up, and Ochoa got mad and said that guys like Joe would cause the union to come in. Joe replied that when it did Ochoa could "play with

them too." Joe admitted hitting Ochoa in the helmet with the flashlight, but doing so lightly and both of them went about their business. Joe testified that they were alone.

Arturo Flores claimed to have witnessed this confrontation at the chemical room a little while before the union won. He corroborated Ochoa's testimony, adding that Joe said the union would not get in. However, in his testimony he indicated that he walked between the men while the confrontation was occurring, both to get into the shop and out again where he was listening. As Joe denied this and as there was no mention of it in Ochoa's testimony, the testimony is not very credible.

Francisco Perez testified that once when he had a note from the doctor for a back injury and had gone beyond the one day that the note excused him from work, Joe talked to him about the union. Joe refused to let him work and led him to the office where he asked Sergio to leave. Joe proceeded to tell him that he and his brother had gone to their knees for their jobs and were ungratefult. Joe told him he knew they were for the union and to watch out because either he or Art would give it to them. He then told him to report in two days.

Miguel Gutierrez testified that in October, Joe told him that he would hire him if he promised not to be in the union. Joe denied any discussion of the union took place when he hired Miguel.

ANALYSIS AND CONCLUSIONS

Section 1153(a) of the Act makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce employees in the exercise of their right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and . . . the right to refrain from any or all such activities." Section 1153(c) makes it an unfair labor practice to discriminate "in regard to hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Further, Section 1148 directs the Board to follow applicable precedents of the National Labor Relations Act, as amended in 29 U.S.C. Section 151, et seg. (hereafter the "NLRA").

In order to prove an 1153 (c) violation, the General Counsel must establish three elements for a prima facie case: (1) anti-union animus, (2) knowledge of union or concerted activities, and (3) discriminatory motivation to discourage union activity. Sunny Slope Farms, 4 ALRB No. 74 (1978).

General Counsel has the burden of establishing that the employees were engaged in concerted activity, as well as establishing the causal connection between union activity and the discharge. Jackson & Perkins Rose Co., 5 ALRB No. 20.

In the present case, the alleged union activity of these three workers hinges on two factors: (1) Sal Favela's direct testimony that Antonio and Pedro came to him and had the discussions advocating a work stoppage and unionization in

response to Sal's departure; (2) the talking-up of the union and the distribution of authorization cards.

Dave Distefano denied having any conversation with Sal about the union as Sal claimed, so the credibility of Sal with regard to this alleged event is challenged. Moreover, neither Antonio nor Pedro ever mentioned the alleged meetings with Sal. This is very curious. Furthermore, the general tenor of hostility exhibited by Sal at the hearing towards the management of Del Mar further detracts from the reliability of his testimony. It strains credulity to believe that this unfriendly former supervisor would call up his old boss and inform him about the concerted activities of the employees who were close to him. I therefore discredit Sal's statements that he discussed the union with Dave or with Pedro and Antonio.

Daniel and Antonio both testified that they talked union with Emiliano Ortiz, which Emiliano denied. Emiliano's testimony is suspect for bias, as he is Joe Nuno's second cousin and lives at an apartment owned by his first cousin, Joe's mother. However, evidence of alleged pro-union activity by Daniel is meager and is solely based on his testimony and a couple of other pro-union workers.

A second important event is the alleged meeting at the warehouse at which it is claimed that Santos overheard the discussion regarding the union. Pedro claimed that this discussion led directly to his dismissal. Santos denied ever hearing such a discussion.

Pedro's testimony on this point is quite inconsistent. It

is flawed by the implausibility of his remembering the details of the incident in which Joe claimed to have caught him coming out of the house with mushrooms. If this event occurred as Pedro claimed, that he had done nothing wrong and nothing was ever said to him about it, then the question becomes why would he remember so well what was tantamount to a "non-event"? Similar considerations go to Francisco Perez's recollection of this non-event.

On the other hand, if Joe had in fact confronted Pedro about the mushrooms, then both men's testimony is flawed by their flat denial that this occurred.

Thus, although there is substantial testimony that some talking about the union occurred, there is little reliable evidence that the union activity was itself substantial. Instead, it seems rather minimal.

Furthermore, the claim that Santos overheard the conversation of the men at the warehouse is too insubstantial itself to carry the General Counsel's burden. The very fact that the claim is that Santos was outside the warehouse during the alleged conversation points to the difficulty in assuming that he heard what was being discussed. Further, although Ochoa and others were supposedly present, no other discharges occurred or were alleged. Moreover, Santos denied hearing anything.

There was no evidence offered to show that any individual in management was nearby when any distribution of authorization cards, buttons or the like by the three employees took place.

This does not in itself disprove employer knowledge because

such knowledge can be shown by circumstantial evidence. Kitayama Bros. Nursery, 4 ALRB No. 85. Direct evidence of discriminatory discharge is rare and often must be proved by circumstantial evidence. S. Kuramura, Inc., 3 ALRB No. 49 (1977), Amalgamated Clothing Workers, 302 F.2d 186 (1962).

General Counsel relies upon the small-plant doctrine to circumstantially establish knowledge. The gist of this doctrine is that in a small-scale operation it may be inferred from the close proximity of plant operations that management would more than likely observe an employee's union activities. NLRB v. Joseph Antell, 358 F.2d 880 (C.A. 1, 1966). Daily contact with the workers in small surroundings justified the application of this doctrine where the employee engaged in many of his union activities on the premises, and where the owner engaged in conversation with the workers about the union. S. Kuramura, Inc., 3 ALRB No. 49, supra.

In Dutch Bros., 3 ALRB No. 80 (1977), the small plant doctrine was applied where there was evidence of heated-up union activity as the election approached. Anti-union animus had been established and there had been unlawful interrogation of the employees. There were four supervisors and fewer than twenty employees at the plant.

Here, however, the only discussion alleged between management and workers about the union occurred either after the discharges, as when Joe and Ochoa had their confrontation in the chemical shop or between Francisco Perez and Joe at some unremembered time .

In Mario Saikhon, Inc., 4 ALRB No. 107, the Board refused to apply the small-plant doctrine where evidence of union activity was minimal. The Board, citing NLRB v. Joseph Antell, Inc., supra, analyzed the meaning of the doctrine:

Actually, the term small-plant doctrine is quite misleading. The smallness of the plant, or staff, may be material, but only to the extent that it may be shown to have made it likely that the employer had observed the activity in question.

In the present case, General Counsel failed to establish employer knowledge by a preponderance of the evidence.

But this in itself does not end the inquiry, for in trying to discern an illegal anti-union motivation through circumstantial evidence, one looks to the record as a whole to establish the motive. McGraw-Edison Co. v. NLRB, 419 F.2d 67 (1969), As-H-Ne Farms, 3 ALRB No. 43 (1977). The totality of the evidence and circumstances are considered. Genuardi, 172 NLRB 1357 (1968). Evidence pointing to a pattern of discrimination is highly relevant. Aba Hi Farms, Inc., 5 ALRB No. 34 (1979).

However, evidence of anti-union animus in the present record is scarce. Francisco Perez, whose testimony we have already seen as suspect, claimed that Joe talked to him about the union as he was penalizing him for failing to show up when his back was injured. I do not credit Perez' testimony, the incident failing to fit into the alleged pattern of discrimination.

Miguel Gutierrez's testimony was that his hiring by Joe was made conditional upon his declaration of not supporting the union. This was flatly denied. Furthermore, it occurred months after the successful UFW election. I therefore discredit Gutierrez's testimony.

A number of factors have been seen in past decisions as highly relevant to an inference of illicit motive. The timing of a discharge and its coincidence with the protected activity of the employee is a critical factor. NLRB v. Council Manufacturing Corp., 334 F.2d 161 (1964). Other Section 8(a)(1) violations in the same time period are highly relevant. Aliceville Cotton Mill, Inc. 193 NLRB 865 (1971). Evidence of general hostility to the union is also relevant. NLRB v. Superior Sales, Inc., 366 F.2d 229 (1966). Sudden dismissal without previous notice is highly suspect. Central Distributing Co., Inc., 187 NLRB 3002 (1970). Giving shifting reasons for a dismissal is suspect. S. Kuramura, Inc., 3 ALRB No. 49 (1977); Federal Mogul Corp. v. NLRB, 391 F.2d 713 (1968).

There are many aspects of this case that make management's justification suspicious. Daniel had never been given a personal notice. Antonio was let go, according to management, despite the claim that they did not want to do so. There was conflicting testimony as to whether or not Pedro had ever been given prior warnings. There are also prior inconsistent statements, Dave claiming that Antonio's illiteracy was a reason for Waldo being hired, but then at this hearing, denying its relevance. Furthermore, there was evidence that urinating outside was common, although there was evidence that management was trying to correct it.

There is considerable evidence in the record as to personal animosity between Joe and Daniel as well as a universal disregard for Joe on the part of the workers. Joe himself

testified to the contempt with which he was held. This personal antagonism is itself an extremely plausible background to help understand the escalating tensions between Joe and the Rangels. Furthermore, there is abundant testimony to a change in the nature of management, independent of any anti-union considerations. In particular, there was an increased concern with sanitation and an attempt to speed up the work and modernize operations. The evidence of General Counsel emphasizes a hostility between the older workers and the new management, as well as a get-tough attitude on management's part. The record shows that management anticipated trouble with Antonio in instituting the speed up. There was evidence that management had organized surveillance to catch violations of its sanitation policies.

It must be borne in mind that it is the burden of the General Counsel to show that the alleged pretextual discharge of workers is due to anti-union animus. Simply finding management's story implausible does not in itself carry that burden. The record shows an escalation of tensions in the plant.

Thus the record points more to a breakdown in employer-management relations, culminating in the discharges at issue. General Counsel has not established that anti-union animus was at the core of these tensions, nor has it adequately established employer knowledge of concerted activities at that time.^{8/}

8/ General Counsel claims that the failure of management to call a material witness, Art Distefano, is relevant. This overlooks the General Counsel's burden of production. It had the ability to subpoena the witness so no negative inference against Respondent should be drawn. See McCormick, Evidence, p. 658.

I therefore find that Respondent did not violate Sections 1153(a) and (c) of the Act,

ORDER

Having found that Respondent did not violate Sections 1153 (a) and (c) of the Act, the complaint is dismissed in its entirety.

Dated: January 26, 1981

Agricultural Labor Relations Board

By _____

Ron Greenberg
Administrative Law Officer